

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

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

Respondent/Employer,

and

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

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

and

UNITED STEEL WORKERS 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,

Petitioners/Charging Parties.

**PETITIONERS'/CHARGING PARTIES' ANSWERING BRIEF IN OPPOSITION TO  
RESPONDENT'S/CHARGED PARTY'S LIMITED EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING BRIEF**

**Table of Contents**

I. Introduction.....2

II. Argument.....4

    A. The Board Has Broad Remedial Authority.....4

    B. The ALJ’s Recommended Order is Entirely Consistent with Board Precedent....5

    C. The Cases the Company Cites are Distinguishable or, in Some Instances, Actually Support a Finding that the ALJ’s Recommended Order Is Appropriate and Should Be Affirmed.....8

III. Conclusion.....14

**Table of Authorities**

<b>Case</b>	<b>Page No.(s)</b>
<i>E.I. DuPont De Nemours</i> , 355 NLRB 1084 (2010).....	9, 10, 11
<i>Famous Castings Corp.</i> , 301 NLRB 404 (1991).....	8, 9
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (U.S. 1964).....	4, 5
<i>Glendale Associates, Ltd.</i> , 335 NLRB 27 (2001).....	11
<i>J. Picini Flooring</i> , 356 NLRB No. 9 (2010).....	3
<i>Jackson Hosp. Corp.</i> , 356 NLRB No. 8 (2010), <i>enfd. denied on other grounds sub nom. Jackson Hosp. Corp. v. NLRB</i> , 647 F.3d 1137 (D.C. Cir. 2011).....	3
<i>Johnstown America Corp.</i> , JD-135-03, Case 6-CA-33127 (2003).....	7
<i>Kingsbridge Heights Rehabilitation and Care Center</i> , 353 NLRB 631 (2008), <i>enfd</i> 358 Fed. Appx. 267 (2d Cir. 2009).....	12, 13, 14
<i>Kraft Plumbing &amp; Heating, Inc.</i> 252 NLRB 891 (1980) <i>enfd. mem.</i> 661 F.2d 940 (9th Cir. 1981).....	2, 3
<i>Merryweather Optical, Co.</i> , 240 NLRB 1213 (1979).....	2
<i>NLRB v. Food Store Employees Union</i> , 417 U.S. 1 (U.S. 1974).....	4
<i>North Star Steel Company</i> , 305 NLRB 45 (1991).....	6, 7
<i>Ogle Protection Service, Inc.</i> 183 NLRB 682 (1970), <i>enfd.</i> 444 F.2d 502 (6th Cir. 1971).....	2

*Omaha World-Herald*, 357 NLRB No. 156 (2011)..... 13, 14

*Retail Clerks Union, Local 770*, 145 NLRB 307 (1963).....9

*Sunrise Mountainview Hosp., Inc.*, 357 NLRB No. 122 (2011).....5, 6

*Union-Tribune Publishing Co.*, 353 NLRB 11 (2008), *vacated and remanded by Graphic  
Communs. Conf., Local 432(M), Int'l. Bd. of Teamsters, Graphic Communs. Int'l Union v. NLRB*,  
189 L.R.R.M. 2607 (D.C. Cir. 2010).....14

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Petitioners/Charging Parties United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Workers International Union, AFL-CIO-CLC ("USW") and Local No. 7-0354 ("Local Union") (collectively, "Union") submit their Answering Brief to the Limited Exceptions to Administrative Law Judge Jeffrey Wedekind's Decision and Supporting Brief of Respondent/Charged Party New NGC, Inc. (d/b/a National Gypsum Company) ("National Gypsum" or "Company").

## I. INTRODUCTION

This case was heard before Administrative Law Judge Jeffrey Wedekind (“ALJ”) from May 7 to May 9, 2012 in Bloomington, Indiana. (ALJ’s Decision, p. 2, lines 22-23). The General Counsel alleged that the Company violated the Act by unlawfully making unilateral changes with respect to employee health insurance premiums and safety procedures in April and June 2011, respectively.<sup>1</sup> (*Id.* at p. 2, lines 11-15). The ALJ issued his decision on September 7, 2012. The ALJ concluded that the Company did violate Section 8(a)(5) and (1) of the Act by unilaterally changing its lockout/tagout procedures and by refusing, from April 1 to June 30, 2011, to pay any portion of the increase in health insurance premiums. (*Id.* at p. 31, lines 11-20).

The ALJ concluded that the appropriate remedy under the Act is a cease and desist order requiring the Company to take appropriate affirmative action. To the extent that the Company had not already done so, the ALJ ordered the Company, on the Union’s request, to rescind its unlawful and unilateral changes and restore and maintain the status quo ante until such time as the Company has complied with its collective bargaining obligations under the Act. (*Id.* at p. 31, lines 27-31). The ALJ also ordered the Company to make all its required payments to the pension and welfare fund, including any additional amounts due the health and welfare fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). (*Id.* at p. 31, lines 31-34). He further ordered the Company to make the unit employees whole for any loss of wages or benefits in a manner set forth in *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971) and *Kraft Plumbing & Heating, Inc.* 252 NLRB 891, 891 fn. 2

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<sup>1</sup> The General Counsel also alleged that the Company violated the Act by prematurely declaring impasse and improperly conditioning an end to the impasse on the Union submitting the Company’s revised last, best and final offer for a second ratification vote. (ALJ’s Decision, p. 2, lines 15-20). The ALJ did not find that the Company violated the Act with respect to these allegations. (*Id.* at p. 2, lines 25-28). On November 5, 2012, the Union filed exceptions to this portion of the ALJ’s decision with a supporting brief. These exceptions are still pending before the Board.

(1980) *enfd. mem.* 661 F.2d 940 (9th Cir. 1981), with interest compounded daily as prescribed in *Jackson Hosp. Corp.*, 356 NLRB No. 8 (2010), *enfd. denied on other grounds sub nom. Jackson Hospital Hosp. Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). (*Id.* at p. 31, lines 34-42). The Company was additionally required to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010). (*Id.*).

In its limited exceptions to the ALJ's decision and supporting brief, the Company does not contend that the ALJ improperly concluded that it violated the Act by unilaterally changing its lockout/tagout procedures and by refusing to pay any portion of the increase in the bargaining unit employees' health insurance premiums from April 1 to June 30, 2011. Because the Company does not assert that these conclusions should be reversed, the Board should affirm the ALJ's finding of these violations, which are properly based on substantial record evidence.

Although the Company does not challenge the ALJ's central substantive findings of violations of the Act by the Company with respect to the lockout/tagout procedure and its obligation to pay health insurance premiums, the Company does except to portions of the remedy that the ALJ ordered with respect to these violations. The Company asserts that the ALJ's remedy improperly includes a broad order that requires it to cease and desist from:

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

(ALJ's Decision, p. 31, lines 15-18). The Company also challenges the following language that the ALJ included in the notice posting:

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

The Company contends in its limited exceptions brief that the cease and desist component of the ALJ's decision is "either vague and requires clarification, or alternatively, is unduly broad and not intended to effectuate" the Act's policies. (Company's Limited Exceptions Brief, p. 2). It maintains that the cease and desist order and the notice language should have been limited to the two unilateral changes at issue. (*Id.* at p. 7). It further argues that the order is improper because it contains no limits on the requirement of bargaining to impasse or agreement on employees' terms and conditions of employments and does not permit otherwise lawful unilateral changes by the Company. (*Id.*). The Company argues that, if the ALJ intended to use the language in the order and notice that the Company challenges, the language is overbroad, punitive and does not effectuate the policies of the Act. (*Id.*). If the ALJ did not intend to use this language, the Company argues that the order and the notice should be modified to address the specific and limited underlying violations in a manner that permits lawful conduct. (*Id.* at p. 7-8).

The Company's assertions are without merit. The ALJ's remedy was not only properly recommended in accordance with the Board's broad remedial power but also is consistent with Board precedent.

## **II. ARGUMENT**

### **A. The Board Has Broad Remedial Authority**

It has long been established that the Board has broad authority to remedy violations of the Act. For example, in *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 (U.S. 1974), the Supreme Court observed that "the congressional scheme [invested] the Board and not the courts with broad power to fashion remedies that will effectuate national labor policy." The Supreme Court has also long held that Section 10(c) of the Act "charges the Board with the task of

devising remedies to effectuate the policies of the Act.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215-216 (1964). The Board’s order will not be disturbed “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Id.*

**B. The ALJ’s Recommended Order Is Entirely Consistent with Board Precedent**

Although the Company recognizes that the Board possesses broad remedial authority, it nonetheless contends that the remedy the ALJ recommended is partially “either vague and requires clarification, or alternatively, is unduly broad and not intended to effectuate” the Act’s policies. (Company’s Limited Exceptions Brief, p. 2). To support its argument that the remedy provided by the ALJ is improper, the Company argues that the remedy is overbroad because it is directed at “any changes in any unit employees’ terms and conditions of employment, and not just those at issue, i.e., the health insurance premiums and lockout/tagout policy.” (*Id.* at p. 10). The Company, thus, asserts that it was improper for the ALJ to order general remedial relief in connection with his finding of specific violations. The Company fails to recognize that such relief is not unprecedented and, in fact, is both common and proper.

For example, in *Sunrise Mountainview Hosp., Inc.*, 357 NLRB No. 122, slip op. at 1 (2011), the Board affirmed the ALJ’s conclusion that the employer violated Section 8(a)(5) and (1) the Act when it unilaterally departed from its holiday staffing policy by scheduling four on-call nurses on July 5, 2010 (the observed July 4 holiday), instead of its normal practice of scheduling two on-call nurses with one backup on holidays.<sup>2</sup> To remedy this violation of the Act, the Board ordered that the employer cease and desist from unilaterally changing the work

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<sup>2</sup> In so doing, the Board found it unnecessary to pass on the ALJ’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally departing from its established surgical scheduling policy by permitting physicians to schedule elective surgeries on a holiday.

schedules of bargaining unit employees without first giving notice to the Union and bargaining with it. *Id.* The Board further ordered that the employer cease and desist from: “Making any changes in wages, hours, or other terms and conditions of employment of employees represented by the Union without first bargaining with the Union as their exclusive collective-bargaining representative.” *Id.* (emphasis added). It also ordered the employer to cease and desist from: “In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.” *Id.* Thus, although the violation the Board found in *Sunrise Mountainview* was specific and there was no evidence of widespread misconduct by the employer, the Board nonetheless found it proper to order general relief similar to the relief the ALJ ordered in this matter. The holding in *Sunrise Mountainview*, therefore, directly contradicts the Company’s contention that a remedy provided in connection with a specific 8(a)(5) violation must be expressly specific to the particular violation(s) found.

Furthermore, language identical to or very similarly to the language the ALJ included in his recommended order has commonly been provided where Section 8(a)(5) violations have been found. For instance, in *North Star Steel Company*, 305 NLRB 45, 45 (1991), the administrative law judge concluded that the employer violated Section 8(a)(5) by unilaterally changing an employee health insurance plan that covered bargaining unit employees. The administrative law judge ordered the employer to make the employees whole for losses they incurred as a result of the change. *Id.* The Board agreed with this conclusion. *Id.* Unlike the administrative law judge, the Board concluded that there was no evidence to establish that the parties subsequently reached impasse. *Id.* The Board therefore concluded that the employer had to restore the status quo ante to January 1998, the date of the employer’s initial illegal action. *Id.* at p. 45-46. The Board modified the administrative law judge’s recommended order to reflect this conclusion. *Id.* at p.

46. However, it did not disturb the portion of the administrative law judge's recommended order in which he provided an essentially identical remedial cease and desist order as the order ALJ recommended in this case. *Id.* at p. 46, 51-52.

Thus, in *North Star Steel Company*, the Board found proper the administrative law judge's order that the employer cease and desist from "unilaterally changing the employees' terms and conditions of employment without affording the union an opportunity to bargain about the changes and without bargaining with the union to either an agreement or to impasse." *Id.* at p. 46, 52. The Board therefore adopted nearly identical language to the language the ALJ utilized in his recommended order and did so in the context of a specific Section 8(a)(5) violation regarding the employer's unilateral change to employee health insurance benefits. Moreover, in the notice that the Board substituted for the administrative law judge's notice in *North Star Steel Company*, the Board also included essentially identical language to the language the ALJ included in his proposed notice for which the Company now excepts. In *North Star Steel Company*, the Board specifically included the following language in the notice: "We will not change our bargaining unit employees' terms and conditions of employment unilaterally, without affording the United Steelworkers of America, AFL-CIO, CLC an opportunity to bargain about the changes, and without bargaining with that union either to an agreement or a good-faith impasse." *Id.* at p. 46. *See also Johnstown America Corp.*, JD-135-03, Case 6-CA-33127 (2003) (not reported in Board volumes) (the administrative law judge found section 8(a)(5) and (1) violations where the employer unilaterally cancelled the annual wage increases and ordered the employer to cease and desist from: "Unilaterally changing the unit employees' terms and conditions of employment without affording the union the opportunity to bargain about the changes and without bargaining with the union to either an agreement or good faith impasse").

The relief the ALJ fashioned in his recommended order is by no means uncommon or improper. As the cases cited above demonstrate, similar or identical remedies to the relief the ALJ recommended have properly been provided in the same or similar contexts.

**C. The Cases The Company Cites Are Distinguishable Or, in Some Instances, Actually Support a Finding that the ALJ's Recommended Order Is Appropriate and Should Be Affirmed**

The cases the Company cites do not support its argument that the ALJ's remedial order is improper. For example, in *Famous Castings Corp.*, 301 NLRB 404, 407-409 (1991), the administrative law judge concluded that the employer improperly extended recognition to the union and that the union also violated the Section 8(b)(1)(A) and (2) of the Act by accepting this recognition and entering into a collective bargaining agreement with the employer that included a union security clause. The administrative law judge ordered that the Union "cease and desist from accepting recognition from employers, and executing and giving effect to collective-bargaining agreements" at a time when it did not represent an uncoerced majority of employees in the bargaining unit. *Id.* at 409 (emphasis added). The judge also ordered the union to cease and desist from acting as the exclusive collective bargaining representative of the employer's facility unless it was properly certified as the exclusive bargaining representative to employees in an appropriate bargaining unit. *Id.* The Board agreed with the union's exception that the judge's order directing it to cease and desist from accepting recognition from "employers" was overly broad and should be modified so as to only include the employer at issue. *Id.* at 404. The Board modified the order because there was no evidence to show that there was a pattern of conduct by the union indicating a proclivity to violate the Act and the union also had not engaged in such egregious or widespread misconduct as to demonstrate a fundamental disregard for employees' statutory rights. *Id.*

*Famous Castings Corp.* is thus distinguishable from this matter in all material respects. Unlike *Famous Castings Corp.*, in which the relevant Board charges related to the union's 8(b)(1)(A) and (2) violations, the ALJ's order was issued to remedy 8(a)(5) and (1) violations by the Company. This matter is not a recognition dispute. The ALJ ordered the remedy in question after he properly concluded that the Company unilaterally changed its lockout/tagout procedure and did not meet its health insurance premium obligations for a period of time and refused to bargain over these matters. In addition, the justification for the Board's modification of the judge's order in *Famous Castings Corp.* is also not applicable here. In *Famous Castings Corp.*, the Board concluded that the administrative law judge's order was overly broad because he ordered injunctive relief against the union at all "employers" even though the allegation against the union related to one facility of the co-respondent employer and there was no evidence of widespread misconduct by the union. *Id.* In contrast, the ALJ's order here does not seek to bind the Company with respect to any of its other facilities. Rather, the ALJ limited his relief to the facility in question and provided it in a manner that has been utilized in other cases in which refusal to bargain violations have been found.

Another case cited by the Company - *Retail Clerks Union, Local 770*, 145 NLRB 307 (1963) - is clearly distinguishable because it did not relate to the appropriate remedy for an employer's refusal to bargain. It, instead, concerned union violations of Section 8(b)(4)(A) and (B) of the Act (in effect before the 1959 amendments). *Id.* at 307. Moreover, the language the Company excepts to in its limited exceptions was not at issue in *Retail Clerks Union*.

The Company cites the Board's decision in *E.I. DuPont De Nemours*, 355 NLRB 1084 (2010) to argue that the ALJ's recommended order and accompanying notice are improper. In *E.I. DuPont De Nemours*, the Board did not modify the recommended order of the administrative

law judge because the order was overbroad. The Board, instead, issued its own remedial order after it determined, contrary to the administrative law judge, that the employer had violated the Act by making unilateral changes to the benefits of bargaining unit employees. *Id.* at p. 1086-87, 1095. The remedial relief the Board ordered in *E.I. DuPont De Nemours*, therefore, did not stem from a finding that the administrative law judge's order was overbroad. In fact, the administrative law judge had not issued any remedial relief because he had not found that the employer had violated the Act. In this respect, *E.I. DuPont De Nemours* is distinguishable and not applicable. *Id.* at p. 1095.

The Company's suggestion that the relief provided in *E.I. DuPont De Nemours* is model relief that should be provided to remedy Section 8(a)(5) violations should also be rejected. The Board never expressly or implicitly issued such a holding in *E.I. DuPont De Nemours*. Contrary to the assertion of the Company, the relief provided by the Board in *E.I. DuPont De Nemours* is itself very similar to the relief the ALJ recommended. The ALJ ordered the Company to cease and desist from making changes in the unit employees' terms and conditions of employment without first bargaining in good faith with the United Steelworkers International Union and its Local 7-0354 to an impasse or agreement. In *E.I. DuPont De Nemours*, the Board ordered the employer to cease and desist from making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective bargaining agreement and have not reached impasse. *Id.* at p. 1086-87. As explained above, the Board has held that language either identical to or very similar to the relief the ALJ recommended is appropriate to remedy specific Section 8(a)(5) violations.

Even though the Company argues that the *E.I. DuPont De Nemours* order does not "in any manner proscribe otherwise lawful unilateral changes," there is no material or substantive

difference between the ALJ's order and the *E.I. DuPont De Nemours* order with respect to such changes. The Company suggests that the ALJ's order requires it to bargain over terms and conditions of employment where the Union has waived its right or in instances where unilateral changes are consistent with past practice. Like the ALJ's order, the *E.I. DuPont De Nemours* order does not speak to such changes. *Id.* at p. 1086-87. The *E.I. DuPont De Nemours* cease and desist order does not include language expressly stating that the employer could institute unilateral changes pursuant to a past practice or in the instances of waiver. This is true even though the issue in *E.I. DuPont De Nemours* was whether there was a valid past practice that would have permitted the employer to institute unilateral changes. The Company's contention that the ALJ's cease and desist order encroaches on its right to exercise rights it has under the Act is therefore incorrect.

*Glendale Associates, Ltd.*, 335 NLRB 27, 28 fn. 10 (2001) is also distinguishable from this dispute. In that case, the Board concluded that the administrative law judge's order was overbroad to the extent that it required the employer to cease and desist from maintaining, and to affirmatively delete and expunge, rules and guidelines prohibiting activities that are not protected under the Act. The Board therefore modified the recommended order and limited it to remedy the employer's intrusion on Section 7 rights. *Id.* at 28-29. Thus, although the Board did modify the cease and desist order, it did so because the judge's overbroad cease and desist order extended to conduct not protected under the Act. In this matter, the ALJ's recommended order is only directed at conduct protected under the Act. Since it does not extend to conduct that is not protected under the Act, *Glendale Associates* does not provide support that the ALJ's order should be modified.

The Company also cites the Board's decision in *Kingsbridge Heights Rehabilitation and Care Center*, 353 NLRB 631 (2008), *enfd* 358 Fed. Appx. 267 (2d Cir. 2009) to support its argument that the ALJ's recommended order is overly broad. Yet, this decision does not support the Company's argument and, in fact, it actually helps establish that the ALJ's recommended order is consistent with Board precedent. In *Kingsbridge Heights*, the Board concluded that the administrative law judge properly found that the Company violated the Act by failing to make timely contributions to the union's pension funds. *Id.* at p. 631. The administrative law judge's recommended order provided, in relevant part, that the employer pay into the Union's funds the contributions that it had failed to make. *Id.* at p. 644. With respect to this portion of the administrative law judge's decision, the Board found that the administrative law judge's proposed order required modification because he had omitted necessary language. *Id.* at p. 631-632. The Board modified this portion of the recommended order to require the employer to continue to make the required timely contributions "until the parties reach agreement or a bona fide impasse." *Id.* The Board also found certain language included in the administrative law judge's recommended order to be inappropriate. The language the Board found objectionable was the requirement that the employer cease and desist from violating the Act "in any other manner." *Id.* To rectify what the Board found was an overbroad order, the Board narrowed the order so that it only required the employer to cease and desist from violating the Act in any "like or related manner." *Id.*

In this case, the ALJ properly concluded that the Company had made changes in the bargaining unit employees' terms and conditions of employment without bargaining in good faith with the Union. He, therefore, ordered the Company to cease and desist from making changes in the bargaining unit employees' terms and conditions of employment without first

bargaining in good faith with the Union to impasse or an agreement. The ALJ's recommended order is thus entirely consistent with the remedy language the Board found appropriate in *Kingsbridge Heights*. He specifically included the language that precludes the Company from making unilateral changes "until the parties reach agreement or a bona fide impasse" which the Board found proper to include in *Kingsbridge Heights*. As the Board also found proper in *Kingsbridge Heights*, the ALJ narrowed the cease and desist portion of his recommended order so that the Company was only required to cease and desist from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights "in any like or related manner." The ALJ's recommended order is thus entirely consistent with the Board's holding in *Kingsbridge Heights* and that decision therefore further establishes that the Board should adopt the ALJ's recommended order.

For similar reasons, *Omaha World-Herald*, 357 NLRB No. 156, slip op. at 4, 17 (2011) does not support a finding that the judge's order should be modified. In that case, the Board affirmed the administrative law judge's finding that the employer violated Section 8(a)(5) and (1) of the Act by implementing changes to benefit plans without giving the union an opportunity to bargain. The administrative law judge had ordered the employer to cease and desist from unilaterally, without first bargaining with the union, freezing the accrued pension benefit of all participating employees and suspending its matching contributions to the 401(k) plan. *Id.* at p. 17. The administrative law judge ordered the employer to cease and desist from: "In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." *Id.* The Board modified the order to include the narrow injunctive language "in any like or related manner," consistent with the ALJ's recommended notice. *Id.* at p. 4, 17. The language that the Company challenges from the ALJ's order is thus not similar or

analogous to the language the Company objects to in its limited exceptions. In fact, as in *Kingsbridge Heights*, the ALJ's usage of the "in any like or related manner" language is consistent with the language the Board found appropriate in *Omaha World-Herald*.

The Company cites the Board's decision in *Union-Tribune Publishing Co.*, 353 NLRB 11 (2008), *vacated and remanded by Graphic Communs. Conf., Local 432(M), Int'l. Bd. of Teamsters, Graphic Communs. Int'l Union v. NLRB*, 189 L.R.R.M. 2607 (D.C. Cir. 2010) to support its argument that limited cease and desist orders in cases of unlawful unilateral 8(a)(5) changes are the norm, rather than the exception. Yet, as noted above, it is not uncommon for the Board to provide the exact relief that the ALJ included in his recommended order in the context of specific 8(a)(5) violations. Moreover, in *Union-Tribune Publishing*, the language the Board modified from the administrative law judge's recommended order was not at all similar or analogous to the language the Company objects to in the ALJ's recommended order. *Union-Tribune Publishing*, therefore, does not establish that the ALJ's recommended order should be modified.

### III. CONCLUSION

For all the foregoing reasons, the Petitioners/Charging Parties request that the Board find that National Gypsum's limited exceptions to the ALJ's decision are without merit, affirm the ALJ's finding of violations of Sections 8(a)(5) and (1) of the Act by the Company and adopt the ALJ's recommended order with respect to these violations.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been duly served upon the following counsel of record by United States first-class mail, postage prepaid and e-mail this 20<sup>th</sup> day of December, 2012:

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