

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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

Respondent/Charged Party,

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' REPLY BRIEF IN SUPPORT OF THEIR
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

I. ARGUMENT

A. Certain ALJ Factual Findings Are Not Supported by the Record Evidence

The ALJ found that the parties have a “history of successfully and expeditiously negotiating successive agreements, apparently without the necessity of economic warfare.” (ALJ’s Decision, p. 27, lines 5-7). The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (“USW” or “International Union”) and Local No. 7-0354 (“Local Union”) (collectively, “Union”) excepted to this finding because the 2011 negotiations were unique from previous negotiations and not determinative of impasse. (See Union’s Exceptions Brief, p. 22-23). The ALJ observed that “circumstances in 2011 were significantly different.” (ALJ’s Decision, p. 15, line 5). The Respondent/Charged Party New NGC, Inc. d/b/a National Gypsum Company (“Company” or “Co.”) acknowledges that the previous bargaining history is “irrelevant.” (Co.’s Answer Brief, p. 28). Since there is no evidence that the 2011 negotiations were similar to the parties’ previous negotiations, the ALJ erred by considering the parties’ prior negotiations in his impasse evaluation.

The ALJ also improperly found that the parties met on 12 separate occasions and that half of the parties’ meetings lasted all or most of the day. (ALJ’s Decision, p. 27, Lines 9-10, Footnote 29). The ALJ recognized that only seven bargaining sessions took place after the Company began negotiating economic proposals during the February 9, 2011 meeting. (*Id.*). Several of these sessions were short or truncated. (Tr. p. 52, 107, 113-114, 154-155, 261, 300). The parties only devoted approximately 3 to 4 hours to the new retirement account and 401(k) match proposals (economic proposals) during their entire negotiations. (Tr. p. 166-167). These facts refute a finding that the parties were at impasse simply because they exchanged several proposals and counterproposals and had an opportunity to present and discuss issues and

proposals. The length of the negotiations and the number of sessions do not support a finding of impasse, particularly where so little time was devoted to the new retirement account and 401(k) match issues.

The ALJ found that negotiations at Pryor, Oklahoma helped explain why the Company continued to push for a second ratification vote during the September 2, 2011 session. (ALJ's Decision, p. 29, lines 17-21). The Union excepted to the significance the ALJ gave to the Pryor negotiations because it contended that these negotiations were not analogous to the Shoals negotiations. No Union representative that negotiated at Shoals attended the Pryor negotiations. (Tr. 462). There is also no evidence that the employees at the Pryor facility ratified the contract after initially voting to reject the contract. The Company acknowledges there is "a lack of commonality" between the Pryor negotiations and those at Shoals. (Co.'s Answer Brief, p. 32). Because these negotiations were not similar, Company lead negotiator Matt May could not have reasonably believed that the Pryor negotiations provided evidence that the parties could have broken their alleged deadlock on the new retirement account and 401(k) match issues through another vote. Several other undisputed facts demonstrate that May could not have reasonably believed that a re-vote would result in a contract when he stated during the September 2nd session that the parties were at impasse unless the Union submitted the Company's revised last, best and final offer ("LBFO") for a vote. These facts include the Union membership's overwhelming rejection of the initial LBFO, the Union bargaining committee's previous recommendation that members vote no on the initial LBFO and the committee's desire to continue bargaining on September 2nd. (Tr. p. 153-154, 261, 300, 450-453; Resp. Exhibit 44).

The ALJ also improperly weighed the evidence regarding the Union's March 10, 2011 counterproposal on the 401(k) issue. When the Union submitted this proposal, the Company

could not unilaterally suspend its 401(k) match and the parties were not even required to discuss mid-contract changes regarding the Company's 401(k) match obligation. The Union's March 10th proposal allowed the Company the right to suspend its matching 401(k) contribution after the parties bargained in good faith and reached mutual agreement on this issue. (Tr. p. 117-118; G.C. Ex. 5, p. 59). While the Union's proposal may not have constituted entirely what the Company was seeking, it represented real movement toward the Company's proposal and constituted real progress in negotiations. The Company concedes that the Union's counter-proposal offered the Company a right it did not previously possess. (Co.'s Answer Brief, p. 33). This progress is even more significant since the Union had not moved on this issue previously and had previously rejected the Company's proposal. (G.C. Ex. 5, p. 38-60). Contrary to the ALJ's finding, the Union's proposal was also not the "opposite" of the Company's proposal. (ALJ's Decision, p. 18, lines 37-39). A truly opposite proposal would have precluded the Company from ever unilaterally suspending its contributions to the 401(k) plan.

The ALJ mistakenly equated progress with total Union acquiescence to the Company's 401(k) match proposal or ultimate agreement on this issue. Although the Union did not accept the Company's proposal between February 9th and March 10th, its March 10th counter-proposal moved closer to the Company's proposal. At that time, the Company had not indicated that it would not accept a proposal like the Union's counter-proposal. Moreover, the Union's counter-proposal led the Company to offer a new counter-proposal on the 401(k) match issue during the March 28, 2011 session. The Union excepted to the ALJ's determination that this proposal represented only "slight" movement on this issue. The Company's new proposal obligated it to meet with the Union and provide information to explain its need to suspend the 401(k) match. (G.C. Ex. 5, p. 61). The proposal also obligated the Company to tell the Union when the

suspension would end and changed the amount of notice it would give the Union prior to a match suspension. (*Id.*). The proposal responded to concerns the Union had raised. Because the Company had not moved on this proposal, the Company's offer represented substantial progress that should not have been diminished by the ALJ. (ALJ's Decision, p. 19, lines 38-42).

The Union excepted to the ALJ's finding that the July 28th session was "relatively productive" because significant progress was made during this session. (ALJ's Decision, p. 22, lines 8-9). This significant progress occurred during the last session before the Company unilaterally and prematurely declared impasse on September 2nd. The Company essentially agrees with the Union's point that the session was very productive. (Co.'s Answer Brief, p. 34). It acknowledges that its lead negotiator May testified that the July 28th session was "the most constructive day of bargaining for the parties" because they were able to move on several issues. (*Id.*). In light of this progress, the ALJ could not have reasonably concluded that the parties reached impasse almost immediately after their next negotiation session commenced.

The ALJ's finding that the parties made "relative" progress is tantamount to a finding that the parties made no progress at all simply because they did not resolve the 401(k) match and new retirement account issues. The substantial progress that the parties made during the July 28th session negates a finding that the parties ultimately reached impasse, irrespective of whether the parties settled the new retirement account and 401(k) match proposals. As is clear here, parties can fail to make progress on certain issues because they are resolving other issues. If real progress is made, but the parties don't resolve all outstanding issues, then the ALJ's reasoning nevertheless leads to a finding of impasse just as if the parties had made no progress whatsoever. This is inconsistent with the Board's standard for determining whether the parties have reached an impasse on a single issue. *See Calmet Co.*, 331 NLRB 1084, 1098 (2000) (single-issue

impasse includes analysis of whether impasse on the critical issue led to a breakdown in the overall negotiations such that there can be no progress on any aspect of negotiations until the impasse relating to the critical issue is resolved). Such an impractical standard is particularly inappropriate in this case because it is undisputed that the parties devoted only a very small portion of their negotiations to the new retirement account and 401(k) match issues. Finally, since the parties made progress during the July 28th session, well *after* the Company submitted its initial version of its LBFO and that proposal was rejected, the progress they made was not “relative” but substantial.

Although it recognizes that the parties “made progress on various items as described in the Union’s brief,” the Company contends that the Union could not have reasonably believed that continued negotiations would have been fruitful. (Co.’s Answer Brief, p. 39). Both the Company and the ALJ improperly discount the value of the numerous tentative agreements the parties reached, up to, and including the September 2nd session. Many of these agreements were reached after the Company submitted its initial LBFO and the Union overwhelmingly rejected it. It was therefore certainly reasonable for the Union to believe that continued progress could have been made during or after the September 2nd session. In fact, one of the Company’s negotiators noted in his negotiation minutes that the parties were making progress at that time. (Resp. Ex. 132). As noted above, the parties exchanged proposals on the 401(k) match issue. They also had discussed the parameters of the new retirement account and USW Staff Representative Chris Bolte had researched plans. (Tr. p. 61, 134-135, 164-166, 247, 270).

Although the ALJ cited comments USW District 7 Director Jim Robinson made during the September 2nd session, the ALJ improperly did not find that Robinson was not a negotiator. (ALJ’s Decision, p. 23, lines 21-27). The undisputed record evidence establishes that Robinson

had no bargaining role whatsoever. Bolte did not relinquish his role as lead negotiator and Robinson did not formulate any proposals. The parties negotiated after Robinson left the September 2nd session. (Tr. p. 149-150, 259, 338-339). Robinson attended the meeting solely to support the Local Union.

B. Certain of the ALJ's Conclusions Are Not Fully Supported by the Record Evidence And Applicable Board Precedent

To support the ALJ's conclusions, the Company erroneously claims that the parties had not resolved most of the major outstanding issues dividing them through the September 2nd session. (Co.'s Answer Brief, p. 32). This is simply not true. During the July 28th session, the Employer made a significant move on scheduling language, which it had not moved on since the January 13, 2011 session. (Tr. p. 452; G.C. Ex. 5, p. 87). The Union also withdrew a proposal regarding dues deduction and proposed a signing bonus instead of retroactive pay. (Tr. p. 64, 144; G.C. Ex. 5, p. 91). May described these as "significant" moves on the Union's part. (Tr. p. 64-65, 451). Through the September 2nd session, the parties had met each other with respect to wages. (Tr. p. 78; G.C. Ex. 5, p. 96). They had nearly met each other with respect to the annual increase to the defined pension benefit multiplier, and had made consistent progress on this issue throughout negotiations. (G.C. Ex. 5, p. 4, 36, 46, 56, 58, 96). They also had made progress through the September 2nd session on health insurance. (Tr. p. 150; G.C. Ex. 5, p. 95).

The Company argues that the new retirement account and 401(k) match issues were "the two most critical issues." (Co.'s Answer Brief, p. 37). Yet, after the Company cut off negotiations during the September 2nd session, its lead negotiator also described the pension multiplier issue and health insurance balance billing issue (an issue that arose after negotiations commenced and the Company refused to pay its share of health insurance premium obligations) as "critical issues." (Respondent's Ex. 44; Tr. p. 59, 125, 428). May had never previously

described any issues as critical. (Tr. 457). The progress on the pension multiplier issue and health insurance balance billing issue and a multitude of other issues, the agreement on wages and the more than 20 other agreements the parties reached all demonstrate that the parties' progress was consistent and continual and had not come to a "halt" by the September 2nd session.

The Company recognizes that parties' contemporaneous understanding about impasse is a factor in the determination of impasse, but argues that "a bald statement of disagreement by one party is hardly sufficient to defeat an impasse." (Co.'s Answer Brief, p. 39). The cases cited by the Company in its Answer brief are inapplicable because the Union's willingness to compromise is supported by substantial record evidence. The Union did present a comprehensive counter-proposal during the next session at which the Company agreed to bargain. It specifically offered a new retirement account proposal that was the culmination of months of research by Bolte to look for a plan that met the Company's parameters. Although the Company rejected the Union proposal, it did consider it during the October 24, 2011 session. (Tr. p. 71-72, 76, 163).

Furthermore, there is no evidence that the Company met the burden of establishing impasse on either the new retirement account or 401(k) match issues. To establish impasse on either of these single issues, the party asserting a single-issue impasse must establish: first, the actual existence of a good faith bargaining impasse; second, that the issue is a critical issue; and third, that the impasse on the critical issue led to a breakdown in the overall negotiations—in short that there can be no progress on any aspect of negotiations until the impasse relating to the critical issue is resolved. *Calmet Co.*, 331 NLRB at 1098. The Union contends that the record establishes that the parties were not at impasse on the new retirement account or 401(k) match proposals by the September 2nd session because the parties had exchanged proposals and, at least the Union remained willing to negotiate these proposals. Yet, at minimum, the Company has not

met its burden of proving single-issue impasse on either the new retirement account or 401(k) match issues because it is undisputed that there never was a point in negotiations when no progress on any aspect of negotiations could be made until the impasse relating to these issues was resolved. The parties reached agreements or made progress on a multitude of issues- large and small- throughout their negotiations in spite of their respective positions on either of these issues, including through the September 2nd session. The ALJ could not have reasonably concluded that the parties reached impasse as a result of their positions on either of these issues.

The record evidence also establishes that the ALJ erred in determining that the Company did not bargain to impasse on the permissive subject of a ratification vote. The ALJ found that the parties had reached impasse when May linked the permissive subject of a ratification vote with impasse. As explained above and in the Union's exceptions brief, the parties were not at impasse when May made this statement. Moreover, May could not have been clearer in stating that the parties were not at impasse if the Union permitted a vote on the Company's revised LBFO, but were at impasse if the Union did not allow for such a vote. (Tr. p. 73, 77, 153-154, 260, 299). The Company, thus, considered the parties to be at impasse because the Union would not submit the revised LBFO for a vote even though the Union remained willing to bargain. May reiterated this point when Bolte asked him to clarify his position. (*Id.*).

The Company contorts May's statement by contending that May's impasse declaration was tied to the parties' respective positions on the critical, disputed issues and not to the ratification vote. Yet, May did not say that the parties were at impasse because they were deadlocked on the new retirement account or 401(k) match proposals. May stated that the parties were at impasse if the Union did not submit the LBFO for a ratification vote but were not at impasse if the Union submitted the proposal for a vote. (ALJ's Decision, p. 24, lines 22-25). The

Company's argument is inconsistent with May's statement. It is also telling that the Company seeks to explain May's statement by way of background information to argue that the ALJ's conclusion was proper. Because May's statement linking impasse to the permissive subject of a ratification vote is so unambiguous, there is no need to pore over its context.

However, even if background information regarding the statement is reviewed, the relevant background information supports a finding that the Company bargained to impasse on the permissive subject of bargaining of a ratification vote. For example, when the Company initially sought a ratification vote on the first version of its LBFO at the end of March 2011, May asked Bolte what it would take for the proposal to be submitted to a vote. (Tr. p. 130-131). After Company acquiescence on several proposals, Bolte told May that the Union would allow a vote on the initial LBFO. (*Id.*). The proposal was voted down overwhelmingly by the Union membership. (Tr. p. 60). The parties nonetheless continued negotiating and were able to reach numerous agreements. May agreed that the July 28th session was their most constructive session to date and he wanted the parties to continue negotiating. (Tr. p. 63-64, 401, 450).

May also testified that, going into the September 2nd session, the Company believed that the Union membership would ratify an agreement. (Tr. p. 70, 77, 401-402). May testified that the Company had been approached by bargaining unit employees frustrated with the Shoals negotiations. (*Id.*). The Company was clearly intent on obtaining another ratification vote on a revised LBFO in the September 2nd session. This explains why it abruptly cut off bargaining during that session even though the parties had reached another agreement, made progress on other issues and the Union wanted to continue bargaining. This also explains why May expressly stated that the parties were at impasse unless the Union submitted a revised LBFO for a ratification vote. The Company wanted to pressure the Union into submitting the proposal for

a ratification vote, and not because he felt the parties were deadlocked on the new retirement account and 401(k) match proposals. The ALJ disregarded these key background facts.

There is no merit to the Company's argument that May made his statement linking impasse to a ratification vote because he believed that a ratification vote "equated to an agreement." (Co.'s Answer Brief, p. 44). May knew from the experience with the initial LBFO that submission of a Company proposal to a vote did not ensure that the agreement would be ratified. Moreover, because the Union negotiating committee opposed the initial LBFO even after it agreed to submit the proposal for a vote, May knew or should have known that the Union committee, which wanted to continue negotiating, would not have recommended that its members accept the revised LBFO. In fact, because the Company previously had to offer several concessions to the Union before it would agree to submit the initial LBFO for a vote, May knew or should have expected that the Union would not simply agree to a ratification vote just because the Company requested one. May did not make his statement because he thought a ratification vote would lead to an agreement that would break the alleged impasse. Rather, consistent with May's express words, the Company sought a ratification vote and considered the parties to be at impasse unless that vote occurred. The ALJ erred by failing to find that the Company insisted to impasse on this permissive subject of bargaining. Because the Company also prematurely declared impasse, the ALJ failed to properly conclude that September 6th lockout was unlawful.

III. Conclusion

For all the foregoing reasons, the Union requests that the Board find that the Union's exceptions have merit and modify the ALJ's decision in accordance with those exceptions.

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 3rd day of January, 2013:

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