

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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'S ANSWERING BRIEF TO CHARGING PARTY'S AND GENERAL
COUNSEL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND
BRIEFS IN SUPPORT**

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On Behalf of Respondent

Dated: December 20, 2012

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Respondent, National Gypsum Company (“National Gypsum” or the “Company”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board” or “NLRB”), and the Board’s November 8, 2012 order granting the Respondent and Charging Party’s Joint Motion for Extension to Answer Exceptions, Respondent hereby submits its Answering Brief to Charging Party’s (“Union”) and Acting General Counsel’s (“GC”) Exceptions to ALJ Decision and Briefs in Support.¹

I. STATEMENT OF THE CASE

Administrative Law Judge Jeffrey D. Wedekind’s Decision (“Decision”) rejects GC’s Consolidated Complaint allegations that Respondent violated the Act by (1) declaring impasse on September 2, 2011 without first bargaining with the Union to impasse; (2) unlawfully refusing to bargain with the Union on September 2, 2011 in the absence of impasse; (3) insisting, as a condition to reaching an agreement, that the Union agree to a ratification vote of the last, best and final offer; and (4) unlawfully locking out employees on September 6, 2011 following the unlawful declaration of impasse.

Indeed, the ALJ concluded that the parties had reached a bonafide impasse on September 2 at the time the Company had declared impasse, and that the Company neither conditioned impasse on a ratification vote (as impasse already existed), nor insisted on a ratification vote as a condition to ending the impasse. Decision, p. 29, lines 39-41, p. 30, lines 22-25. In doing so, the ALJ also found that the Company’s statements allegedly linking impasse to a ratification vote simply reflected the fact that the only way to reach an agreement – consistent with the parties’ practice, their proposals, and the express understanding regarding the

¹ References to General Counsel’s Exhibits, Respondent’s Exhibits and Union Exhibits admitted into evidence at the hearing are designated as “GC. __,” “R. __,” and “U. __,” respectively. References to the transcript of the hearing are designated as “Tr. __.” References to the ALJ’s Decision dated September 7, 2012 are designated “Decision, p. __.” References to the Union’s and Acting General Counsel’s Briefs in Support of Exceptions are designated “Un. Brief” and “GC Brief,” respectively.

necessity of a ratification vote – was for employees to revote in favor of the Company’s last, best and final offer. Decision, p. 30, lines 14-20. Based on his findings that the Company’s positions regarding impasse and ratification were not unlawful, the ALJ further concluded that the Company’s September 6 lockout also was not unlawful. Decision, p. 31, lines 1-3. The Union and GC’s respective Exceptions can be reduced to basic objections to these three conclusions of the ALJ.

The conclusions, however, are fully supported by both the record evidence and NLRB precedent upon which the ALJ fully and properly relied. Notably, both the Union’s and GC’s briefs in support of their respective Exceptions conspicuously disregard relevant record evidence which refutes their Exceptions. In the end, in finding impasse, the ALJ relied upon the proper factors and analysis to determine impasse articulated in *Taft Broadcasting Co.*, 163 NLRB 475 (1967), including the entirety of the evidence of the parties’ bargaining history, the parties’ good faith conduct in negotiations, the length of the negotiations, the importance of the issues as to which there was disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Decision, p. 26, lines 31-35. And while Company spokesperson Matt May in fact made a statement which the Union and the GC allege conditioned the existence of impasse on a ratification vote, the ALJ properly considered this statement in the context of the parties’ full bargaining history and practices, and credited May’s explanation that he believed the only way to reach an agreement was for employees to revote in favor of the Company’s last, best and final offer. Decision, p. 30, lines 16-20.

Based on these findings, the ALJ properly determined that the September 6, 2012 lockout was lawful. For the reasons set forth in the Company’s Post-Hearing Brief, the ALJ’s Decision, and herein, the Exceptions are without merit, and warrant dismissal in their entirety.

II. STATEMENT OF FACTS²

A. The Parties' Bargaining History

As set forth herein, the Union and GC entirely disregard a significant number of critical facts and evidence of the parties' bargaining history which are necessary to the resolution of the Exceptions at issue – facts upon which the ALJ properly relied in his Decision that the parties had reached impasse by September 2, 2011, and that the lockout which ensued was lawful. As noted by both the Union and GC, throughout the course of negotiations, the parties exchanged proposals, modified proposals, and reached several tentative agreements. Un. Brief, p. 6. This information is undisputed and is set out in its entirety in the parties' respective proposals, counterproposals, and tentative agreements. See GC. 5. However, the determination of impasse is a highly fact-intensive inquiry, and the necessary facts to determine the existence of impasse, particularly those relating to the Company's new RA/DB suspension proposal (no. 5) and the 401(k) matching suspension language -- issues which the ALJ concluded "were of vital importance and critical to reaching agreement" -- are kept to a bare minimum or excluded altogether by the Union and GC, resulting in an entirely different and deceptively incomplete set of facts upon which the Union and GC rely to support their Exceptions that the parties were not at impasse, such that the lockout was unlawful. Decision, p. 27, lines 18-19. Most of the facts from their Exceptions amount to little more than a summary of the parties' proposals and responses. GC 5. The entirety of the record evidence as set forth herein clearly illustrates the importance of these two retirement issues to both sides, and the parties' inability to reach any

² The Acting General Counsel did not set forth a statement of facts in his Brief in Support of Exceptions. The Statement of Facts herein is intended to address critical facts left out of the corresponding section of the Union's Brief in Support of Exceptions, as well as those facts included by the Union and GC which misrepresent the record evidence.

compromise over multiple good faith bargaining sessions in which progress in other areas was made.

1. **The Parties' Bargaining Session on January 13, 2011**

The parties first met on January 13, 2011, simply to exchange and go through their respective proposals, and cover any questions regarding those proposals. Tr. 42, 95. The Union fails to mention, however, that immediately after the first session ended on January 13, 2011, Company representative and chief spokesperson Matt May met with Union Representative Chris Bolte, and provided him with a copy of the Company's defined contribution RA proposal. Tr. 5, 179, 353-354; R. 7, 140. May and Bolte also had discussed the Company's plans to introduce the RA proposal well before the parties first met. Tr. 179-180. May explained the entire proposal to Bolte at that time. Tr. 178-179; R. 7, 140. He provided Bolte with the very same document that comprised Company economic proposal no. 4, which was "formally" presented to the Union on February 9, 2011. Compare R. 141 and GC. 5.

The Union's Statement of Facts also fails to mention that May, on January 24, 2011, provided Bolte with the Company's written proposal setting out the Company's ability to suspend the Company's matching contributions to employees' 401(k) accounts. Tr. 182-183; R. 12. May stated in his e-mail response to Bolte:

...we do have a 401(k) proposal that will read as follows – "401(k) matching contribution from National Gypsum will accrue throughout the year, and will be paid in a lump sum amount to employees' accounts by February 15th of each year. The Company may also **suspend the 401(k) matching contribution** provided it gives notice to the International Union no later than 30 days before the effective date of the suspension."

R. 12 (emphasis added). This is the same proposal that was presented to the Union "formally" on February 9, 2012. Compare R. 12 and GC. 5.

Even though the Company did not “formally” present its economic proposals to the Union until February 9, 2011, it is undisputed that by January 24, 2011 (the first full day of negotiations), the Union had received *all* of the Company’s economic proposals, including proposal No. 4 (new RA plan/DB pension suspension) and No. 5 (401(k) matching contribution suspension language), to “give [the Union] a heads up that was going to be coming during negotiations and to give [the Union] an opportunity to review it and get any initial information requests about it to help, you know, keep negotiations moving.” Tr., 354, 356-367, 369; GC. 5.

2. The Parties’ Bargaining Session on January 24, 2011

The parties met for the first full day of negotiations on January 24, 2011. Tr. 46, 357; GC. 5. The Union fails to mention that, later that day, May provided additional information about new Retirement Account/DB pension suspension proposed by the Company, as well as the Company’s pension plan. Tr. 182-183; R. 12. This included detailed information about which other Company facilities with employees represented by the USW had recently negotiated the new RA and DB pension suspension into their collective bargaining agreements. R. 12.

Importantly, the Union disregards all evidence pertaining to the numerous Bargaining Updates it issued to bargaining unit employees throughout the course of negotiations, important evidence upon which the ALJ relied in reaching his conclusion that the parties remained consistently and fundamentally apart on critical issues. Un. Brief p. 7; Decision, p. 16, line 30-35, p. 20, lines 29-35, p. 27, lines 15-28. On the evening of the January 24 session, the Union issued the first of many “Bargaining Updates” to advise its membership of the status of negotiations following each session. Tr. 188, 357-358; R. 90. Bolte, the chief spokesperson for the Union, either drafted or approved each and every Union update to the membership. Tr. 188. Bolte admittedly used these updates to identify issues of concern and importance to bargaining

unit members.³ Tr. 190. From the very first update, it was apparent to the Company that the Union fully understood the nature of the Company's economic proposals, and was concerned about them. Tr. 357-358. The update stated: "The Company has presented the Union with various economic proposals, which would have a **great impact** on the Union membership, that they desire to discuss later in negotiations." R. 90 (emphasis added). The Union explained the Company's purported position on "pension," and stated that the Company wanted "to make **drastic changes** to the pension." *Id.* (Emphasis added). May received it the next morning, and was surprised to see a reference to the pension plan, where the pension had yet to be discussed during bargaining. Tr. 357.

3. The Parties' Bargaining Session on January 25, 2011

The parties resumed for the second full day of negotiations the following day on January 25, 2011. Tr. 47; R. 130-133. Toward the end of the day, the Union raised concerns to the Company about the pension plan (based on the information that May had furnished to Bolte the day before in response to a request for information). Tr. 47-48, 358. Bolte was upset, and questioned whether the Company had properly funded the pension plan, asking about the funding level percentage listed on the Form 5500, whether employees were continuing to accrue benefits, whether notices had been sent out to employees about funding levels, and other questions conveyed in a manner which indicated significant concern by the Union. Tr. 358-359; R. 131.

³ The ALJ relied upon "the parties' statements and bargaining updates" when he concluded that "the resolution of the two issues on which the parties were consistently furthest and most fundamentally apart – the Company's proposals to substitute a defined contribution pension plan for younger workers and to permit suspending 401(k) matching contributions – were of vital importance and critical to reaching agreement. Decision, p. 27, lines 15-19. To the extent contrary, the ALJ expressly discredited Bolte's testimony as "contrary to the overwhelming weight of the record evidence." *Id.* at fn. 31. Indeed, the finding is supported by Bolte's evasive testimony on cross-examination concerning the Union's first bargaining update. At first, Bolte refused to answer the question of whether the update identified issues that were of concern to the Union, and refused to admit that the update identified only two topics: pension and insurance. Tr. 189-190. When pressed further, he admitted that the Company's "drastic changes to pension" as noted in the update was indeed a concern of his. Tr. 190. From day one of bargaining, the pension concerned Bolte and the Union. Tr. 190.

The Union's Brief excludes references to important discussions that day between the parties which illustrate the Union's concerns about the Company's new RA proposal. Un. Brief, p. 7. For instance, Bolte stated that the Union was faced with a "dilemma," because as a part of the Company's "economics," the Company had proposed a new "defined contribution plan," (i.e., the new RA) which included suspension of the pension for those 40 and under, and "suspension of matching 401(k) plan" with a proposal for a one time funding of the contribution on February 15 of each year. R. 131; *see also* Tr. 193-194. Importantly, Bolte asked how the Union could trust the Company with the new retirement plan if the defined benefit plan was not being funded. R. 131. He explained that employees "were not receiving credit for time worked," that this was the "employer's responsibility not the union's," and that he was "pissed off." R. 131. Bolte asked for the name of the Company representative who could answer further questions from the USW about the pension plan; May responded that Jim Brown, Director of Qualified Plans, would be able to address them. Tr. 359.⁴

Consistent with the concerns expressed by Bolte during bargaining that day, the Union issued another bargaining update that evening, which continued to express concerns about the proposed changes to the pension plan: "Yesterday, we advised you of the Company's position regarding insurance and pensions. Now, we add the 401(k)." Tr. 359-360; R. 91. The remainder of the update addressed three issues: (1) changes to insurance premium costs; (2) the proposal to suspend the DB pension and implement a new RA plan; and (3) the proposed language to allow the Company to suspend its matching contributions to employee 401(k) accounts. R. 91. The Union went into detail in this update explaining to its membership that the

⁴ May's testimony is corroborated not only by Gammon's negotiations minutes, but also by his own minutes, minutes taken by Jeff Hawk, and minutes taken by Greg Berry, each of which were admitted without objection into evidence. *See* R. 130-133.

Company's RA proposal provided "ABSOLUTELY NO GUARANTEES" whereas the existing DB pension "DOES PROVIDE GUARANTEES" and that a suspension in the 401(k) match "could wipe out all or a portion of any wage increase your Union negotiates."⁵ R. 91 (original emphasis). The update concluded, "**Your committee is opposed to these types of proposals.**" *Id.* The Company understood from this update that the suspension of the DB pension, new RA plan, and 401(k) matching contribution suspension language were "very important," inasmuch as they were the focus of so much attention and concern. Tr. 360.

4. The Union's Suspension of Negotiations on January 26, 2011

Bargaining resumed the next day as scheduled, for all of six minutes. Tr. 48, 360; R. 130-133. Bolte stated he felt "uncomfortable proceeding" in light of questions about pension funding levels, that he "did not trust" whether the Company could even meet its obligations under the new RA proposal. Tr. 361. Bolte then unilaterally suspended negotiations *on all issues* after only 2 days of bargaining (and only 5 days until the parties' agreement expired), cancelled all further bargaining sessions, and advising that negotiations would not resume until he called to let the Company know that he was ready to resume. Tr. 360-361.

5. The Parties' Bargaining Session on February 9, 2011

The parties met again on February 9, 2011. Tr. 365. The Company formally introduced its (five) economic proposals that day. Tr. 48, 366. The Union's Brief notably fails to mention that the Company's "formal" economic proposals included the very same DB suspension and the

⁵ When questioned about the new retirement account, Bolte expressed concern that it "would have no guarantee whatsoever on what the employee would receive when they retire." Tr. 100. He repeatedly emphasized "There would be absolutely no guarantee to any amount that you'd ever receive when you retire. It would all depend on your investment returns and what was put into your account." Tr. 100-101. This is the same concern – the lack of a guarantee – that the Union expressed throughout negotiations as it repeatedly rejected the proposal, with no indication that it was willing to move. Bolte admitted that the lack of a guarantee in the new RA "was one of the things that was very important to the union, yes." Tr. 98. This testimony evidences the relative importance of the new RA to the Union, and the parties' drastically different positions, inasmuch as the Company had explained, and the Union understood, that there were no such investment vehicles in a defined contribution plan that guaranteed a specific return.

new RA plan (economic proposal no. 4) it previously had provided to the Union *on January 13*, and the same language addressing the ability to suspend the Company's matching contributions to employees' 401(k) accounts which May had provided to Bolte *on January 24* (economic proposal no. 5). Tr. 49; GC. 5. The Company also provided the same Powerpoint presentation to the Union committee summarizing the terms of the proposed Retirement Plan. Tr. 85; *compare* R. 140 and GC. 5. May also explained that the Company might consider implementing a 401(k) contribution suspension based on "cash flow" reasons, or in the event of an "economic downturn," or for "belt tightening" reasons. Tr. 207.

6. The Parties' Bargaining Session on February 10, 2011

The next day, on February 10, Bolte advised the Company that the Union committee had taken a look at the Company's economic proposals, and needed additional information before the Union could provide any counterproposals. Tr. 208, 373. Bolte handed May a four page, seventeen paragraph, single-spaced, request for information, 11 paragraphs of which pertained to the new Retirement Account proposal. Tr. 209-211, 373, R. 24. Bolte explained that the Union could not continue with negotiations until the Company provided responses to this request. R. 24, 130-133. Thus, the only reason why bargaining "only lasted two (2) to three (3) hours" (Un. Brief, p. 9) was because of the information request about the new RA plan, i.e., Company economic proposal no. 4.

Later that day, the Union issued Bargaining Update #5 to its membership. R. 94. It emphasized that the Company had "various proposals that will economically affect you and your family," and, in response, the Union had requested documentation regarding these proposals. The Union identified the "issues," using bold and underlined emphasis, as "**SUSPEND 401(k) MATCH,**" "**ELIMINATE DEFINED PENSION PLAN FOR THOSE 40 AND UNDER AS OF JANUARY 1, 2012,**" and "**New Retirement Account.**" R. 94 (original emphasis).

7. **The Parties' Bargaining Session on March 9, 2011**

The parties met again on March 9, 2011. Tr. 379. The Union provided its first formal response to the Company's economic proposals. GC. 5 (p. 46). The Union indicates in its brief that the parties met for "approximately forty (40) minutes" and that "Retirement benefits were not discussed during this session." Un. Brief, p. 10. This is not true; retirement benefits were in fact discussed, as the Union went through each of the Company's economic proposals, and specifically rejected economic proposal nos. 1, 2, 4 (new RA/DB suspension), and 5 (language about 401(k) matching contribution suspension). R. 130. Bolte expressed no willingness to compromise with respect to Company economic proposal no. 4 (suspension of DB pension/new RA plan) or no. 5 (401(k) language) during the discussions held. Tr. 379-380. To the contrary, May recalled, and Bolte admitted, that Bolte had stated during that session in response to Company proposal no. 4, that "*We're not interested in that proposal, we have no intent in shifting to that account, we're not buying in,*" leaving little, if anything, to discuss.⁶ Tr. 220, 380; R. 130. Bolte further explained, consistent with his previous updates to the membership since January, that there were "no guarantees" with the RA and that the Company's new RA proposal was "based on assumptions." R. 131. Other than his rejection, Bolte admittedly offered no counterproposal or alternatives to Company economic proposal no. 4. Tr. 220, 380.

Bolte similarly expressed to the Company that he was not interested in Company economic proposal no. 5. Tr. 220, 380-381. In fact, Bolte (admittedly) told the Company that the "unilateral right" to suspend the 401(k) matching contribution would equate to a loss of \$100,000 or more per person over a lifetime, and that the Union was not interested in giving the

⁶ May's recollection is consistent with his bargaining history minutes. R. 130. May noted Bolte's response as "Not interested, no intent on shifting that type of account, based on assumptions, not buying in." *Id.* Importantly, the words used by the Union indicated no room for discussion or compromise, where it simply stated it was "not interested," and had "no intent" to move to the RA.

Company \$100,000. Tr. 220; R. 131. May testified, without contradiction, that nothing prevented the parties from having a meaningful opportunity to discuss Company economic proposal nos. 4 or 5, and that the Company never expressed any objection to, or prevented the Union from, discussing these proposals. Tr. 220-221, 381.⁷ Likewise, Bolte admitted at the hearing that both parties that day had the opportunity to ask and answer questions about, *and discuss*, their respective proposals and counterproposals. Tr. 221.

The Union's 7th Bargaining Update that night explained that the Company had made "various proposals that will economically affect you and your family," and highlighted only Company economic proposals 3, 4 and 5. Tr. 221; R. 96. Specifically, the Union dedicated nearly an entire page of the update to proposals 4 (new RA/suspension of DB pension) and 5 (401(k) matching contribution suspension language). Now a recurring theme for each update to the membership, the Union expressed concern with respect to these proposals, emphasizing their asserted impact with bolded, capitalized, and underlined language. The Union explained that the proposal to "**SUSPEND 401(k) Match,**" "could be in **excess of \$100,000** in your lifetime," and that the Company would "not tell the Union how **YOUR MONEY** will be spent" from the savings realized. R. 96. The Union reiterated its concerns about the proposal to "eliminate" the DB plan for those under 40, and the lack of a guarantee with the new RA, noting that even "[t]he Company has acknowledge that there are **no guarantees** with the new retirement account."

⁷ The Union's Brief underscores selective record evidence to challenge the ALJ's finding that the parties "met on 12 separate occasions over a relatively lengthy 9-month period." Decision, p. 27, lines 9-10; Un. Brief, pp. 23-24. This selective evidence, however, does not refute the ALJ's findings, and is irrelevant where the Union intentionally ignores evidence to the contrary, particularly those upon which the ALJ relied to determine the existence of impasse based on the two critical issues of the RA/pension and the 401(k) language, as well as the uncontested evidence establishing that the parties had a meaningful opportunity to discuss and present their counterproposals and ask and answer questions without restriction throughout negotiations. See Respondent's Post-Hearing Brief to the ALJ; see R. 130-133.

R. 96 (original emphasis). The Union concluded its update leaving little room for confusion about its position on these issues: “**AN INJURY TO 1 IS AN INJURY TO ALL.**” *Id.*

8. The Parties’ Bargaining Session on March 10, 2011

The parties met the following day, on March 10, 2011. GC. 5. As noted by the Union, the parties made progress in several areas, exchanging multiple responses to proposals. Un. Brief p. 11; GC. 5 (pp. 49-60). With respect to its economic proposals, however, the Company held its position on nos. 1, 4 and 5, withdrew proposal no. 2, and submitted a counterproposal on no. 3. GC. 5 (p. 49, 55). The Union, in turn, continued to reject all Company economic proposals and hold its position. Tr. 222-223; GC. 5. (pp. 52-53, 58-59).

Late in the afternoon that day, the Union submitted a counterproposal to Company economic proposal no. 5, relating to the ability to suspend the Company’s matching contribution to employees’ 401(k) accounts. Tr. 223; GC. 5 (p. 59). Bolte testified at the hearing that he was concerned about the Company’s proposal because it would unilaterally allow the Company to implement a suspension. T. 224. Accordingly, the Union’s counteroffer permitted the Company to “propose suspension of the Company 401(k) matching contribution,” but **not** “without the express consent of the Union,” and it would require the Company to provide justification for the suspension, information concerning the suspension, and the duration of the suspension. Tr. 223-224; GC. 5 (p. 59). The parties would then be required to “negotiate in good faith and must reach mutual agreement regarding the proposed suspension of the Company 401(k) matching contribution.” *Id.* This stood in stark contrast to the Company’s proposal, which, to ensure its objectives relating to cash flow, would permit the suspension of the matching contribution upon 30 days’ notice to the Union. GC. 5.

The Company did not consider the Union’s counter-offer a realistic proposal. Tr. 383. Indeed, the Union’s counter “wasn’t even in the ballpark of what we were looking for with...our

proposal, from the cash flow standpoint and where we're at with being able to respond..., given the housing market and things like that." *Id.* May explained one of the reasons for seeking this ability to suspend quickly: "with the number of plants we have with Collective Bargaining Agreements, we have neither the time nor the bodies, the resources, to be able to go out and negotiate these items and that's why we need the ability to be able to do with prior notice to the unions and this counterproposal would allow us to suspend if we had the express consent of the union." *Id.* By requiring the Union's express consent, and thus giving the Union the ability to "veto" the Company's need to suspend its matching contributions, May explained that the counterproposal did not represent movement by the Union. Tr. 383-384. While there were no lengthy discussions concerning the parties' respective positions on economic proposal nos. 4 and 5, it is undisputed that they were discussed, and that nothing prevented the parties from having a meaningful opportunity to bargain over either of those proposals that day. Tr. 227, 384.

The Union that night issued its 8th Bargaining Update, which highlighted and emphasized only two issues, thereby again signaling their importance:

The Company has not moved on its suspension of the 401(k) matching contribution, elimination of the defined benefit pension plan for those under forty (40) years of age as of January 1, 2012, and they have not moved on the new retirement account.

R. 97 (original emphasis). Bolte admitted that these were "important enough" issues to warrant highlighting them in the update. Tr. 228. By now, Company economic proposals 4 and 5 had become the focus of nearly every update from Bolte and the Committee to the members.

9. The Parties' Bargaining Session on March 28, 2011

The parties met on March 28, 2011. Tr. 385; GC. 5. The parties once again exchanged several proposals, continuing to make progress in some areas and not moving in others. GC. 5. In response to the Union's counterproposal from March 10 regarding the suspension of the

matching contributions to 401(k), the Company submitted a counterproposal of its own, in which it modified its original proposal to include a provision for meeting with the Union, providing information as to the status of the Company, and explaining its need to suspend the Company contribution. GC. 5 (p. 61). Notably, the Company did *not* alter its proposal to remove language that allowed the Company the flexibility to implement the suspension in its discretion, without the consent of the Union, which was the crux of the Union's counterproposal. *Id.* Bolte demanded a specific list of items that would trigger the suspension, to which May replied that there was no specific list, but that it would be based on the status of the Company, as he had explained to Bolte when he formally introduced the proposal on February 9. R. 130-131. Both sides held to their respective positions on the new RA plan (proposal no. 4). GC. 5.

Later during the day, the Union presented a new "contingent" counterproposal which addressed both Company economic proposal no. 4 and no. 5, in which the Company would agree to "withdraw[] from their February 9, 2011 economic offer: Co. #1, Co. #3 except for language that the Union has accepted, Co. #4, Co. #5." *Id.* In exchange, the Union would withdraw Un #5, 7(d)-(g) and 11(a). Tr. 232-233, 234-235, 385-386; GC. 5 (p. 69). As May testified at the hearing, the contingent proposal was "not at all" acceptable to the Company. Tr. 385. Indeed, the Company had just withdrawn economic proposal no. 2, which left only nos. 1, 3, 4 and 5. Tr. 234, 386. The contingent proposal asked the Company to "wipe our economic proposal slate clean except for the language portion of company 3, and that was unreasonable and unrealistic." Tr. 386. From the Company's perspective it did not evidence *any* willingness to move by the Union, particularly where the items which the Union would withdraw were inconsequential when considering that the Company would withdraw all of its economic proposals. Tr. 386. The Company had no interest in such a lop-sided contingent offer, and

rejected it, holding to its previous responses. GC. 5 (p. 73). The Union, in turn, continued to hold to its contingent proposal. GC. 5 (p. 75).

The parties continued to work through other issues, but as the day progressed, May and Bolte both agreed that the parties were reaching their respective limits. Tr. 386; R. 130-131. The parties met in the afternoon shortly after 4:00 p.m., and discussed what the “main sticking points” in negotiations were at that point, to determine whether the Union was prepared to take a last, best and final offer to a ratification vote. Tr. 236-237, 386-387; R. 130-131. In identifying the Union’s main sticking points, Bolte told the Company to look at the Union’s contingent proposals, and specifically listed (in order): (1) DB suspension; (2) new RA; (3) unilateral suspension of 401(k) contribution; (4) tiered premium structure for health insurance; (5) dues checkoff; and (6) clearing discipline from employee files. Tr. 238-239, 387; R. 130-131. Bolte admitted that he identified these issues as the sticking points to an agreement. Tr. 238-239. Bolte further recalled May advising him during the session that the pension, RA and 401(k) proposals *were not changing*. Tr. 239. During those discussions about “sticking points,” Bolte expressed continued objection to the Company’s proposals on these issues, explaining that the Shoals plant was unique, and that a “one size fits all” approach by treating all plants the same was inappropriate. R. 130-131.

The Union signaled a willingness to receive a last, best and final offer at that point, with Bolte clarifying to the Company that it would be a mistake for the Company to present an offer that held to a percentage wage increase structure rather than a cents per hour structure, and a tiered premium structure for health coverage (a “sticking point” identified by the parties, and Company economic proposal no. 3). R. 130-131; Tr. 130-131, 238-239. He did not raise the issue of the DB suspension, new RA, or the 401(k) language. *Id.* In response, the Company

agreed to make these modifications in its last, best and final offer, with the understanding that these concessions “would get us to the point of getting the last, best, final out and voted and ultimately ratified.” Tr. 388. This was a significant concession on the part of the Company, according to May, as it amounted to the Company’s withdrawal of economic proposal no. 3. Tr. 388-389.

Based on the Union’s representations, the Company prepared its “Last, Best, Final” offer (“LBFO”) that evening which included all tentative agreements to date, and presented it to the Union committee. GC. 5 (p. 79); R. 61. The Union advised the Company that it would present the LBFO to its membership on April 4, 2011, with a vote on April 11, 2011. Tr. 389-390. In its Bargaining Update #9 to employees, the Union explained that the Company had provided its “last, best and final offer,” but immediately following this statement, it reiterated what was now clearly a primary concern to the Union that:

The Company has not moved on its suspension of the 401(k) matching contribution, elimination of the defined benefit pension plan for those under forty (40) years of age as of January 1, 2012, and they have not moved on the new retirement account.

Tr. 242, R. 98 (original emphasis). Bolte admitted at the hearing that these issues of 401(k), DB suspension, and new RA were important issues and sticking points for the Union in reaching an agreement at this point. Tr. 242. The Update then stated that “You deserve dignity and respect,” and recommended a “NO VOTE!”, notwithstanding the Union’s representations earlier that day that it was ready to receive the LBFO, and ready to present it to its membership for vote. R. 98. When May saw the update the next day, he was “deeply shocked.” Tr. 390. While the Union had told the Company that they would not be able to recommend the LBFO, he was not surprised by this statement because it was common in negotiations, and he took it to mean that the Union would not recommend employees to either vote for it or against it. Tr. 390. Indeed, May

testified that this is what had happened with negotiations he had just completed with the USW at the Company's Pryor, Oklahoma facility. Tr. 390.

May testified that he understood the parties to be at a complete impasse on the key issues of the RA, the DB suspension, and 401(k) plan, where the bargaining update specifically and **only** highlighted Company economic proposal nos. 4 and 5, followed by the statements "You deserve dignity and respect" and "your Local Union Committee and your International Union unanimously recommends a NO vote." Tr. 391; R. 98.

The Company, in turn, distributed a Negotiation Update dated March 30, 2011 to *all employees* (including those on the Union's bargaining committee), to clarify its proposals with respect to the 401(k), RA, and DB, as these proposals had now been clearly identified by the Union as "main sticking points," and thus obstacles to an agreement. R. 81; Tr. 391-392. May believed that the Union's actions established that these proposals were critical to the Union, as the Union had continually highlighted them from the beginning of negotiations. Tr. 392. The Company's update carefully explained to employees that these specific proposals were motivated by economic realities facing the industry, and the uncertainty as to when the housing market might improve. R. 81. The Company explained that its proposal with respect to the 401(k) match was designed to give the Company the flexibility in the future should the need arise to remain competitive when faced with serious economic situations. *Id.* The Company also explained very clearly that its proposal with respect to the new RA and DB was the very same one that had been negotiated into nine other union contracts, including four other USW contracts since May 2009. *Id.*

On April 4, 2011, the Union Committee provided bargaining unit members with a copy of the Company's last, best and final offer, with its recommendation that employees reject it.

R. 100. The Company responded with another Negotiation Update to employees on April 6, based on questions that supervisors were receiving from employees at Shoals. R. 82; Tr. 392-393. Two of the four topics addressed in the update related to concerns about the 401(k) matching contribution, and the new RA plan. R. 82. The Company learned that on April 9, 2011, the employees rejected the LBFO by a margin of 65 to 3. Tr. 60, 132, 393.

10. The Parties' Mediation/Bargaining Session on May 10, 2011

Following this rejection, the parties submitted to mediation before FMCS Mediator Don Ellenberger on May 10, 2011, with little, if any progress, achieved. Tr. 60, 393. The parties met separately, with Ellenberger shuttling back and forth between the two, sharing suggestions and ideas throughout the day. Tr. 394. Early on, after meeting with the Union, and in response to a question by May about issues he knew to be blocking an agreement, Ellenberger stated to the Company that “*the* issues” for resolution were “pension and 401(k).”⁸ R. 131. Indeed, Bolte admitted on cross-examination that he told Ellenberger that the 401(k) and RA proposals were “areas of great concern” and very important issues to the Union. Tr. 244. When the parties finally met face-to-face, Bolte advised the Company that he was “**not interested in any way**” in the proposed 401(k) language. Tr. 394; R. 130-131. In continuing to reject proposal no. 4 (RA/DB), Bolte commented that the Company secure a fund that would guarantee a 5% return for the RA plan. Tr. 135, 394; R. 130. May confirmed that the request for a fund in a DC plan with a guaranteed 5% fund was unrealistic, as it did not exist. Tr. 394-395.

11. The Parties' Bargaining Session on July 28, 2011

When the parties met on July 28, 2011, they were able to reach tentative agreements on several proposals (as described by the Union), with both sides making movement on remaining

⁸ Gammon's minutes from the mediation indicate that Ellenberger, sometime between 10:21 and 10:27 a.m., met with Company representatives and “said he felt pension & 401(k) are the issues.” R. 131.

issues, and even attempting to resolve recent grievance matters. R. 131; GC. 5; Un. Brief p. 14. However, the Union reiterated its rejection of the Company's RA/DB and 401(k) proposals. Tr. 398-399; R. 130-131; GC. 5. Bolte not only rejected the Company's new RA plan proposal, but proposed that the Company **withdraw its proposal** and present it in another three years. Tr. 398; *see* R. 130. It is uncontested that Bolte told the Company "we're not going to buy a pig in a poke," in rejecting the RA/DB proposal and the 401(k) contribution suspension proposal. Tr. 248, 399. It is also uncontested that May advised Bolte that the RA/DB and 401(k) proposals were not going away. Tr. 249. May viewed Bolte's suggestion of withdrawing proposal no. 4 not only as a flat out rejection, but also as movement backwards, inasmuch as Bolte's "concepts and ideas" that he wanted to share amounted to having the Company withdraw a proposal which, by no later than May 13, the Company had communicated in unequivocal terms to the Union and bargaining unit employees constituted "very important issues to the Company." Tr. 399; R. 83. Other than this suggestion from Bolte, the Union did not express any other willingness to compromise or move from its position of rejection on either of the two proposals on July 28. Tr. 399; GC. 5. May further testified, without rebuttal or contradiction, that nothing prevented the parties from having a meaningful opportunity to bargain over these key proposals, that neither party expressed any objection to discussing these proposals, or prevented the other from raising or discussing these proposals. Tr. 399.

In response to the Union's counter offers (which included the proposal to withdraw Company economic proposal no. 4), the Company submitted a response in which it held to its LBFO from March 28, with May explaining that "holding" to the last, best and final offer meant that the Company was not going to make any material changes to sweeten the offer from an economic standpoint. Tr. 399-400; GC. 5 (p. 87). The Union nonetheless continued to "Reject"

Company Article 16, Pension Plan (i.e., suspension of the DB) and Company New Retirement Account, which comprised Company economic proposal no. 4. GC. 5 (p. 89). May reiterated that the Company would not add to its LBFO from March 28, and that the Company would not move on the RA/DB and 401(k) proposals. R. 130-131. After a caucus, May advised the Union that the 401(k), RA/DB proposals were “not going away,” and that there had been no progress on these issues. *Id.* May testified that, at this point, he did not have a favorable assessment about whether the parties were going to be able to make any progress on these two issues, inasmuch as both parties were still both “dug in” on their respective positions. Tr. 400. May further testified that from the Company’s standpoint, the parties were, moreover, no closer together on these two proposals than they were from the time negotiations had first started. Tr. 401. None of these important facts is mentioned by the Union. Un. Brief pp. 13-14. May, however, testified that even though the parties had not made any progress with respect to Company economic proposal nos. 4 and 5, the July 28 session represented perhaps the most constructive day of bargaining, inasmuch as the parties were able to continue to make movement on other issues.⁹ Tr. 63, 401.

12. The Parties’ Bargaining Session on September 2, 2011, and the Company’s Declaration of Impasse

The parties resumed on Friday, September 2. Tr. 402; GC. 5. When the parties met, both sides’ respective bargaining teams were present, with one addition. Tr. 402. Jim Robinson, the Regional Director of District 7 from the International USW (and Bolte’s boss), was present, and

⁹ Just because the parties continued to make progress does not mean that there can be no impasse. *Taft Broadcasting Co.*, 163 NLRB at 478 (“an impasse is no less an impasse because the parties were closer to an agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.”). Evidence concerning the parties’ lack of progress on the RA plan and 401(k) proposals is notably lacking from the General Counsel’s and Union’s Exceptions and briefs in support; indeed, both the Union and General Counsel go to lengths to offer evidence of progress made on other issues, but disregard the overwhelming record evidence that notwithstanding the numerous meetings and discussions on the issues on the table the parties were deadlocked on the RA plan and 401(k) proposals.

it was the first time that he had participated in any of the bargaining sessions. Tr. 65, 402. The bargaining session commenced with Bolte introducing Robinson, and indicating that Robinson had a statement to make to the Company -- neither Bolte nor Robinson explained Robinson's purpose that day. Tr. 403. May testified that at that point, Robinson leaned forward, and speaking with an authoritative tone, told the Company representatives that he wanted to come in and **make clear** what perhaps had not been clear up to this point, that he was speaking on behalf of the International Steelworkers and Leo Gerard, the International President, and that the Steelworkers did not agree with National Gypsum's destruction of employees' retirements. Tr. 403. Robinson continued by stating that the Company's decision on retirements was shortsighted, and that whoever made it was wrong. Tr. 403. He also stated that he wanted to leave **no doubt** with the Company where the Steelworkers stood in relation to the retirement issues, the new RA and the 401(k) language, and that the USW was going to do **everything it could** to reverse the trend of what had happened.¹⁰ Tr. 67, 403. *See also* R. 130-131.

Robinson's speech, according to May, left "no question where the Steelworkers stood on that topic [of the new RA and 401(k) contribution suspension]." Tr. 403. When Robinson finished speaking, May responded by expressing his disagreement that the Company was destroying employees' retirement, that defined contribution retirement plans were now common among companies, and served as a very viable retirement option for employees. Tr. 404. May also stated that the proposals should not come as a surprise to the International, as they already

¹⁰ The importance of Robinson's statement about "making clear" and "removing any doubt" over the Union's position on Company economic proposal nos. 4 and 5 cannot be overemphasized. Indeed, prior to the September 2, 2011 session and Robinson's statement, the Company did not have any doubt about the Union's position, where the Union repeatedly had rejected the proposals with no meaningful counterproposals, and with no indication of any willingness to move or compromise. Rather, at the session on July 28, the Union proposed that the Company **withdraw** its new RA plan, even after the Company plainly had indicated to the entire membership that it was a **very important** to the Company. R. 83. Accordingly, Robinson's statement about "removing any doubt" cannot be reasonably interpreted as anything other than a clear message that it was **not** going to give in on these issues.

had been agreed upon in four other National Gypsum plants represented by the Steelworkers. Tr. 404. Robinson replied that the Steelworkers organization was large, with over a million members, and that the International was not aware of everything that went on at the local level. Tr. 147-148, 404; R. 130-131. He then stated that these proposals **should not have been accepted** by the locals, but that he was not going to criticize the USW representatives who had accepted those proposals in those contracts. Tr. 67, 404; R. 130-131. Based on this statement, May understood the Union's position that "it was a mistake of the other locals that accepted that and they weren't going to accept it here."¹¹ Tr. 404. May had no reason to believe that the Union remained willing to bargain on the two issues of the new RA and the 401(k) contribution suspension language and believed that the parties were at impasse. Tr. 67, 404. May also believed that "there was no prospect" that continuation of discussions regarding Company economic proposal nos. 4 and 5 would be productive. Tr. 405. Robinson did not indicate that the Union had any room for movement on these proposals, and did not suggest any alternatives. Tr. 405. His position was consistent with that of the Union negotiations committee and Bolte during the parties' negotiations leading up to September 2. Tr. 405. Bolte *made no effort* to contradict or clarify Robinson's statements.¹² Tr. 405. Nothing else was said by either of the parties during Robinson's speech and the exchange he had with May. Tr. 147-148; R. 130-131.

¹¹ Robinson's testimony is undisputed. Tr. 251-253, 336-337. Indeed, Robinson himself testified as to his statements at the hearing, and corroborated May's testimony. Tr. 336-337.

¹² The Union's "after the fact" attempt to dilute the impact and significance of Robinson's statement as nothing more than a "rah-rah" to "pump up" the Local Union and reassure it that the International and District were supportive (Un. Brief, p. 15) does not reflect what in fact occurred, and the ALJ properly discredited Bolte's testimony downplaying the dispute over these critical issues "as contrary to the overwhelming weight of the record evidence." Decision, p. 27. The record fully supports the ALJ's credibility determination. Indeed, on cross-examination, Bolte corroborated the Company's evidence and May's testimony, nearly word for word. Tr. 251-253. These are critical facts which the Union and General Counsel leave out of their Exceptions and supporting briefs, precisely because Robinson's actual statements, and the parties conduct in the nine months leading up to that point, **leave no doubt that the parties were at impasse** no later than September 2, 2011.

Shortly thereafter, Bolte handed out the Union's counterproposals to the Company; Robinson was still present for the Union. GC. 5 (p. 95). Critically, in its brief the Union excludes (Un. Brief, p. 16) the fact that Bolte went through the proposals, and when he reached the Union's responses to Company economic proposal nos. 4 and 5 (suspension of DB pension/new RA and suspension of 401(k) contribution), he explained that **Robinson had already clearly stated the Steelworkers' position on these issues, and rejected them.** Tr. 76, 406; R. 130-131. Bolte testified that beyond these statements, neither he nor Robinson made any attempt to contradict or refute any of the prior statements, and neither he nor Robinson suggested in any way that there was room for movement on the Union's part with respect to these proposals. Tr. 76, 258, 261, 406.

Following the presentation of the Union's counterproposals, May looked through them, and then remarked to the Union committee and Robinson that the Company had submitted its last, best and final offer, and that it included the Company's retirement proposals. R. 130-131. May further explained that, in light of the Union's stated position on the suspension of the DB pension/new RA and the 401(k) contribution suspension proposals, the parties may not have much more to discuss. Tr. 407. After making this statement, the parties stopped for a caucus. Tr. 407. *See also* R. 130-131.

When the parties resumed after the caucus, Robinson had left. Tr. 65-66, 150. May started by explaining that he had reviewed the Union's last counter. Tr. 407; R. 130-131. He expressed the Company's position that the Union should permit the employees to vote on the last, best and final offer. Tr. 260, 407; R. 130-131. May then stated that, given Robinson's statements about the new RA and 401(k) suspension proposals, it was the Company's position that the parties were at impasse and had nothing more to discuss. Tr. 66, 260, 407-408.

Importantly, Union President Hawkins corroborated May's testimony, recalling that May advised the Union at this time that:

there were two items left on the table, the pension and the 401(k) and that if the union thought that those items were going to disappear, they were not going to go away and that at that point we were at impasse and that there was no more discussion that needed to be had.

Tr. 321-322; R. 143. Thus, even according to the GC's own witness, May's initial declaration of impasse was not tied to a ratification vote, but tied directly to the parties' respective positions on the Company's pension and 401(k) proposals. It was only after that declaration of impasse when Bolte then asked May to confirm the Company's position that the parties were at impasse, to which May subsequently replied, "short of a vote, we are at impasse." Tr. 153-154, 260, 408; R. 130, 131, 133. Bolte then asked May to confirm his position that if the Union took the last best and final offer to a vote, May was not claiming impasse, which May did. Tr. 153-154, 408; R. 130, 131, 133. Bolte then asked May to confirm that if the Union did not take the last best and final offer to a vote, May was claiming impasse, which May did as well. *Id.* The selective facts pertaining to September 2 laid out in the Union's and GC's briefs, which exclude May's actual declaration of impasse, and references only the portion of the discussion between May and Bolte, misrepresents both the sequence of statements between the parties on that day, as well as May's actual statements. Both the Union and GC, in turn, rely on these misrepresentations to support its Exceptions. *See Un. Brief*, p. 17.

Following a brief caucus, the parties resumed with May presenting the LBFO to the Union – the same LBFO that had been presented to the Union on March 28, updated to incorporate new tentative agreements by the parties. R. 62; GC. 5 (p. 99). Bolte expressed the Union's position that the parties were not at impasse, in light of the "10 TAs" the parties had reached over the last 2 bargaining sessions. Tr. 408; R. 130, 131, 133. He also stated that the

Union stood ready to bargain, to which May replied that, given Mr. Robinson's comments that morning, there was nothing further to discuss. Tr. 68, 408-409; R. 130, 131, 133. In other words, May once again confirmed the Company's position that the parties were deadlocked over the RA/DB and 401(k) proposals. Contrary to the Union's and GC's assertions, May did not state that there would be no more bargaining that day on September 2; rather, he stated that there was nothing more to discuss -- neither the Union nor the GC attempted to refute this testimony. Tr. 410. May further explained the Company's position that Bolte's offer to bargain was "an empty offer," because there was no indication that there was going to be any agreement on the new RA plan or the 401(k) language at that point, in light of Robinson's statements that morning. Tr. 409. When combined with Bolte's admission that the Company, at all times leading up to that September 2, 2011 session, had not shown any interest in moving on these proposals, the parties on September 2 stood no closer to an agreement than they had when they first sat down to bargain in January. Tr. 266.

Bolte sent an e-mail to May on September 4 to "confirm" his understanding of the Company's position on bargaining. Tr. 68-69; R. 44. In his e-mail, he recalled that, "On behalf of the Employer, you indicated that due to Director Robinson's positions and comments related to the defined pension, the new savings account, and the 401(k), there was nothing more to discuss." *Id.* He then attempted to confirm that the declaration of impasse was tied to whether the Union took the proposal back to the membership for a vote, and reiterated the Union's position that the parties were not at impasse and that it remained willing to continue to bargain.

Id. May responded, explaining that:

In response to your September 4 email regarding the status of negotiations, as appears clear from the discussion at our September 2 bargaining session, the Company does not intend to modify its proposals regarding the DB pension, the New Retirement Account, or the 401 K plan. It also appeared clear that the Union

had no intention of modifying its position on those issues. As we have made clear throughout the negotiations, those issues are critical to the reaching of an agreement. If I have misstated the Union's position on those issues, please promptly let me know and we can then discuss how to proceed.

Id. May's explanation establishes that his declaration of impasse was based on the Union's position on the new RA and 401(k) proposals (consistent with Union President Hawkins' testimony). *Id.* Importantly, and as noted by the ALJ, in his response, Bolte did not dispute May's description of the Union's position on these issues. *Id.*, Decision, p. 25, lines 5-6. Rather, he questioned the consistency of May's e-mail and the Company's stated position during bargaining on September 2. *Id.* May replied that the message during the September 2 session and his e-mail were consistent: "They both convey that unless there is a change in the union's position on the three critical issues [DB pension, the New Retirement Account, or the 401 K plan] continuing to meet seems highly unlikely to produce an agreement." *Id.* May offered Bolte the opportunity to explain whether the Union had changed its position on these three issues, but Bolte refused to address the issue, instead alleging that the Company had engaged in, and continued to engage in, "illegal behavior." *Id.*

B. The Lockout on September 6, 2011

The Company locked out all 80 bargaining unit employees the following Tuesday, on September 6, 2011, in light of the months of negotiations that had failed to yield an Agreement. Tr. 72, 485. The Company mailed a letter to all employees, explaining that "months of negotiations have failed to result in a new union contract," and "[t]herefore we regret that we must lock out all bargaining unit employees effective with the start of the first shift on Tuesday, September 6, 2011." Tr. 486; R. 87. *Id.* It further explained that the lockout would continue until a new collective bargaining agreement was ratified. *Id.*

C. The Parties' Bargaining Session on October 24, 2011

The parties met after the lockout commenced on October 24, 2011, at the request of FMCS mediator Don Ellenberger.¹³ Tr. 412-413. The Union presented the Company with a Counter Proposal to the LBFO (the same LBFO from March 28, 2011 with the additional TAs provided to the Union on September 2, 2011). GC. 5 (p. 103). The parties discussed the Union's Counter Proposal, focusing mostly on the Union's alternative to the retirement accounts, a "USW sponsored PACE 401(k) plan," i.e., another 401(k) plan, in place of the Company's RA proposal. R. 131; GC. 5 (p. 103). The Union also presented its counter proposal to the Company's 401(k) plan proposal, rejecting the language that would allow the Company to complete annual accruals and contributions into employee accounts by February 15, and proposing that the Company only could suspend contributions after negotiating to an agreement with the Union. Following a caucus, the Company responded that it was not interested in the Union's Counter Proposal, and that it was holding to its last, best and final offer on the table. R. 130, 131.

Virtually none of the facts set forth above were included in the Union's Brief in Support of its Exceptions, and the same facts were likewise absent without explanation in the GC's Brief.

¹³ The ALJ properly notes that the Union's counterproposal on October 24, 2011 is irrelevant to whether the actions on September 2 and 6 were lawful. Decision, p. 28, lines 2-12. Any progress after that obviously does not bear on whether impasse existed as of September 2, 2011, and accordingly is irrelevant to the resolution of the Complaint allegations of unlawful declaration, and non-existence of, impasse as of September 2, 2011. Counsel for the General Counsel, moreover, **admitted** that there are no allegations in the Complaint relating to any events following the September 6 lockout. Tr. 71.

III. ARGUMENT

The Union excepts in its Brief to specific factual findings in addition to the legal conclusions of the ALJ. The GC's Brief instead focuses on the ALJ's legal conclusions, which mirror those of the Union. The Union's Exceptions to the ALJ's findings are addressed herein in the order presented, followed by argument which supports the ALJ's ultimate conclusions that are the primary focus of both the GC and Union's Exceptions, namely, that the parties were at impasse on September 2, that the Company did not unlawfully insist to impasse on a non-mandatory subject of bargaining, and that the September 6 lockout was lawful.

A. The ALJ's Factual Findings Are Fully Supported by the Record Evidence

1. The ALJ Properly Weighed the Parties' Bargaining History In Determining the Existence of Impasse.

The Union's Exception to the Judge's statement that the parties "have a substantial history of successfully and expeditiously negotiating successive agreements, apparently without the necessity of economic warfare," is fully supported by the record (Tr. 475-477), and, moreover, is irrelevant to the issue presented since the finding did not serve, as the Union asserts, to "imply" that the parties were at impasse during negotiations in 2011. Un. Brief, p. 22-23, citing to Decision p. 27, lines 5-7. To the contrary, the ALJ's finding of impasse, as clearly stated, was based on his application and assessment of the factors under *Taft Broadcasting Co.*, 163 NLRB 475 (1967), including the parties' bargaining history, good faith, importance of the issues over which there is disagreement, and the contemporaneous understanding of the parties regarding the status of negotiations. Decision, p. 26, lines 31-36. As the Union properly notes, "circumstances in 2011 were significantly different" than in prior negotiation years, in light of the parties' dispute over Company economic proposals 4 and 5, which the Union entirely ignores in its Exceptions. Un. Brief, p. 23, citing Decision, p. 15, line 5. The Exception is without merit.

2. **The ALJ Properly Weighed the Evidence Regarding the Duration and Length of Negotiations.**

The Union excepts to the ALJ's finding that "the parties met on 12 separate occasions over a relatively lengthy 9-month period," that "half" of those meetings lasted "all or most of the day," and that seven of the meetings occurred after February 9 when the Company "formally offered the economic proposals" which (as omitted by the Union) "it had provided to the Union prior to the January 25 meeting." Un. Brief p. 23, citing Decision, p. 27 lines 9-10, fn. 29. The Union asserts that this finding "is not a proper measure of the parties' bargaining sessions in relation to the impasse analysis." Un. Brief, p. 24. Here too, the Exception is without merit.

First, contrary to the Union's assertions, it is undisputed (based on Bolte and May's respective testimonies) that the parties had a meaningful opportunity to present and discuss proposals and issues without restriction over the course of those 9 months and 12 sessions, as discussed in detail and documented above. Tr. 381, 384, 399; R. 130-133; *see* Respondent's Post-Hearing Brief, pp. 11-64. The Union's selective recitation of the record does not change this fact. The parties' respective proposals, counterproposals, withdrawals, and tentative agreements set out in GC Exhibits 5 and 10 and Respondent Exhibit 61 and 62 (original proposal and 16 full counterproposals from the Union, and original proposal plus 14 counterproposals, along with the last, best and final offer, and an updated last, best and final offer, from the Company, and tentative agreements), and the meticulous negotiations notes kept by Company officials (R. 130-133) fully support the ALJ's conclusions.¹⁴

More importantly, the number and length of the sessions were not the only measures of the parties' bargaining history assessed by the ALJ in determining impasse. The ALJ also

¹⁴ The ALJ specifically determined that the "underlying facts are well documented by the parties' written proposals (GC Exh. 5; R. Exhs. 61-62) and tentative agreements (GC Exh. 10), and the Company's contemporaneous bargaining notes (R. Exhs. 130-133)." Decision, p. 14, lines 31-34.

specifically relied “on the parties’ statements and bargaining updates” -- integral aspects of the parties’ bargaining history -- to conclude that “resolution of the two issues on which the parties were consistently furthest and most fundamentally apart...were of vital importance and critical to reaching an agreement.” Decision, p. 27, lines 15-19. The statements made by the parties throughout bargaining with respect to company economic proposals 4 and 5 -- culminating in the speech by Robinson focusing on these proposals on September 2 -- support this finding.

In sum, the ALJ’s findings with respect to the parties’ bargaining history to which the Union excepts are based not only on his assessment of the length and number of sessions, but also the parties’ statements made during those sessions, the parties’ bargaining updates to employees, their proposals, counterproposals, withdrawals, tentative agreements, and the corroborating contemporaneous notes of bargaining, i.e., the parties’ full bargaining history, as discussed in his Decision, in Respondent’s Post-Hearing Brief, and herein.

3. **The ALJ Properly Determined That There Was No Reasonable Basis for the Union to Believe that Continued Bargaining on or After September 2 Would Have Been Fruitful.**

The Union’s Exception to the ALJ’s finding that “there was no reasonable basis for the Union to believe that continued bargaining on September 2 would have been fruitful” also is without merit. The ALJ’s finding is fully supported by the record evidence, which in turn supports the ALJ’s further finding that Bolte’s statements that the Union was prepared to continue bargaining on September 2 amounted to an “empty offer.” Decision, p, 27, lines 27-31. Here too, the Union relies almost entirely on the parties’ respective proposals set out in GC Exhibit 5, in complete disregard of all of the other bargaining history properly assessed by the ALJ, and without any meaningful reference to the parties’ completely deadlocked positions on the RA/DB plans and the 401(k) language. Un. Brief pp. 25-26.

As acknowledged above, it is undisputed that the parties made progress on various items as described in the Union's Brief. Un. Brief p. 26. The Union, however, simply ignores all evidence establishing that the parties made no meaningful progress on the disputed RA/DB and 401(k) issues, as illustrated by the parties' respective statements and proposals in bargaining which establish there was no room for movement from either side, and culminating in the statements by Robinson, Bolte, and May at the September 2 bargaining session, in which both sides made abundantly clear that neither intended to budge from its position on the critical issues. This is a fatal omission from the Union's Exception, particularly where the ALJ's findings about the impact of the disputed issues on bargaining bears directly on the issue of whether impasse existed.

4. **The ALJ Properly Weighed Evidence Pertaining to the Parties' Prior Bargaining History in Pryor, Oklahoma.**

The Union excepts to the ALJ's decision to give weight to May's testimony relating to his recent bargaining experience with the International Union at the Company's Pryor, Oklahoma facility, where the Union had rejected the Company's LBFO which included the disputed 401(k) and RA proposals at the table, only to have it accepted by the membership in a ratification vote. Decision p. 29, lines 12-14; Un. Brief. P. 26. The ALJ cited to this testimony as evidence of May's reasonable belief that a re-vote would result in a contract, and that May's statements at the September 2 meeting allegedly "linking" the impasse to a revote was a reflection of this belief, i.e., that impasse would end only through ratification. Decision, p. 28, lines 19-21. The history at Pryor, however, is but one of many considerations upon which the ALJ relied to support his finding. As the ALJ explained, "nothing is clearer from the record than that no contract could or would be reached with the Union without a favorable ratification vote, and that the Company was well aware of this." Decision, p. 28, lines 16-17. In support of this

conclusion, the ALJ pointed to the undisputed facts in the record: no USW local at any Company facility had ever accepted a LBFO without a ratification vote (Tr. 411-412); at Shoals, the parties' agreements were always the result of a ratification vote, and that the Union had never executed a contract without such a vote (Tr. 507); the parties' proposals contemplated a ratification vote (GC. 5); the parties agreed at the outset of negotiations (on January 24) to a ratification vote, and tentative agreements would be effective "upon ratification; there would be a "ratification vote" before a new contract took effect (R. 118); Bolte himself had admitted that the Shoals membership could very well have rejected the Union's recommendation, and ratified (no differently than at Pryor) (Tr. 267). Decision, p. 28-29.

The Union's Exception focuses entirely on the lack of commonality between the negotiations at Pryor and those at Shoals, which is irrelevant, as the evidence about Pryor was used as but one of many examples to underscore that May's insistence on a re-vote was tied to his reasonable belief that it would result in an agreement. The Exception is without merit.

5. **The ALJ Properly Determined that the Union's March 10 Counterproposal on the 401(k) Issue Was Essentially the Opposite of the Company's Proposal.**

The Union excepts to the ALJ's finding that the March 10 counterproposal on the 401(k) issue was the opposite of the Company's proposal, on the basis that the proposal "would have allowed the Company to suspend its matching 401(k) contribution, which is exactly what the Company was seeking." Un. Brief p. 28. The Union claims that its proposal "ceded the right" to suspend "after the parties bargained in good faith and reached mutual agreement on the issue." *Id.* The Union's counterproposal did not constitute any meaningful movement. The parties' central dispute about that proposal concerned the Company's ability to suspend contributions in its sole discretion if financial circumstances so dictated. Tr. 224, 383-384. The dispute which the parties could not overcome was the Union's "veto" power. The Company could not accept

this “veto” provision as it negated the basic purpose of the proposal -- to be able to remain flexible and suspend contributions as needed for cash flow reasons. The Union, on the other hand, had no interest in giving the Company this right. Accordingly, the ALJ’s assessment that the Union’s proposal amounted to an “opposite” of the Company’s is accurate.

In fact, when asked about the 401(k) proposal, Bolte admitted concern about a proposal that would unilaterally allow the Company to implement a suspension. T. 224. This clearly shaped the Union’s counteroffer, which required “the express consent of the Union” -- a fact conveniently omitted by the Union. Tr. 223-224; *see* GC. 5 (p. 59). This requirement establishes that the Union did not “cede” any right, but rather took away the one right the Company was seeking. “Express consent” stood in stark contrast to the Company’s proposal, which would permit the suspension of the matching contribution upon 30 days’ notice to the Union. GC. 5. May further testified that the Company did not consider the Union’s counteroffer a realistic proposal, which is why the Company rejected it. Tr. 383-384; GC. 5. Indeed, the Union’s counter “wasn’t even in the ballpark of what we were looking for...” *Id.* The counterproposal may technically have “offered the Company a right that it did not previously possess,” but it was not the right that underpinned the Company’s 401(k) proposal. The Exception is without merit.

6. The ALJ Properly Determined that the Company Moved “Only Slightly” on the 401(k) Issue During the March 28 Negotiations.

For the same reasons above, the ALJ’s assessment that the Company “moved only slightly” on the 401(k) issue on March 28, 2011 is accurate, because the Company’s counterproposal continued to preserve the sole right it was seeking in conjunction with its original proposal, i.e., the flexibility to suspend in its discretion based on business necessity. Decision, p. 19, lines 38-40. The Union perceived this counterproposal no differently than the

Company's initial proposal, and it responded in turn with a contingent proposal requesting the Company to withdraw all of its economic proposals, including the RA/DB proposal, and the 401(k) language proposal, essentially asking the Company, according to May, to "wipe our economic proposal slate clean...and that was unreasonable and unrealistic." Tr. 386. Later that day, after the so-called "movement" by the Company, the Union specifically identified this 401(k) provision as one of the main "sticking points" to an agreement, to which the Company responded that it was not going away. Tr. 236-237, 239, 386-387; R. 130-131. This exchange hardly evidences "even more progress" on the 401(k) issue as stated by the Union. Un. Brief, p. 29.

7. **The ALJ Properly Determined that the July 28, 2011 Negotiation Session Was "Relatively" Productive.**

The ALJ did not determine that the July 28, 2011 negotiation session was "only relatively productive," as asserted by the Union (out of context), but rather he specifically stated, "The July 28 meeting lasted essentially the entire day (8-4:30) and was relatively productive." Decision, p. 22, lines 8-9. The Company did not dispute this – indeed, May testified that the July 28 session represented perhaps the most constructive day of bargaining for the parties, because the parties were able to make movement on certain issues. Tr. 63, 401. The ALJ notes this progress in his Decision, but only to highlight the clear deadlock on the Company's RA/DB and 401(k) proposals. *Id.*, lines 8-33. Notably absent was any progress on these retirement issues on the 28th, or at any other time during bargaining between the parties, for that matter. With respect to these proposals, the Union did not come forward with any offers to move the parties closer on July 28, but rejected the 401(k) proposal outright, and even proposed that the Company withdraw its RA proposal altogether, with Bolte commenting with respect to these issues, "We're not going to buy a pig in a poke." Tr. 248, 398-399; R 130. The Company held to its

LBFO, explaining to the Union that the RA/DB pension and 401(k) proposals were “not going away,” and that no progress had been made on these issues; clearly, from the Company’s perspective, the parties were no closer on these proposals than they had been from the time negotiations first started. R. 130-131; *see* Tr. 400-401. Thus, while progress in some areas were made, no progress was made in the critical areas, leading to the ALJ’s accurate assessment that the July 28 session “lasted essentially the entire day . . . and was relatively productive.” Decision, p. 22, lines 8-9.

8. The ALJ Properly Assessed Jim Robinson’s Role During the September 2 Session.

The Union’s primary Exception regarding the ALJ’s findings with respect to Jim Robinson’s role during the parties’ September 2 session concern the ALJ’s failure to “note that Robinson did not have any role whatsoever with negotiating or bargaining with the Union,” in a clear attempt to downplay the unambiguous statements he made with respect to the Company’s RA/DB pension and 401(k) proposals. Un. Brief, p. 31. This lack of a prior role, his stature within the International USW, and the statements he made does not lead to a reasonable inference that Robinson was there just as a “rah-rah,” as alleged by the Union. From the Company’s perspective, the Union brought in the chief spokesperson’s boss, the Regional Director for District 7 of the USW International, without notifying the Company that he was going to be there, or advising the Company of the purpose of his participation. Tr. 65, 402. The bargaining session commenced with Bolte simply introducing Robinson by name and title, and explaining nothing more than that Robinson had a statement to make to the Company. Tr. 403. Robinson then proceeded to tell the Company that he wanted to come in and “make clear what perhaps had not been clear” up to this point, that he was speaking on behalf of the International USW and its President Leo Girard, and that they did not agree with the Company’s RA/DB

pension and 401(k) proposals. Tr. 251-252, 403. Bolte himself admitted that Robinson advised the Company that “if there was any doubt about the union’s position, there shouldn’t be any doubt, any more doubt.” Tr. 67, 252-253, 403. The fact that Robinson, a senior USW International official, who had not ever participated in the 9 months of negotiations until that time, suddenly appeared without announcement and addressed and rejected only the disputed proposals using such strong and unmistakable terms refutes the Union’s simple assertion that Robinson was there simply to express support for the local. Un. Brief, p. 31. He did much more than that, as explained above, and the ALJ did not “unnecessarily inflate[] his role.” *Id.* The Exception is without merit.

B. The ALJ’s Conclusions Are Fully Supported by the Record Evidence and Applicable Board Precedent

1. The ALJ Properly Determined that the Company Did Not Unlawfully Refuse to Continue Bargaining with the Union by Prematurely Declaring Impasse During the September 2 Negotiation Session.

Both the Union and GC assert that the ALJ erred by concluding the parties had reached impasse by September 2, relying on the progress the parties had made up to that time, and the *assertion* that the parties had made, and were continuing to make, progress on the RA/DB and 401(k) proposals. Un. Brief, pp. 33-39; GC Brief pp. 5-13. At the outset, the Exceptions are flawed, inasmuch as both the Union and GC present only a very small portion of the facts about the parties’ bargaining history which are relevant and necessary to the resolution of the impasse issue. The facts included by the Union and GC in support of their Exceptions accordingly present a very skewed, incomplete, misrepresented bargaining history, and the cases cited in their respective briefs accordingly are distinguishable and of limited value in assessing their Exceptions.

The Union first asserts that “the steady progress the parties made throughout negotiations establishes that they were not at impasse on September 2nd,” and cites to *Caldwell Mfg.*, 346 NLRB 1159, 1171 (NLRB 2006), for the proposition that there is no impasse where the parties made progress during the session in which the employer contended impasse, and the union had made compromises during the last few meetings. *Caldwell* is entirely distinguishable, and does not stand for the simple proposition asserted by the Union. In *Caldwell*, the parties had made a list of 14 core issues dividing them in the final days before impasse, and over the course of the next several days, the parties “resolved most of the major outstanding issues dividing them,” leaving only 3 or 4. *Id.* at 1162. The ALJ noted that “the pace of progress towards an agreement was accelerating, not slowing,” and that the Union had “made a number of creative proposals to resolve the outstanding issues” and had made “many compromises” which demonstrated a willingness to make sacrifices in the interest of reaching a new agreement.” *Id.* at 1171. Thus, according to the ALJ, “[g]iven the clear indication of the Union’s flexibility on significant issues, the Respondent was “required to recognize that negotiating sessions might produce other or more extended concessions.” *Id.* In the case at hand, the parties had not resolved most of the major outstanding issues dividing them. To the contrary, they remained completely divided over the two most critical issues. The progress toward an agreement was not accelerating on September 2, but had come to a complete halt, and the Union had failed to make any proposals demonstrating a willingness to make sacrifices to reach a new agreement. Noticeably missing from the facts of *Caldwell* is the gaping dispute over two fundamental issues which existed from the beginning of bargaining which the parties were unable to bridge throughout negotiations. The RA/DB issue was not like the disputed issue of wages in *Caldwell* where the parties were free to ultimately reach agreement at any one of many points along the spectrum between their

respective positions, but rather was a fundamental, black and white difference between a defined contribution plan on the one hand, and a defined benefit plan on the other, which neither side was willing to concede.¹⁵ The same is true for the 401(k) issue, in which both sides were deadlocked over whether to permit unilateral action by the Company or require consent by the Union.

More importantly, in *Caldwell*, on the final day on which the company declared impasse, the union “was prepared to make concessions on the unresolved economic issues.” *Id.* at 1162. The crux of the charge in *Caldwell* related to the company’s refusal to provide information requested by the union which it could use to “propose changes” that would address the central dispute (of wage increases), and the union had presented evidence that it was prepared to respond either by agreeing with the company’s wage proposal, disagreeing, or reaching a middle ground based on what the information showed. *Id.* at 1163. In stark contrast, in the case presented, the Union had requested and received all of the information it needed on the RA plan early on in bargaining, and brought in a senior official of the USW International on September 2, who began the session with an unambiguous speech in which his stated purpose was to “clarify” and “leave no doubt” that the Union was not going to agree to Company economic proposals 4 and 5. Following that speech, the Union went through its responses to the Company’s last set of proposals, and when it reached proposals 4 and 5, Bolte explained that Robinson had already clearly stated the Union’s position on those issues, and rejected them. Tr. 76, 406; R. 130-131.

¹⁵ The “after the fact” proposal by the Union to substitute the RA plan with the Union’s own 401(k) plan on October 24 is irrelevant as the Company declared impasse on September 2 (and implemented the lockout on September 6), based on the Union’s stated unwillingness (through Robinson, and as confirmed by Bolte) to make any movement on the RA and 401(k) issues. At all times leading up to that date, the Union indicated no willingness to consider a defined contribution plan (which by definition could not provide the “guaranteed” return sought by the Union) in place of the defined benefit pension plan.

The Union nonetheless asserts that there was no impasse on September 2, as it had expressed its willingness to continue bargaining that day. Un. Brief, p. 37. The Union cites to *Huck Mfg. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982) for the proposition that for an impasse to occur, “neither party must be willing to compromise,” and further asserts that, in *Huck*, the “determinative factor” was the “ALJ’s finding that union’s chief negotiator never felt the parties were at impasse.” *Id.* First, the parties’ contemporaneous understanding about impasse is indeed one factor in the impasse analysis, but a bald statement of disagreement by one party is hardly sufficient to defeat an impasse (and by no means can be considered “determinative”), absent conduct demonstrating a willingness to compromise further. *Taft*, 163 NLRB at 478. This is precisely why the Board has indicated that a Union’s “bare assertions of flexibility on open issues and its generalized promises of new proposals [do not represent] any change, much less a substantial change in the Union’s [negotiation] position.” *Civic Motor Inns*, 300 NLRB 774, 775 (1990); *see also Erie Brush & Manufacturing Corp. v. NLRB*, No. 11-1337 (D.C. Cir. Nov. 27, 2012) (the finding that “one of the parties would decide to change its position...was not based on the record evidence...Such rank speculation cannot form the basis of a sound administrative finding...); *Taft*, 163 NLRB at 476-478; *CalMat Co.*, 331 NLRB 1098 (2000); *Richmond Electrical*, 348 NLRB 1001 (2006); and Respondent’s Post-Hearing Brief, pp. 92-100 and cases cited therein. Unlike the facts of *Huck*, moreover, the ALJ in the present case specifically *discredited* the Union’s testimony that it believed further bargaining would have been fruitful, relying on the parties’ bargaining history, the length of negotiations, the absence of allegations of bad faith by the Company, the parties’ statements in bargaining, and the updates. Decision, p. 27, fn. 31. These facts stand in stark contrast to *Huck* where the parties met only four times, and the employer delayed meetings, ignored and rebuffed the union’s willingness to

compromise, disparaged the Union and strikers, told employees that unions were unnecessary and undesirable, and threatened returned strikers with discharge. *Huck Mfg. Co.*, 254 NLRB 739, 754 (1981).

Furthermore, the Union's assertion that the deadlock on the RA/DB and 401(k) proposals did not preclude "agreements on other outstanding issues" which in turn refute impasse is not an accurate assessment of Board precedent. It is well-settled that a *single* issue can create an overall bargaining impasse, as previously discussed in the Company's Post-Hearing Brief (at pp. 83-84). *See Taft*, 163 NLRB at 478 ("an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions."). The Union and GC both fail to address this in their Briefs. The Union, moreover, identifies only one piece of evidence allegedly supporting its position that it remained willing to move on these proposals – its "after-the-fact" October 24 counterproposal in which the Union proposed the USW 401(k) plan in lieu of the RA proposal, notwithstanding that the Company already had a 401(k) plan already.¹⁶ Un. Brief, p. 37-38. This proposal came approximately 7 weeks after the Company declared impasse, pursuant to a session held at the request of FMCS mediator Ellenberger, who reached out to the parties in light of the time that had passed since the parties had last met. Tr. 412-413. The simple fact that the Company met with the Union on October 24 even though it "had no legal obligation under federal law to continue bargaining with the Union" if the parties were at impasse (as noted by the Union) does not establish that the impasse did not exist on September 2

¹⁶ The Union fails to point out that its offer on October 24 with respect to the Company's 401(k) contribution suspension language proposal had not changed, where it still required the Union's prior agreement. R. 130, 131; *see* Respondent's Post-Hearing Brief at p. 68. That Bolte allegedly "spent a great deal of time researching plans and ultimately found one" (Un. Brief, p. 36) is also irrelevant, where Bolte himself admitted that he never shared that he was exploring such options with respect to the RA, and had not indicated any willingness to move from the Union's position of rejection of the RA. Tr. 247.

because the parties subsequently met 7 weeks after impasse was declared, as asserted by the Union. Un. Brief, p. 38. This is a propositional fallacy and is contradicted by Board precedent, as identified in the ALJ's Decision. As discussed at length, the Union's "after-the-fact" counterproposal to the Company's RA/DB proposal is irrelevant to whether the parties were at impasse on September 2, as properly noted by the ALJ. Decision, p. 28, lines 6-12 (and cases cited therein).¹⁷

Similarly, the GC relies on a superficial and partial treatment of the facts to except to the finding of impasse, pointing only to the movement made by the parties on all issues other than the two disputed ones (regarding which he makes virtually no reference to the parties' relevant bargaining history and statements). His reliance on *Grinnell Fire Protection Systems*, 328 NLRB 585, 596 (1999) is misplaced where the relevant parties in that case had met only four times, and the union not only had continued to demonstrate its willingness to compromise with its proposals, but also had made "significant concessions" which "indicates a willingness to compromise further," and respondent failed to test the union's "willingness to make even more concessions than [it] had already made." *Id.* at 585, fn.4, 592-596. The record in the case presented, however, lacks evidence of such willingness by the Union to compromise or make concessions, and the parties had met and bargained on many more occasions and over a far greater period of time than those in *Grinnell*.

In the end, there is no basis to overturn the ALJ's conclusion that the parties were at impasse on September 2. The facts assessed by the ALJ under the proper impasse factors (and held sufficient by the Board in analogous cases to demonstrate impasse) establish that the parties had reached the end of their respective ropes on the issues of the RA/DB suspension and 401(k)

¹⁷ See e.g. *Francis J. Fisher*, 289 NLRB 815 fn. 1 (1988) (overruling Board precedent to the extent it holds that impasse can be found on the basis of subsequent events).

contribution suspension language. This is plainly evidenced by the parties' bargaining history, length of negotiations, and the parties' respective understanding about the status of bargaining (evidenced by the lack of any meaningful movement on these issues throughout bargaining, the clear positions on these issues stated by the parties to one another throughout bargaining, and the Union's own internal updates from the first day of bargaining repeatedly identifying only these issues and highlighting them as areas of great concern). The importance of these deadlocked issues to each party is undeniable, culminating in unequivocal terms on September 2 when the Union consciously decided to bring in USW International Director Robinson to criticize, attack, and reject these retirement proposals outright. The Union did not attempt to qualify or clarify Robinson's rejection, rather confirmed them in presenting its final counterproposal that day in which it also rejected the proposals, indicating only that Robinson had spoken on the Union's behalf, without any statements indicating a willingness to meaningfully move, modify or compromise.

2. **The ALJ Properly Determined that the Company Did Not Unlawfully Bargain to Impasse on a Permissive Subject of Bargaining.**

Both the GC and Union's Exceptions about May's statements on September 2 are premised on their assertion that May bargained to impasse on a permissive subject of bargaining, and that the ALJ improperly concluded that May's statements "simply reflected what was patently true at that point: the only apparent way to reach a new collective-bargaining agreement – consistent with both parties' practice and their proposals and express understanding of the necessity of a ratification vote – was for the employees to revote in favor of the Company's LBFO." Decision, p. 30, lines 14-20. The Exceptions fail for two reasons: first, as the ALJ determined, the parties already had reached impasse over the RA/DB and 401(k) language proposals, i.e., mandatory subjects of bargaining, by the time May made his statements which

allegedly tied impasse to the permissive subject of the ratification vote (and the parties already had acknowledged throughout bargaining that the ratification vote would have to occur for an agreement to be reached). *Id.*, lines 14-16. Second, both the Union and GC once again provide only a very narrow snapshot of the events and statements that day to support their Exceptions, relying on an overly literal and unreasonable interpretation of one particular statement without assessing the context in which that statement was made. The ALJ took the time to describe this evidence in justifying his conclusion. The Union offers no precedent to support its position, whereas the GC cites to the same precedent already considered and distinguished by the ALJ (and addressed by the Respondent in its Post-Hearing Brief). Neither party addresses the Board precedent cited by the ALJ in support of his conclusion. Without more, the Exceptions are unfounded.

The GC and Union both fail to provide any background behind May's September 2 statement critical to resolving the issue under well-settled Board precedent. Importantly, the record evidence establishes that the exchange at issue between Bolte and May was preceded by May's lawful declaration of impasse, shortly after the parties had resumed after a caucus following Jim Robinson's speech, and after Bolte had confirmed Robinson's unwavering rejection of the RA/DB pension and 401(k) proposals as he was explaining the Union's counterproposals to the Company. Tr. 76, 406; R. 130-131. It was this sequence of events that led May at first to respond that, in light of the Union's stated position on those issues, the parties might not have more to discuss. Tr. 407. At this point, the parties stopped for a caucus. Thus the Company, in its first articulation of the possibility of impasse, did so based on the deadlock over these proposals, i.e., mandatory subjects of bargaining.

After this caucus May came back, and expressed the Company's position that the Union should permit the employees to vote again on the Company's LBFO, based on his belief that the vote equated to an agreement. Tr. 67, 260, 407, 411; R. 130-131. After he expressed this position, he then made the statement that, given Robinson's statements about the Company's RA/DB and 401(k) suspension proposals, it was the Company's position that the parties were at impasse and had nothing more to discuss. Tr. 66, 260, 407-408. Here too, May's declaration of impasse was tied solely to the parties' respective positions on the critical, disputed issues, and **not** on a ratification vote. The issue of the ratification vote (a permissive subject) did not create the impasse; rather, it was the deadlocked retirement proposals (mandatory subjects) which created the impasse.¹⁸

The substance of this testimony is corroborated by Union President Hawkins, who specifically recalled May stating that "there were two items left on the table, the pension and the 401(k) and that if the union thought that those items were going to disappear, they were not going to go away and that at that point we were at impasse and that there was no more discussion that needed to be had." Tr. 321-322; R. 130, 131, 133. This statement establishes that the Union also understood the Company's position of impasse was based on the RA/DB and 401(k) proposals, which Hawkins understood were there to stay.

May's testimony is further corroborated by the meeting minutes taken by May, Gammon and Berry. R. 130, 131, 133; Decision, p. 24, lines 20-21. Gammon's notes reflect that the parties met after a caucus at 10:10 a.m., with "all members except Jim Robinson," and that Matt began by stating that he had had a "chance to review union's last counter," addressed the "LBF"

¹⁸ This refutes the Union's claim that, "if the parties did reach a bargaining impasse, it reached this impasse because the Company insisted to impasse that the Union submit its revised LBFO for another ratification vote." Un. Brief, p. 41. The assertion is further refuted by the months of bargaining history leading up to and including September 2, 2011, which establishes impasse over the critical pension and 401(k) issues.

and the opinion that the “union should allow ees to vote contract again & with stated position of this morning, we are at impasse.” (emphasis added) R. 131. Berry’s minutes reflect that the parties resumed at 10:24 a.m., that “Jim Robinson not present for this session,” and that May stated, “Had a chance to review Union’s last counter. Our position is that we have a LBF out there and we think employees should be allowed to revote LBF. Given Jim’s statements this morning we believe we are at impasse.” (emphasis added) R. 133. May’s notes, for instance, reflect that the parties “regrouped” at 10:21, and that he began by advising the Union he had “rvw’d last counter, that “our position is you should let the ee vote LBF again,” and “with the Union’s stated position on pension & 401(k) language, we believe we are at impasse and have nothing further to discuss.” R. 130. Thus, at the outset, he explained very carefully that he wanted the employees to have another opportunity to vote the LBFO (which – as cited by the ALJ – the Union and Company acknowledged was required for an agreement based on prior history and practice), and that in light of Robinson’s statements on the disputed issues, he believed the parties were at impasse. May’s declaration is fully consistent with the bargaining history which establishes the complete deadlock on the issue of the new RA plan/suspension of DB and the 401(k) suspension language, with both parties refusing to demonstrate any willingness to compromise from its position. The declaration of impasse had nothing to do with a ratification vote; rather, it was based entirely on the clear and unambiguous message from the Union (International, its President, its Regional Director, its Representative, and the local Committee) that it was **not** going to accept the new RA plan and 401(k) suspension proposals. The mere fact that May subsequently stated that the parties were at an impasse “short of a new vote” (a statement which the Company has not disputed), is simply insufficient to change the clear evidence that he just minutes before previously had articulated impasse based on the

deadlock over those mandatory subjects, and that further bargaining would be fruitless and not at all likely to produce an agreement because of that deadlock.

Both the GC and Union completely disregard this sequence of statements and events, and present only the final statements made by May in response to questioning by Bolte in which he was clearly attempting to bait May into asserting an unlawful position. The Union and GC in their Briefs both cite only to May's subsequent statements – following his declaration of impasse based on the disputed issues – in which he acknowledged that, “short of a vote” the parties were at impasse, and answered affirmatively to Bolte's questions that if the Union took the LBFO to a vote, May was not claiming impasse, and that if the Union did not take the LBFO to a vote, May was claiming impasse. The GC and Union focus only on those isolated statements taken out of context, because the actual facts and evidence they omitted discredit their contention that the Company insisted to impasse on a permissive subject of bargaining, i.e., the ratification vote.

In the end, and as properly determined by the ALJ, May was attempting to communicate that the parties were at impasse because of Robinson's statements about the RA and 401(k) proposals, unless the Union took the LBFO to a vote and the employees ratified. May admittedly left out what follows a ratification vote, but there were only two options – reject or ratify. It makes no sense that May would declare impasse tied to Robinson's statements, urge a ratification vote only to have employees vote and reject the LBFO, and then for May to take the position, as he appeared to state in response to Bolte's questioning, that there was no impasse merely because a vote had occurred. Not surprisingly, when asked what the Company's position would have been had the union voted and rejected the last, best and final, May testified, “We would have been in the same place then, we would have been at impasse.” Tr. 411 Bolte understood the same thing, notwithstanding May's statement tying impasse to a ratification vote,

when he testified that if the Union had taken the contract to a vote and it was accepted, there would not have been an impasse.¹⁹ Tr. 266-267. In other words, the fact of the vote was irrelevant – it was the result of the vote that May was after. This is further corroborated by his testimony in response to questioning by the ALJ about why the Company had locked out the employees. May responded, “Basically that the decision was made to try to get the employees to the point of **voting for the contract,**” i.e., ratification and an agreement.²⁰ Tr. 462 (emphasis added).

Thus, the theory that the Company conditioned an agreement or impasse on a ratification vote is not supported by the evidence or the bargaining history, and on its face makes no sense given the context in which the statements were made. In these circumstances, May’s statement was not of the type that the Board has found to be an unlawful insistence to impasse on a permissive subject of bargaining, where, even if the statement was taken literally, the insistence on the ratification vote did not contribute to the parties’ actual impasse, or give rise to the impasse.

The ALJ’s conclusion based on these facts is supported by Board precedent. The ALJ applied the Board’s rationale in *ACF Industries*, 347 NLRB 1040, 1042 (2006), in which the

¹⁹ The Union asserts that May’s statement – agreement upon a ratification vote in favor of acceptance – is so obvious to all parties that it did not have to be made. Un. Brief, p. 42-43. Indeed, May was stating the obvious, where he wanted to reiterate to the Union that unless the employees voted for the LBFO, the parties would remain at impasse because of the deadlock over the critical issues.

²⁰ The GC blatantly misrepresents this line of questioning by asserting that “May identified only one purpose behind the lockout: to put pressure on the employees to have the Union hold a second ratification vote.” GC Brief, p. 15. This is directly contradicted by May’s actual testimony, in which he stated that the purpose of the lockout was to get employees to vote for the contract, meaning reaching an agreement. This is consistent with the Company’s lockout notice to employees, which explained that the lockout would continue until a new collective bargaining agreement was reached. R. 87. Thus, there is a significant distinction between May’s actual testimony and the GC’s disingenuous (and desperate) attempt to distort what May said to support his flawed theory.

Board refused to invalidate an impasse by virtue of the employer's inclusion of a nonmandatory subject of bargaining in its final offer, explaining:

[W]e rely on the judge's finding that neither the General Counsel nor the Union demonstrated that the Respondent's insistence on the proposal contributed to the impasse in any discernible way.

Id. citing Branch International Services, 310 NLRB 1092, 1103 fn. 20 (1993), *enfd.* 12 F.3d 213 (6th Cir. 1993). *See also Branch International Services, Inc.*, 310 NLRB 1092, 1103 fn. 20 (1993) ("An unlawful impasse on a nonmandatory subject is reached not where the nonmandatory subject is merely present in the impasse offer, but where the presence of the nonmandatory subject itself gives rise to the impasse.") *citing Chicago Beef Co.*, 298 NLRB 1039 (1990), *enfd. mem.* 955 F.2d 906 (1991); *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985) (GC failed to satisfy his burden of proof that the Respondent conditioned any agreement to a mandatory subject on acceptance of a permissive subject of bargaining, where the permissive subject is not the issue over which the parties reached impasse.); Decision, p. 30, fn. 36.

The record evidence is clear that May's declaration of impasse was tied solely to the parties' respective positions on the critical, disputed RA/DB and 401(k) issues (the mandatory subjects of bargaining), and **not** on a ratification vote (permissive subject). The Union's and GC's Briefs disregard the facts which establish the propriety of, and meaning behind, May's statements, fail to address the persuasive Board precedent relied upon by the ALJ, and fail to offer any other Board precedent to support their respective positions, other than the handful of cases first presented by the GC in his Post-Hearing Brief, each of which were distinguished by the ALJ. Decision, p. 30, fn. 36. This Exception is also without merit.

3. **The ALJ Properly Determined that the September 6 Lockout Was Lawful.**

The GC's and Union's Exceptions to the ALJ's conclusion that the lockout was lawful hinge on their Exceptions relating to the ALJ's conclusion that the parties had reached impasse by September 2, and that May did not unlawfully insist to that impasse on a ratification vote. Un. Brief, pp. 43-44, GC Brief, pp. 17-18. However, because the Company's positions regarding impasse and ratification were not unlawful (for the reasons discussed above), the Exception is without merit, and the cases cited accordingly are readily distinguishable.

While not specifically cited by the ALJ, the purpose of the lockout was not to coerce the Union into allowing a ratification vote, as alleged by the GC. The Company offered uncontested evidence that the individuals involved in the decision to lockout employees did not consider whether the Union would or would not present the LBFO to a vote. Rather, they discussed the lack of progress made at the September 2 session, the statements Robinson had made, and the Union's position on the RA and 401(k). Tr. 483. This is further borne out by the e-mail exchange between May and Bolte in the days immediately preceding and following the lockout, in which May reiterated the position he articulated at the September 2 session that the parties each had no intention of modifying its proposals on the critical issues, which made it "highly unlikely" that the parties would reach an agreement. R. 44. This explanation is consistent with what the Company told employees at the time it implemented the lockout on September 6, namely, that the lockout was necessary not for a ratification vote, but rather "to bring our negotiations to a conclusion with a new agreement." R. 87. The lockout had nothing to do with a ratification vote, because May did not insist on such a vote to impasse. Even after the lockout commenced, the Company followed up with employees with an update advising them that yet another Company facility had accepted the LBFO which included "accepting the company's

401(k) and new retirement proposals.” R. 88. The Company concluded this update with a statement that it was time to end the dispute and “vote the offer that is on the table,” a statement consistent with May’s intended communication to the Union on September 2 that only an acceptance of the LBFO would break the impasse. *Id.*

Finally, for the reasons discussed more fully in the Company’s Post-Hearing Brief, even assuming, *arguendo*, that impasse either did not exist (rendering May’s rejection of continued negotiations on September 2 unlawful) or that May’s statements about the ratification vote and impasse on September amounted to a technical violation of the Act, such a finding still does not render the lockout unlawful, where the lockout was not motivated by the declaration of impasse, but rather was in support of the Company’s good faith bargaining position, without any evidence of discriminatory purpose. This Exception accordingly also is without merit.

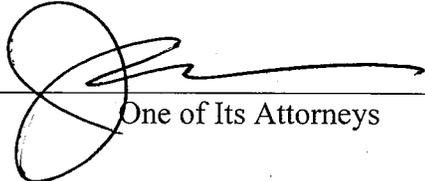
IV. CONCLUSION

Based on the foregoing, the Employer respectfully requests that the respective Exceptions of the Union and GC be denied in its entirety.

Date: December 20, 2012

Respectfully submitted,

NATIONAL GYPSUM COMPANY

By:  _____
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CERTIFICATE OF SERVICE

Jason C. Kim, an attorney hereby certifies that he served the foregoing Respondent's Post-Hearing Brief on the 20th day of December, 2012 upon the following:

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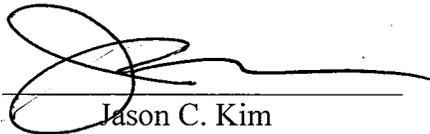
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