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Stein Industries, Inc. ***and*** **New York City and Vicinity District Council of Carpenters.** Case 29–CA–134711

February 10, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On April 27, 2015, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party each filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

FACTS

The Respondent constructs movie theater concession stands. For 40 years, the Respondent and the New York City and Vicinity District Council of Carpenters (the Union) were parties to a series of Memoranda of Understanding (MOUs). The MOUs mirrored the Memoranda of Agreement (MOAs) negotiated between the multiemployer Manufacturing Woodworkers Association (the Association) and the Union.[3] On April 9, 2012, approximately 2 months before the June 30 expiration of the then-current MOA, the Respondent, through its representative and chief negotiator Mark Portnoy, timely notified the Union that it desired to negotiate its own separate agreement. Union Representative Andrew Mucaria responded that the Union was currently negotiating a new MOA with the Association and that upon completion of those negotiations the Union would contact Portnoy to negotiate a separate agreement with the Respondent. Because Portnoy also represented several other union-signatory contractors, he and Mucaria occasionally conversed on a range of topics, including the pending negotiations with the Respondent. Over the course of those discussions, Mucaria informed Portnoy that the Union was still negotiating the MOA and had not forgotten about the Respondent.

On September 13, 2013, Portnoy wrote to Mucaria about scheduling a negotiation session with the Respondent. On September 18, 2013, Mucaria replied that the Respondent had always signed an MOU mirroring the MOA and that the Union would send a copy of the MOA to the Respondent to review once it was finalized. Portnoy responded that the Respondent would not be bound to the MOA and requested dates to begin negotiations for its own agreement. After an exchange of emails, Portnoy and Mucaria met on November 6, 2013. Portnoy explained that the Respondent had financial difficulties and needed concessions from the Union. The Union agreed to offer the Respondent concessions.

On January 11, 2014,[4] the Association and the Union ratified a new MOA. The Respondent and the Union held their first bargaining session on March 4. Union Representative Robert Villalta attended for the Union; Portnoy and Respondent President Andrew Stein attended for the Respondent. Initially, Portnoy proposed a

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct two inadvertent errors in the judge's decision that do not affect the disposition of this case. First, the judge incorrectly stated that an independent contractor, Gilbert Displays, Inc., had won an $8 million arbitration award against the Union; the Manufacturing Woodworkers Association won that arbitration award. Second, the judge failed to mention that, in removing the most-favored-nation provision from their 2014 agreement, the Union and the Association also deleted article XXIII, "Conformity of Agreements."

The judge cited two cases decided by a two-member Board, *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008), and *Monmouth Care Center*, 354 NLRB 11 (2009). Although the D.C. Circuit vacated those decisions pursuant to *New Process Steel v. NLRB*, 560 U.S. 674 (2010), we rely on them here because, in each case, a three-member panel of the Board subsequently incorporated the decision by reference in reaffirming the decision. See *Laurel Bay Health & Rehabilitation Center*, 356 NLRB 3 (2010), enf. denied in relevant part 666 F.3d 1365 (D.C. Cir. 2012), and *Monmouth Care Center*, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012).

[2] While the Respondent excepts to the judge's finding of an 8(a)(5) and (1) violation, it does not specifically except to the judge's recommended affirmative bargaining order. We therefore find it unnecessary to provide a specific justification for that remedy.

In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change and to conform to the Board's standard remedial language.

[3] The Respondent is not a member of the Association.

[4] All dates hereinafter are in 2014 unless otherwise indicated.

freeze of the employees' current wages of $30 an hour. Villalta presented Portnoy with a proposal mirroring the MOA, which included the creation of a two-tier wage and benefit scale. The proposal called for current employees to be in Tier I and paid at their existing wage rate of $30 an hour, with a 1 percent increase in February 2014 and a 2 percent increase in July 2014. New hires would be paid at a Tier II wage rate of $22 an hour, with a 2 percent increase in July 2014, and would receive health care benefits inferior to those in the prior contract, at a savings to the Respondent of another $10 an hour. The proposal also capped the fringe benefit contributions for Tier II employees to provide additional cost savings, eliminated the restriction on how many employees the Respondent could send to a job, permitted electronic timekeeping, modified the deadline for the remission of benefit contributions, and granted the Union the right to remove its members from the Respondent's jobs if the Respondent defaulted on its benefit contribution payments. In response, the Respondent rescinded its initial offer and made a new, less favorable proposal placing all employees in the Tier II wage and benefit scale (an $8-per-hour reduction for current employees) and granting the Respondent the unlimited right to subcontract work and the right to establish reasonable work standards. Portnoy testified that, after hearing the Respondent's revised proposal, union representative Villalta stated that there could be "no deviation" from the Union's proposal and that "this is where we have to go."[5]

Following the March 4 negotiation session, Mucaria and Villalta reviewed and discussed the Respondent's revised proposal and then consulted Union Vice President Michael Cavanaugh. Mucaria and Villalta suggested to Cavanaugh that the Union "could possibly move off the independent MOU for the independent shops and continue to negotiate separately for [the Respondent]." Cavanaugh responded that he had "absolutely no problem" with deviating from the MOU and that if the Respondent "claim[s] to be in a financial hardship, feel free to continue negotiating and we'll go from there." Having determined that it could deviate from the MOA, the Union expressed its flexibility in bargaining at future negotiation sessions.

On April 4, the parties met for a second time. In addition to those who were present at the March 4 session, Union Representative Mucaria attended. Both parties presented their March 4 proposals. In response to the Respondent's request for greater economic assistance, Mucaria stated that the Union could do so but the Respondent "had to come back with a more realistic proposal in a positive way, not just taking all the concessions [the Union] gave and then asking for additional concessions." Mucaria stressed that the Union was "willing to come off our proposal[,] but you need to move in the correct direction in order for us to do that." According to Portnoy's negotiating notes, the session ended when Portnoy told Mucaria and Villalta that he was "reluctant to impose any terms, but if you have nothing else to offer, I have nothing to offer. Let's just set another date."

On June 25, the parties met again for an hour. The Union agreed to an addition to the parties' arbitration panel, requested by the Respondent. Both parties expressed their frustration with each other for refusing to make a second proposal.

The parties held their fourth and final negotiating session on July 8. Portnoy again presented the Respondent's March 4 offer but with an additional provision, that "new hires shall be paid no less than $20.00 per hour." The Union asserted that this was regressive because, on March 4, the Respondent had offered to pay all employees $22 per hour. The Union also reiterated its rejection of the proposal that all employees receive Tier II wages and benefits. The Union offered, however, to move from its proposal for a 10-year contract. It also expressed willingness, if the Respondent moved on wages and benefits, to agree to the Respondent's request to set reasonable work standards so long as that did not result in the creation of a production quota. Portnoy then asked if the Union would change its proposals, and Mucaria indicated that the Respondent needed to make some positive movement. At that point, Portnoy declared impasse in the negotiations. He told Mucaria, "You won't change your proposal. You really can't change your proposal, so I'm going to give you a final offer." Portnoy offered to discuss the terms of the Respondent's proposal at any time during the following week but asserted that the Respondent would unilaterally implement them a week later. Mucaria and Villalta were in "shock" and told Portnoy, "[W]e're still making positive movement" and "we're not done negotiating." Portnoy asserted that he believed the Union had no intention to bargain and only wanted the Respondent to agree to an MOU binding it to the Association's MOA.

By letter dated August 11, the Respondent advised the employees that work was available "under the terms of employment recently implemented by the company. Your hourly rate will be $22.00 and your benefits will be with the Union's Tier II Package." Prior to the Respond-

[5] The judge neither credited nor discredited Portnoy's testimony on this point, but found that even if the statement was made, it was contradicted by the events at later bargaining sessions, where the Union indicated willingness to grant further concessions.

ent's declaration of impasse, the parties had not discussed many of the Union's proposals, including the capping of benefit contributions at 40 hours per week, adjusting the manning requirement for installations to increase efficiency, permitting electronic timekeeping, modifying the time limit for the Respondent's remission of benefit contributions, and granting the Union the right to remove members from the Respondent's jobs if the Respondent defaulted on benefit contribution payments.

DISCUSSION

In determining whether impasse has been reached, the Board considers "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub nom. *Television Artists AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968). Applying those factors, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse on July 8 and unilaterally implementing the terms and conditions of its "final offer" when no valid impasse had been reached. For the reasons stated by the judge, we agree and find that the Respondent failed to prove that an impasse existed on July 8.[6] See *PRC Recording Co.,* 280 NLRB 615, 635 (1986) (discussing criteria for determining impasse), enfd. 836 F.2d 289 (7th Cir. 1987).

"'[I]mpasse is … that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.'" *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.,* 484 U.S. 539, 543 fn. 5 (1988); see also *Sacramento Union*, 291 NLRB 552, 554 (1988) ("The Board has long held that an impasse occurs 'after good faith negotiations have exhausted the prospects of concluding an agreement.'") (quoting *Taft Broadcasting Co.*, above), enfd. mem. sub nom. *Sierra Publishing Co. v. NLRB,* 888 F.2d 1394 (9th Cir. 1989); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 65 (2d Cir. 1979) (negotiations must be sufficiently exhaustive to find that impasse had been reached). "Both parties must believe they are at the end of their rope." *Nexeo Solutions, LLC,* 364 NLRB No. 44, slip op. at 12 (2016), (quoting *Larsdale*, *Inc.,* 310 NLRB 1317, 1318 (1993)).

During the course of their four negotiation sessions, prior to the Respondent's declaration of impasse at the fourth session, the parties had not even discussed, let alone fully explored, all the bargaining issues. The parties never bargained over a number of the Union's proposals, including cost-savings proposals benefiting the Respondent and significant noneconomic issues, such as adjusting staffing requirements to increase productivity. Equally, if not more importantly, the Union's course of conduct during the negotiations demonstrated its willingness not only to continue bargaining, but to be flexible in its demands while urging the Respondent to do the same. That the Union did not present a revised proposal but rather attempted to explore a different approach to moving the negotiations forward, inviting a reciprocal flexibility, does not establish that the parties were at an impasse. See *Newcor Bay City Division of Newcor*, 345 NLRB 1229, 1239 (2005) (no impasse where union offered no specific additional concessions but declared its intention to be flexible and continue bargaining), enfd. 219 Fed. Appx. 390 (6th Cir. 2007).

Even though it took a firm position on certain issues, the Union consistently expressed its continued willingness to bargain and never refused to move from its position or deem any issue nonnegotiable. At the second bargaining session on April 4, Union Representative Mucaria told the Respondent that the Union was "willing to come off our proposal; but you need to move in the correct direction in order for us to do that." As noted above, at the prior bargaining session, the Respondent substantially reduced its initial wage proposal. Mucaria also told the Respondent that the Union would consider the Respondent's subcontracting proposal.[7] During the fourth and final session on July 8, before the Respondent declared impasse, Mucaria offered concessions on specific issues of importance to the parties: he told Portnoy that the Union was willing to move from its proposal regarding the duration of the contract and was amenable to the Respondent's request for a reasonable work standard provision if the Respondent modified its proposed language so as not to create a product quota and made a more generous proposal on wages and benefits.[8]

[6] In finding that the parties had not reached impasse on July 8, we find it unnecessary to rely on the parties' conduct after that date.

[7] We do not rely on the judge's finding that Mucaria also made this statement on March 4. Mucaria did not attend the March 4 negotiation session.

[8] The dissent therefore mischaracterizes the Union's position as "a bare promise of flexibility." Moreover, the record disproves the dissent's suggestion that the Union would not, and could not, deviate from its initial proposal. As the judge correctly found, the fact that the Union took a hard position at the outset of negotiations does not mean the Union would not yield later in the process after the parties had the opportunity to engage in further bargaining. "Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously

In *Grinnell Fire Protection System*, cited by the judge, the Board found that the employer prematurely declared impasse "despite the fact that one party had asserted that it had reached its final position and the other had not yet offered specific concessions." 328 NLRB 585, 585 (1999) (and cases cited), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001). The facts of that case are very similar to those here. The union in *Grinnell* negotiated an agreement with a multiemployer association, but the employer sought to bargain independently with the union because it wanted special relief from nonunion competition. Id. at 589. However, while it was engaged in bargaining with the union, the employer "chose to assume that the [u]nion was wedded to the agreement it had signed with the [multiemployer association] and refused to listen to the [u]nion's repeated assurances that such was not the case." Id. at 586. In finding that the employer had prematurely declared impasse, the Board stated:

> Where, as here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms. Such a doctrine would encourage rigid, inflexible posturing in place of the give-and-take of true bargaining.

Id.; see also *Newcor Bay City Division*, 345 NLRB at 1240–1241 (employer prematurely declared impasse where it acted "based on its artificial deadline at a time when a negotiated agreement was still feasible"). Likewise, in this case, the Union had already offered significant concessions and expressed a willingness to go further. Nonetheless, the Respondent assumed that the Union would not deviate from the MOA and refused to test Mucaria's sincerity in seeking to bridge the gap between the parties' proposals. In these circumstances, as the Board stated in *Grinnell Fire Protection System*, it would be wrong to find impasse when the Union refused to accept the Respondent's proposal but still demonstrated its flexibility in bargaining.

In sum, at least four of the five *Taft* factors weigh against a finding of impasse in this case. Although the parties had enjoyed a long collective-bargaining relationship prior to their 2014 negotiations (*Taft* factor 1), this was the first time that the Respondent had directly participated in bargaining with the Union for a separate agreement.[9] With respect to *Taft* factor 2, the judge found, "a ray of hope presented itself at the last bargaining session on July 8 before impasse was declared." See *Hayward Dodge,* 292 NLRB 434, 468 (1989) (no impasse where "there has been movement sufficient 'to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions'"). The judge found no credible evidence that union negotiators stated that any issue was nonnegotiable. He also found that the Union's course of conduct demonstrated its willingness to continue to negotiate and that the Union's refusal at that moment to yield did not mean that it never would. Further, as the judge found, the fact that the parties met for a limited number of sessions prior to implementation weighs against accepting the Respondent's contention that the parties were at impasse (*Taft* factor 3). Turning to the particular matters as to which there was disagreement between the parties (*Taft* factor 4), as shown above, the parties held divergent views on several significant issues including wages and fringe benefit contributions, size of work crews, reasonable work standards, and economic concessions. However, as the judge found, the evidence fails to establish that, when the Respondent declared im-

and late in the process." *Detroit Newspaper Local 13 v. NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979), citing generally *F. A. Reynolds Co.,* 173 NLRB 418, 424 (1968), enfd. 424 F.2d 1068 (5th Cir. 1970). Thus, contrary to the dissent's reliance on "the Respondent's *belief* that the Union would not accept anything other than the MWA Independent Shop Agreement," as shown above, by the fourth negotiating session the Union had made some movement from its original bargaining position, and expressed a willingness to explore further compromise.

[9] Our dissenting colleague cites *Lou Stecher's Super Markets*, 275 NLRB 475, 476 (1985), and *Seattle-First National Bank*, 267 NLRB 897, 898 (1983), review denied sub nom. *Financial Institution Employees of America, Local No. 1182 v. NLRB*, 738 F.2d 1038 (9th Cir. 1984), to assert that the parties' 40-year bargaining history weighs in favor of finding impasse. In *Lou Stecher's Super Markets*, the parties' long bargaining relationship was relevant to interpreting the union's failure to contact the respondent after initially promising to meet every day as an acknowledgment by the parties of the futility of further bargaining. In *Seattle-First National Bank*, the Board merely noted that the parties' negotiation of two 3-year contracts supported a finding of impasse. Here, however, the parties' long bargaining history weighs against a finding of impasse because that history was limited to the Respondent simply signing the MOU that mirrored the MOA, meaning the parties were inexperienced in negotiating directly with one another. As a result, the present case is more analogous to those cases in which parties are attempting to reach an initial collective-bargaining agreement, which the Board has taken into consideration as a factor militating against jumping to any conclusions that difficulties in bargaining signal the existence of a true impasse. See, e.g., *Old Man's Home of Philadelphia,* 265 NLRB 1632, 1634 (1982) ("The parties were negotiating an initial agreement. Thus, the bargaining history does not favor a finding of impasse. To the contrary, it is the Board's policy to encourage 'the fullest opportunity' for parties to effect agreement in initial contract negotiations'"), enf. denied on other grounds 719 F.2d 683 (3d Cir. 1983), cert. denied 466 U.S. 958 (1984).

passe at the fourth session on July 8, the parties had exhausted the prospects of reaching agreement on these admittedly important issues. Indeed, the parties had not even discussed many of the Union's proposals, including the capping of the Respondent's benefit contributions, adjusting the manning requirement for installations, permitting electronic timekeeping, modifying the time limit for remitting benefit contributions, and granting the Union the right to remove members from the Respondent's jobs if the Respondent defaulted on benefit contribution payments.[10] See *Taft,* 163 NLRB at 478 (impasse where progress was imperceptible on critical issues discussed over 23 bargaining sessions). Finally, the record clearly demonstrates that the parties did not share a contemporaneous understanding that they were deadlocked on July 8 (*Taft* factor 5).

As the judge found, the parties' overall course of conduct did not evince a mutual understanding that further bargaining would not take place or be fruitful. Indeed, as the judge further found, union officials were not at the end of their negotiating rope, but were ready and willing to negotiate further. Thus, although the Union had already made major concessions, when the Respondent declared impasse, the Union protested that it had not completed negotiations, stated that it would make further concessions and would be flexible upon the Respondent's making an additional proposal, and offered to continue to bargain. Significantly, even when it declared impasse, the Respondent recognized that the parties were not irreconcilably deadlocked: it agreed to continue bargaining with the Union at any time over the upcoming week. See *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) ("[F]or a deadlock to occur, *neither party* must be willing to compromise." (emphasis in original)).

Contrary to our dissenting colleague's assertions, we are neither intervening in the parties' negotiations by taking a side nor are we making assumptions about the efficacy of further bargaining. It could be that additional bargaining would not have led to an agreement and that the parties eventually would have reached impasse. However, it is imperative that we not be so quick to dismiss the productivity of bargaining unless there truly is "no realistic possibility that continuation of discussion . . . [would be] fruitful." *Monmouth Care Center v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012) (internal quotes omitted). See also *Carpenter Sprinkler Corp. v. NLRB*, above. As the Supreme Court stated in *NLRB v. American National Insurance Co.*,

> The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.
>
> Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences.

343 U.S. 395, 402 (1952).[11]

There is, in fact, no way to know what would have happened if the Respondent had not declared impasse on July 8. But the Union's consistent expressions of flexibility, which the judge credited, demonstrate that there was a realistic possibility that the parties could come to an agreement on economic terms, not to mention the noneconomic subjects that were never discussed. The efficacy of the collective-bargaining process is dependent on it not being curtailed by a premature declaration of impasse.

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[10] Citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000), our dissenting colleague claims that there was no need for the parties to discuss noneconomic matters before the Respondent declared impasse because "economic issues were of overriding importance." However, even assuming that *CalMat Co.*, which involved a claim that one bargaining subject led to a complete breakdown in the entire negotiations, is relevant here, the Board in *CalMat Co.* stated that there can be impasse over a single critical issue only if "there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." Id. In this case, the parties' differences on wages did not lead to a complete breakdown in the overall negotiations that would have prevented them from reaching agreement on any number of issues. See text above. However, the parties never had a chance to attempt to find common ground on other issues before the Respondent declared impasse.

[11] Nor are we, as the dissent suggests, requiring the parties to reach an agreement or instructing them to make concessions. Instead, we are simply finding that, under the *Taft Broadcasting* factors, the parties had not reached impasse by the end of their fourth negotiating session on July 8. We are also not requiring, as claimed by the dissent, that the parties engage in "fruitless marathon discussions." For impasse to be found, it is necessary, as we have long held, that *both* parties believe that they are "at the end of their rope" in the negotiations. *PRC Recording Co.*, above, 280 NLRB at 635; see also *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) ("[F]or a deadlock to occur, *neither party* must be willing to compromise." (emphasis in original)). This was certainly not the case here, after only four negotiation sessions.

The dissent cites *Betlem Service Corp.*, 268 NLRB 354 (1983), where the Board found that impasse was reached after only two bargaining sessions. The union in that case evinced a "take-it-or-leave-it approach" regarding its proposal and refused to discuss or even consider the employer's proposal, thereby demonstrating that the union lacked any intention of engaging in collective bargaining.

The dissent also asserts that it was clear "as early as April 2012 that the parties would be taking radically different positions" in bargaining. This could not yet have been clear to the Respondent because the Union did nothing other than pursue its interest in seeking, as a starting point, terms similar to the multiemployer agreements that were under negotiation. See, e.g., *Teamsters Local 282 (E.G. Clemente Contracting)*, 335 NLRB 1253, 1255 (2001). But even if it were true, an underlying principle of collective bargaining is that the parties "are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486 (1960). This process of collective bargaining—as has been shown time and time again—can lead the parties to find unexpected ways of reaching mutually beneficial terms. See *Royal Motor Sales*, 329 NLRB 760, 772 (1999) ("[T]he very nature of collective bargaining presumes that, while movement may be slow on some issues, a full discussion of other issues, which have not been the subject of agreement or disagreement, may result in agreement on stalled issues."), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001); see also *Newcor Bay City Division*, 345 NLRB at 1238 (employer required to continue bargaining even when "a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement") (internal quotes omitted). However, when negotiations are stymied by a party prematurely declaring impasse, as the Respondent has here, it prevents both parties from realizing this essential benefit of collective bargaining that is firmly rooted in the Act. See *Television Artists v. NLRB*, 395 F.2d at 628 ("It is indeed a fundamental tenet of the [A]ct that even parties who seem to be in implacable conflict may, b[y] meeting and discussion, forge first small links and then strong bonds of agreement."). Accordingly, by prematurely declaring impasse on July 8 and implementing changes to employees' terms and conditions of employment, the Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1).[12] See *Atlantic Queens Bus Corp.*, 362 NLRB No. 65, slip op. at 3 (2015)); *CJC Holdings, Inc.*, 320 NLRB 1041, 1045 (1996), enfd. mem. 110 F.3d 794 (5th Cir. 1997).

[12] It is undisputed that the Respondent unilaterally ceased remitting the required benefit payments to the Union's Benefit Fund and only sent in payments commensurate with the less costly Hollow Metal Welfare Fund.

Having found that the Respondent prematurely declared impasse, we find it unnecessary to pass on the judge's alternative rationale: that if impasse had been reached, the Respondent unlawfully implemented changes that were not encompassed within its final offer.

ORDER

The National Labor Relations Board orders that the Respondent, Stein Industries, Inc., Amityville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with New York City and Vicinity District Council of Carpenters (the Union) as the exclusive collective-bargaining representative of the employees in the following unit:

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

(b) Making unilateral changes in its unit employees' terms and conditions of employment without first bargaining with the Union to impasse.

(c) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

(b) On request, cancel and rescind all terms and conditions of employment which it unlawfully implemented or unlawfully eliminated on and after July 8, 2014, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(c) At the Union's request, restore to unit employees the terms and conditions of employment that were applicable prior to July 8, 2014, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining.

(d) Make whole the unit employees for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, on and after July 8, 2014, with interest, in the manner set forth in the remedy section of the decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each affected employee.

(f) Make all contractually-required contributions to fringe benefit funds that it has failed to make since about July 8, 2014, if any, and reimburse affected employees for any expenses ensuing from its failure to make the required payments, with interest, as set forth in the remedy section of the decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Amityville, New York facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 10, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting.

My colleagues adopt the judge's finding that the Respondent declared impasse prematurely and violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) when it implemented the terms of its final offer. I disagree. The record in this case compels a conclusion that the parties reached a lawful impasse. The Respondent and the Union have a bargaining relationship spanning at least four decades. Throughout all those years, neither the Respondent nor the Union exercised its right to have separate negotiations for a collective-bargaining agreement that might differ from what the Union negotiated with other employers. Rather, the Respondent and the Union always signed "me-too" agreements mirroring the Union's collective-bargaining agreement with the Manufacturing Woodworkers Association (MWA or the Association). The Respondent attempted to change this practice in April 2012, when it requested bargaining for a successor collective-bargaining agreement. However, for independent employers like the Respondent, the Union had one proposal and one proposal only: a me-too agreement adopting the substance of the MWA agreement. As one of the Union's negotiators put it when the Respondent proposed different terms, the MWA agreement was "where we have to go," and there could be "no deviation" from the MWA agreement. For one-and-one-half years, the Un-

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ion refused even to meet with the Respondent in response to its requests to bargain for a new agreement. When the parties met, the Respondent persisted in its right to engage in bargaining for an agreement specific to its business. The Union's position remained intransigent: the only acceptable terms were those set forth in the MWA agreement. The record leaves no doubt that a lawful impasse existed on July 8, 2014, and the Respondent lawfully implemented the terms of its final pre-impasse offer on August 11, 2014.

Accordingly, I believe the complaint should be dismissed in its entirety, and I respectfully dissent from my colleagues' decision to the contrary.[1]

FACTS

The Respondent manufactures and sells concession stands for movie theaters. For more than 40 years, it has been party to successive collective-bargaining agreements with the Union. During that span, the Respondent always signed without bargaining the successive Independent Shop Agreements that incorporated the contractual terms set forth in the then-current agreement between the Union and the MWA, a multiemployer association of which the Respondent was not a member.

As noted above, in 2012 the Respondent attempted to change this practice. Its Independent Shop Agreement was set to expire on June 30, 2012. In an April 9, 2012 letter written by its lead negotiator, Mark Portnoy, the Respondent requested bargaining for a successor collective-bargaining agreement. The Union, through negotiators Andrew Mucaria and Robert Villalta, verbally responded, and repeated conversationally on other occasions, that the Union would not bargain with the Respondent until it was finished negotiating the MWA agreement.

Seventeen months passed. On September 13, 2013, Portnoy emailed the Union and again requested that the Union bargain with the Respondent for a new agreement. On September 18, Mucaria replied: "[H]istorically [the Respondent] has always signed an independent agreement that mirrored the other shop agreements. The [Union] is currently in negotiations with the [MWA] and should be completed soon. As soon as it is completed we can send it over for your review . . . ." Minutes later, Portnoy renewed the Respondent's request for bargaining. He replied: "We want to negotiate our own terms and conditions. The [MWA] is not authorized to bargain on behalf of [the Respondent] and we are not bound by any terms or conditions they bargain for the employers they are negotiating with."

The Union continued to refuse to bargain with the Respondent while negotiations for the MWA agreement were still in progress. Nonetheless, on November 6, 2013, Portnoy and Mucaria met. At this meeting, Portnoy explained to Mucaria the challenges the Respondent was confronting in the current business environment. Portnoy told Mucaria that the Respondent faced challenges unlike those facing other signatories to Independent Shop Agreements because it specialized in movie-theater concession stands and that niche market was experiencing decreased demand and greater competition from overseas. Mucaria stated that the Union would give concessions. Mucaria did not specify, however, whether the concessions he referred to would be limited to those the Union would agree to in negotiations for the MWA agreement.

On January 11, 2014,[2] the Union reached an agreement with the MWA. On January 23, Portnoy renewed his request for bargaining. After a quarrelsome series of emails over the next several days, Mucaria put bargaining off for approximately 1-2 weeks so the Union could ready "the offer for all independent shops."

After 3 weeks passed without word from the Union, Portnoy again asked for bargaining dates. The parties finally met for their first bargaining session on March 4.

[1] The General Counsel alleged, and the judge found in the alternative, that even if the parties reached a lawful impasse, the Respondent violated Sec. 8(a)(5) of the Act when, after declaring impasse, it paid employee Felix Rodriguez $30 an hour, which allegedly constituted a wage rate that differed from the terms of its final offer. Having found that the parties did not reach a valid impasse, my colleagues find it unnecessary to pass on the judge's alternative finding. Because I would find a lawful impasse, I must address the alternative finding. Doing so, I would reverse it.

When contract negotiations have resulted in an impasse, an employer may lawfully make unilateral changes "reasonably falling within its pre-impasse proposal." *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997). Thus, assuming negotiations were at an impasse, the General Counsel can prevail on his allegation that the Respondent unlawfully changed Rodriguez' wage rate only if the evidence establishes two things: (i) that the Respondent *changed* Rodriguez' wage rate, and (ii) that Rodriguez' postimpasse wage rate *differed from Respondent's final pre-impasse offer*. On the record presented here, this allegation fails on both counts. First, the judge did not find, and the record contains no evidence, that the Respondent implemented any postimpasse *change* in employee Rodriguez' (or any other employee's) wage rate. Evidence establishes that Rodriguez was being paid $30 an hour several months after the impasse, but there is no record evidence whatsoever regarding Rodriguez's pre-impasse wage rate. Second, the judge was incorrect in his finding that a post-impasse wage rate of $30 per hour for Rodriguez was inconsistent with the Respondent's final preimpasse offer. The offer relevantly stated that "[n]o current employee shall be paid *less than $22.00 per hour*." In other words, the offer was for current employees to be paid *at least* $22 per hour. Rodriguez was paid at least $22 per hour.

[2] All further dates are in 2014 unless otherwise indicated.

The Union's offer at that meeting was, as the judge found, "essentially the agreement reached between the Union and the [MWA] in January." *This was the only offer that the Union made to the Respondent at any time.* Villalta, on behalf of the Union, contended that the offer represented "major concessions." These concessions were not, however, any different from what the Union had already agreed to give the MWA.

At the March 4 bargaining meeting, Portnoy presented the Respondent's written counterproposal, which sought additional concessions, including decreased wages and benefits and the unlimited right to subcontract work. Upon hearing this proposal, Villalta said that the Union's proposal "is where we have to go" and that there could be "no deviation" from that proposal.

On April 4, the parties held their second bargaining meeting. Neither the Respondent nor the Union presented any new proposals. Portnoy reiterated the Respondent's need for cost savings. Mucaria responded that the Union could offer more economic assistance, but the Respondent "had to come back with a more realistic proposal in a positive way, not just taking all the concessions we gave and then asking for additional concessions. . . . [The Union is] willing to come off our proposal; but you need to move in the correct direction in order for us to do that." Portnoy said that the Respondent was "reluctant to impose any terms, but if you have nothing else to offer, I have nothing to offer. Let's just set another date."

The third bargaining meeting on June 25 was more of the same. Both parties stood by their initial proposals and expressed frustration that the other side would not budge.[3]

The fourth bargaining session, on July 8, started the same way as the prior two meetings. The Union repeatedly conditioned any movement on its part on "some positive movement" by the Respondent first. However, the Respondent had already presented its counterproposal, and it indicated that it had no intention of bargaining against itself. Portnoy stated: "[Y]ou are not being responsive[;] we're having trouble competing in our industry. We need help. . . . [W]e're not making any progress. You won't change your proposal. You really can't change your proposal, so I'm going to give you a final offer."[4] Portnoy indicated that he was declaring impasse and that the Respondent would implement the terms of the final offer in 1 week.

DISCUSSION

To determine whether a valid bargaining impasse existed on a particular date—here, July 8, 2014, when the Respondent declared impasse—the Board considers whether, under "the totality of the circumstances," "further bargaining would [have] be[en] futile" at that time. *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (2016) (internal quotation marks and citations omitted). In making an impasse determination, relevant factors include "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

The record evidence establishes that negotiations had reached an impasse on July 8. The parties never deviated from their initial positions on critically important economic issues. Despite its assertion of flexibility if the Respondent moved "in the correct direction," the Union only offered what the Union has previously agreed to in the MWA agreement. By comparison, the Respondent consistently proposed terms that *differed* from those in the MWA agreement. And there is no allegation that the Respondent bargained in bad faith prior to its declaration of impasse on July 8.

In these circumstances, the Board's role is not to pass judgment on which party's position was more reasonable, but merely to act as a referee of the bargaining *pro-*

[3] At the June 25 meeting, the Union agreed to add an individual to the arbitration panel at the Respondent's request, but the Union never opposed that request and it was insignificant to the overall negotiations, which were fixated on economic terms.

[4] Portnoy's saying "you really can't change your proposal" referred to the Respondent's belief that the Union would not accept anything other than the MWA Independent Shop Agreement. That belief was supported by the union negotiators' statements during bargaining, about which Portnoy testified at the hearing. For example, after Portnoy presented the Respondent's counterproposal at the parties' first bargaining meeting on March 4, either Villalta or Mucaria explained that any contract has to be ratified by the Union's delegate body, and "[w]e can't convince the functions in that body. They won't want to see the cuts." Villalta then said, "I'm sure 99% we can't deliver anything other than the Independent Agreement." Portnoy replied, "This isn't fair," and either Villalta or Mucaria said, "I agree, but *it's not in my control*." (Tr. 181 (emphasis added).) It was the same story at the parties' last bargaining session on July 8. At that meeting, Portnoy went through the items in the Respondent's counterproposal, Mucaria and Villalta rejected each one, and "then I [Portnoy] got my lecture again. 100 Delegate[s] from all Locals have to vote on anything that we agree to. They're never going to agree to this. This won't fly. The Delegates will vote and even if the Members ratify it, it won't pass unless the Delegates agree. And this will never pass." (Tr. 203.) That was when Portnoy said, "We're not making any progress. You won't change your proposal. You really can't change your proposal. So I'm going to give you a final offer." (Tr. 204.)

cess. As the Supreme Court held in *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970):

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that *agreement might in some cases be impossible*, and *it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement*.[5]

Moreover, the Act does not require parties in bargaining to engage in a charade or to pretend they are willing to offer more than they actually place on the table. As the Supreme Court stated:

> [T]he Act *does not encourage a party to engage in fruitless marathon discussions* at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.[6]

Here, the Respondent tried for more than two years to obtain a proposal from the Union that differed from the MWA Independent Shop Agreement, and it came up empty. The Union elected to propose a single offer and not to vary that offer. In the absence of bad-faith bargaining, which has not been alleged here,[7] the Board cannot fault either party. The Respondent was not required to bid against itself, and the Union clearly conditioned any new or different offer on movement by the Respondent. This is the stuff that creates an impasse in bargaining.

Although the parties only had four formal bargaining meetings in 2014, it was clear as early as April 2012 that the parties would be taking radically different positions. This became even more apparent in the exchange between Portnoy and Mucaria in September 2013, in which Mucaria expressed the Union's expectation that the Respondent would sign "an independent agreement that mirrored the other shop agreements" as it had in the past, to which Portnoy immediately replied, "We want to negotiate our own terms and conditions."

The Board has found a valid impasse after only *two* bargaining sessions under circumstances similar to those presented here. See *Betlem Service Corp.*, 268 NLRB 354, 354 (1983) (finding that the parties reached impasse even though there had been only two formal bargaining meetings because the union refused to consider deviating from a me-too agreement). The parties' more-than-40-year history of reaching collective-bargaining agreements also weighs in favor of a valid impasse finding.[8] Moreo-

[5] Id. at 103–104 (emphasis added). See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) (The Act "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 497 (1960) (It is not a proper function of the Board to act "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965) (The Board is not vested with "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.").

[6] *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952) (emphasis added).

[7] Because there is no allegation of bad-faith bargaining by any party, I do not pass on whether the Union's refusal to meet with the Respondent for roughly 18 months or to offer anything other than its initial proposal—the MWA Independent Shop Agreement—constituted a failure to bargaining in good faith in violation of Sec. 8(b)(3). However, it is well established that the Board may find a violation of Sec. 8(b)(3) or Sec. 8(a)(5) if a union or employer, respectively, refuses to deviate from a single offer or fails to meet at reasonable times to negotiate a collective-bargaining agreement. See, e.g., Sec. 8(d) (defining the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession"); *General Electric Co.*, 150 NLRB 192, 193 (1964) (violation where a party "enters into bargaining negotiations with a desire not to reach an agreement"), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (duty to bargain in good faith requires "an open mind and a sincere desire to reach an agreement" and "a sincere effort . . . to reach a common ground") (internal quotations omitted); *NLRB v. Griswold Mfg. Co.*, 106 F.2d 713, 723 (3d Cir. 1939) (violation if a party "enters into negotiations . . . with his mind hermetically sealed against even the thought of entering into an agreement").

[8] See *Lou Stecher's Super Markets*, 275 NLRB 475, 476 (1985); *Seattle-First National Bank*, 267 NLRB 897, 898 (1983), review denied sub nom. *Financial Institution Employees of America, Local No. 1182 v. NLRB*, 738 F.2d 1038 (9th Cir. 1984). My colleagues acknowledge

ver, even Union Representative Mucaria understood that further bargaining would be futile. As the judge acknowledged, Mucaria testified that he "did not think that he would likely reach an agreement with the Employer."[9]

In my view, the majority and the judge erroneously conclude that no impasse existed because the Union stated that it could be flexible if the Respondent moved first. After the Respondent attempted in vain for more than two years to secure from the Union a concrete proposal that differed from the MWA Independent Shop Agreement, I believe my colleagues and the judge mistakenly equate a bare promise of flexibility with an actual offered compromise or counterproposal. Based on the record presented here, I believe the Union's reference to potential flexibility is no different than an attempt to avoid a lawful impasse merely by stating that no impasse exists. The existence or nonexistence of an impasse depends on the parties' actual conduct, not merely their words. Here, by July 8, the Respondent had made an offer that included terms different from the MWA Independent Shop Agreement; the Union had refused to propose anything other than a "me-too" MWA Independent Shop Agreement; the Union had conditioned any flexibility on its part on further movement by the Respondent; and the Respondent had lawfully refused to engage in further movement. Given this state of affairs, even if the Union had some potential willingness to exhibit flexibility if the Respondent moved first, the parties were deadlocked. As of July 8, the parties' respective positions were no different than they were at the first bargaining session on March 4, when Union Negotiator Villalta greeted the Respondent's counterproposal by stating that the MWA agreement "is where we have to go" and that there could be "no deviation" from that agreement. Indeed, the Union's position on July 8 was no different from what it was more than *two years earlier in April 2012*, when Mucaria and Villalta advised that the Union would not even meet with the Respondent until the MWA agreement negotiations were complete, or from what it was in *September 2013*, when the Union stated it would send the Respondent the MWA agreement after it became available.[10]

By finding that the parties were *not* at an impasse on July 8, my colleagues and the judge make three mistakes. First, they disregard what the Union itself made clear on July 8, which was that no flexibility was forthcoming unless the Respondent moved from its position. Second, to the extent the Union meant what it said (that it would not offer anything new or different until the Respondent moved "in the correct direction"), my colleagues and the judge take the Union's side by requiring that the Respondent engage in further bargaining until it made further concessions.[11] Third, if my colleagues and the judge acknowledge that (i) the Union would not make any different proposals unless the Respondent moved first, and (ii) the Respondent lawfully refused to bid against itself, then they are finding that our statute *does* require parties to engage in "fruitless marathon discussions," which is contradicted by the Supreme Court's statement in *American National Insurance* that such "marathon discussions" are *not* required.[12]

Moreover, even if the Union might have been willing to offer different terms (provided that the Respondent did so first), and even if the Respondent at some future point might have decided to modify its proposals, this possibility does not preclude the existence of an impasse on July 8. Rather, this merely means that after the impasse was created, it remained possible that changed circumstances could subsequently cause the impasse to be broken.[13]

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that the parties "had enjoyed a long collective-bargaining relationship," but they find this weighs *against* the existence of an impasse. I disagree. The parties' long and productive bargaining relationship over the course of more than 40 years shows a solid track record of being able to work together. That the parties could not work past their differences this time supports a finding that the deadlock reached on July 8 was genuine.

[9] My colleagues base their no-impasse finding in part on the fact that the parties did not discuss some of the Union's proposals, mostly involving noneconomic matters. However, economic issues were of overriding importance, and negotiations broke down over the Union's adamant refusal to move from its position on those issues unless the Respondent moved first. Cf. *CalMat Co.*, 331 NLRB 1084, 1097 (2000) (finding that parties can reach a valid impasse on a single issue if a good-faith impasse existed on that issue, the issue was of "overriding importance," and the impasse on that issue "led to a breakdown in overall negotiations"). Under the circumstances, it is fanciful to believe that discussing noneconomic matters would have made any difference.

[10] My colleagues find a "ray of hope" at the July 8 bargaining session on the basis that the Union "offered concessions on specific issues of importance to the parties," namely, the duration of the contract and work standards. In fact, the Union did not propose concessions. As to the contract term, the Union merely professed a willingness to move from its proposal for a 10-year contract term *if the Respondent made "a more favorable proposal on wages and benefits."* As to work standards, the Union claimed it would agree to some undefined revised version of a work-standard proposal *if the Respondent came "back with a better proposal on wages and benefits."* In short, the Union professed only unspecified flexibility conditioned on the Respondent's moving from its position first.

[11] To the extent that my colleagues or the judge effectively find that the Respondent was required to continue bargaining until it made further concessions, this would be directly contrary to Sec. 8(d) of the Act (quoted in fn. 8, supra).

[12] See text accompanying fn. 7, supra.

[13] See, e.g., *Jano Graphics, Inc.*, 339 NLRB 251, 251 (2003) ("[A]ny impasse on July 29 was broken on August 4, when the Union

The possibility that circumstances might change sometime after July 8 and that those changed circumstances might break the impasse is irrelevant to determining whether an impasse existed on July 8 to begin with. As shown above, the parties were unwilling to change their positions on July 8, and communications between the parties dating back to April 2012 serve only to confirm that the parties were "warranted in assuming that further bargaining would be futile." *Nexeo Solutions,* LLC, 364 NLRB No. 44, slip op. at 12 (internal quotations omitted).

For all of these reasons, I would find that on July 8, the parties had reached a valid bargaining impasse. Accordingly, I would conclude that the Respondent did not violate Section 8(a)(5) of the Act when it implemented its final pre-impasse offer on August 11.[14]

informed the Respondent that it had new proposals and was seeking further bargaining.").

[14] The cases my colleagues and the judge rely on do not warrant a different finding. In *Serramonte Oldsmobile*, 318 NLRB 80 (1995), enf. denied in relevant part 86 F.3d 227 (D.C. Cir. 1996), the Board found that the employer prematurely declared impasse where the union significantly changed its position at the last bargaining session by stating that it "would accept many of [the employer's] proposed contractual provisions," and where the employer delayed in providing information relevant to an important issue under negotiation. Id. at 97-98. Here, the Union never expressed a willingness to accept the Respondent's proposals—only vague assurances of economic assistance if the Respondent changed position first—and the Union was not hampered in its ability to formulate new proposals by any delay in receiving requested information.

In *Newcor Bay City Division*, 345 NLRB 1229 (2005), the Board found that the employer prematurely declared impasse where (i) the union had recently made substantial concessions that narrowed the differences between the parties, (ii) the employer was determined to declare impasse on the date the current collective-bargaining agreement expired, and (iii) the employer failed to provide requested information. Id. at 1238-1241. In addition, the Board cited the union's stated willingness to "negotiate on any subject." Id. at 1238. But unlike here, where the Union merely professed flexibility, the union in *Newcor* demonstrated flexibility by actually making concessions. And the other reasons the Board relied on in *Newcor* to find no impasse are absent here.

Of the cases my colleagues rely on, the facts in *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), most closely resemble those in this case, and I agree with the dissenting views expressed in *Grinnell Fire Protection* by former Member Hurtgen, who would have found that the union's eleventh-hour claims of flexibility to "make it appear that bargaining progress is just around the corner" were insufficient to preclude a valid impasse. 328 NLRB at 589 (Member Hurtgen, dissenting in part). Yet even in *Grinnell Fire Protection*, the union signaled potential movement on its part that was *not* contingent on the employer changing position first. See id. at 585–586. Thus, although I agree with Member Hurtgen that bargaining reached an impasse in *Grinnell Fire Protection*, not even the majority's decision in that case supports a no-impasse finding here, where the Union *never* signaled potential movement unless the Respondent changed its position first.

CONCLUSION

Accordingly, for the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. February 10, 2017

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Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with New York City and Vicinity District Council of Carpenters (the Union) as the exclusive collective-bargaining representative of the employees in the following unit:

All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

WE WILL NOT make unilateral changes in your terms and conditions of employment without first bargaining with the Union to impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

WE WILL, on request, cancel and rescind all terms and conditions of employment which we unlawfully implemented or unlawfully eliminated on and after July 8, 2014, but nothing in this Order is to be construed as requiring us to cancel any unilateral changes that benefited you without a request from the Union.

WE WILL, at the Union's request, restore to unit employees the terms and conditions of employment that were applicable prior to July 8, 2014, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining.

WE WILL make you whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, on and after July 8, 2014, with interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each affected employee.

WE WILL make all contractually-required contributions to fringe benefit funds that we have failed to make since about July 8, 2014, if any, and reimburse you, with interest, for any expenses ensuing from our failure to make the required payments.

STEIN INDUSTRIES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-134711 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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Alan B. Pearl and *Brian J. Shenker, Esqs. (Alan B. Pearl & Associates, PC),* of Syosset, New York, for the Respondent.
Lydia Sigelakis, Esq. (Spivak Lipton, LLP), of New York, New York, for the Union.

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on April 14, 2014, by the New York City and Vicinity District Council of Carpenters (the Union), a complaint was issued against Stein Industries Inc. (the Respondent or the Employer) on October 30, 2014.

The complaint alleges and the Respondent admits that on July 8, 2014, following meetings for the purpose of negotiating a successor collective-bargaining agreement, the Respondent provided the Union with its final contract proposal and declared an impasse in bargaining.

The complaint also alleges but the Respondent denies that (a) its declaration of impasse was premature; (b) it implemented changes in the contract which differed from the final proposal made to the Union; and (c) it implemented those changes without first bargaining with the Union to a good-faith impasse.

Finally, the complaint alleges and the Respondent admits that the subjects contained in the final proposal and in the implemented changes relate to wages, hours, and other terms and conditions of employment of the collective-bargaining unit and were mandatory subjects for the purposes of collective bargaining.

The Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses which will be discussed below. On January 14 and 15, 2015, a hearing was held before me in Brooklyn, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a domestic corporation, having an office and place of business in Amityville, New York, has been engaged in the manufacture and nonretail sale of concession stands. In the course of its operations during the year ending December 31, 2013, the Respondent purchased and received goods and materials at its Amityville facility valued in excess of $50,000 directly from points located outside New York

State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Respondent currently employs between four and six employees. It has been a party to agreements with the Union for 40 years. Its last contract, which ran from July 1, 2007, to June 30, 2012, set forth the appropriate unit as follows:

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

The Union has two types of agreements with employers. The first is a Memorandum of Agreement (MOA) with the Manufacturing Woodworkers Association (the Association) for 12 employers who are members of that Association. That contract is negotiated and executed by the Association and the Union. The Respondent is not a member of the Association.

The second is an Independent Shop Agreement called the Memorandum of Understanding (MOU) executed by independent employers who are not members of the Association. The MOU has the same terms as the MOA. Typically, the independent shops are presented with the "me-too" MOU and are asked to sign it.

For the past 40 years the Respondent has signed the Independent Shop Agreement, apparently without any negotiation or re-negotiation of its terms, and it did so in the last contract which expired in June 2012. Although the union agent expected the Employer to sign it following the expiration of that contract, it did not.

2. The negotiations

Andrew Mucaria and Robert Villalta negotiated for the Union. The Respondent's representative was Mark Portnoy. He was occasionally joined by his client, the Employer president, Andrew Stein.

On April 9, 2012, Portnoy wrote to Mucaria, advising that he sought to negotiate a new agreement and asking that meetings be scheduled.

One and one-half years later, in September 2013, Portnoy wrote again, asking Mucaria to contact him so that negotiations could begin. Mucaria replied, advising that "historically, Stein has always signed an independent agreement that mirrored the other shop agreements. The [Union] is currently in negotiations with the [Association] and should be completed soon. As soon as it is completed we can send it over for your review. . . ."

Portnoy replied that "we want to negotiate our own terms and conditions. The Association is not authorized to bargain on behalf of [the Employer] and we are not bound by any terms or conditions they bargain for with the employers they are negotiating with. Please advise me of dates we can meet to enter into negotiations."

Portnoy wrote in October 2013, suggesting specific negotiation meetings on five dates in early November. Mucaria replied that two of those dates were available. On December 4, Portnoy asked for a date to negotiate in the next 2 weeks.

a. *The November meeting*

Portnoy testified that he met with Mucaria on November 6, 2013. He explained that the Employer is a small company performing work in a specialized area – the construction of movie theater displays and counters. He complained of great worldwide competition and a smaller market for his work which is not similar to other Independent Shop Agreement signatories. Portnoy asked for concessions and Mucaria replied that concessions would be given.

Mucaria conceded that he met with Stein in November 2013, but that meeting did not concern negotiations. He supported that statement by noting that the Association agreement had not been finalized until January, and he was waiting for that agreement to be executed before beginning negotiations with the Employer.

b. *Events in 2014*

On January 23, 2014, Portnoy wrote to the two union agents, asking that they set a date for negotiations. The following day, Villalta replied that the Union can meet on "February 13, we can meet to discuss the Independent Agreement but not to negotiate." At the time of the hearing, Villalta was employed by the Union and available to testify but did not.

On January 29, Mucaria wrote that "we should have the offer for all independent shops ready in approx. 1-2 weeks. As soon as it is ready I will contact you."

One and one-half years passed between the time the contract with the Respondent expired in June 2012 and the Association contract was signed in January 2014. It was only then that Mucaria "decided that negotiations could go forward with Stein." He stated that he was "not inclined to meet with the Employer" until the Association contract was executed, and told the Respondent that he was not prepared to negotiate with it until agreement was reached on the Association contract. Further, he stated that the Union was "not prepared to negotiate until we completed the [Association] negotiations in January, 2014. . . . Our position was when we finished the Association negotiations is when we were going to start with Stein."

On February 19, 2014, Portnoy wrote that "it is now three more weeks without a meeting." He asked for meeting dates. Mucaria wrote that day that he was "working diligently to put together a fair and equitable proposal for you" and was available on February 27 or 28, or on March 3 or 4.

Given the dates suggested by Mucaria, I cannot credit his testimony that a negotiation session took place on February 24. The above emails indicate that a meeting was not contemplated by him until February 27 at the earliest. Portnoy denied that there was a February meeting. Further, given the amount of

time between meetings, it is doubtful that two substantive meetings would have occurred 1 week apart, on February 24 and March 4.

I accordingly find that the first negotiation meeting took place on March 4.

c. The March 4 meeting

At the time of this meeting, nearly all the independent shops had signed the MOU or did so shortly after March 4. The Union was represented by Villalta. Mucaria was not present. Portnoy expressed his concerns regarding the Employer's ability to compete in the current market.

The Union presented the Independent Shop MOU which was essentially the agreement reached between the Union and the Association in January. He explained that the MOU contained "major concessions" – reductions in terms and conditions of employment from the Respondent's expired contract.

The Union's proposed agreement set forth the following terms:

> 1. All new hires will be paid at the Tier II rates for wages ($22.00 per hour) and benefits ($10.94). Benefits will be provided pursuant to the Hollow Metal Welfare Fund.
> [Mucaria testified that these rates represented a $10 wage cut and about a $10 benefit reduction for new employees as compared to the expiring contract, and that this proposal helped the Employer by hiring new employees at a lower rate, thereby lowering its costs. He further stated that the cost of the benefits from the Hollow Metal Benefit Fund are less costly to the employer than the Union's Benefit (Big) Fund which was the current carrier for the Union. Mucaria also testified that the Tier II employees would have no prescription drug coverage, and fewer physicians to choose from]
> 2. All fringe benefit contributions for all hours paid at the Tier II rate are capped at 40 hours per week.
> [The prior contract required contributions for all hours worked]
> 3. Ten year contract.
> 4. Tier I employees receive a 1% increase in February, 2014 and a 2% increase in July, 2014. Tier II employees receive a 2% increase in July, 2014.
> 5. The Employer had the ability to send more than 2 employees on a job which had been the limitation imposed by the expired contract.

In addition, the MOU provided for disputes to be arbitrated before Martin Scheinman.

The Union made no proposal to change the benefits for Tier I employees.

Portnoy testified that the Union never made any other proposal, and Mucaria conceded that the Union did not submit another MOU to the Employer during negotiations.

Portnoy presented the Employer's proposal, as follows:

> 1. All employees' wage and fringe package shall be the Union's described Tier II package for the duration of the contract. No one shall be designated Tier I during the term.
> 2. Add Ira Cure to the Arbitration Panel with Roger Maher.
> 3. The Employer shall have the unlimited right to subcontract work.
> 4. The Employer shall have the right to establish reasonable work standards.
> 5. Three year agreement.

The Employer's first, but unwritten, wage proposal was for a wage freeze at the current $30-per-hour level. Then, apparently seizing on the Union's proposal to pay new hires at a Tier II level, the Respondent proposed that all its workers, current and new hires, receive compensation at that level, which was $22 per hour.

Portnoy conceded that that was a regressive proposal, since his original proposal was that wages be frozen at the then current rate of $30 per hour. However, he stated that it was a "proposal, it was not meant to be a settlement. It was meant to get talking going."

Thus, the Employer applied the Union's lower Tier II rates to all its employees, and eliminated the higher paid, Tier I category. The Union regarded the proposal as "counterproductive" to its concessions, and considered proposals 1, 3, and 4, above, "completely offensive."

Mucaria testified that as to the subcontracting provision, the union agents considered it be contrary to the Union's standards, adding that no other union shops had a contractual provision permitting unlimited subcontracting. Nevertheless, he stated that he would have taken that proposal "into consideration" since he had the authority to approve or disapprove that clause, but he would not consider the Employer's demand for unlimited subcontracting until the Employer made other, positive, progressive proposals.

Regarding the reasonable work standards clause, Mucaria testified that such a proposal created a quota for employees which was contrary to the Union's standard of a "fair day's work for a fair day's pay," but that he would agree to that proposal, if the Employer made a better proposal on wages and benefits." Mucaria also stated that the Union was receptive to reviewing language drafted by the Employer which did not involve imposing quotas on the employees. As noted above, Mucaria was not present at this bargaining session.

Portnoy testified that after presenting the Employer's proposal, Villalta said that there could be "no deviation" from the Union's proposal - "this is where we have to go."

Portnoy stated that after discussing the proposals, he made the identical proposal as he had before, with the exception that instead of eliminating Arbitrator Roger Maher from the arbitration panel, he proposed adding Ira Cure to the panel with Maher. However, it should be noted that the Respondent's first written proposal that day states "add Ira Cure to the arbitration panel with Roger Maher."

After the meeting, Mucaria and Villalta discussed with Union Vice President Michael Cavanaugh whether they should make a counterproposal or ask the Respondent to make another offer. They told Cavanaugh that "although traditionally Stein has always signed on to the independent shop agreement with no negotiations, we do feel that we could possibly move off the independent MOU for the independent shops and continue to negotiate separately for Mr. Stein." Cavanaugh was not happy with the Employer's proposal but told the men that he had "ab-

solutely no problem. If the employer claims to be in a financial hardship feel free to continue negotiating and we'll go from there."

d. The April 4 meeting

The Employer presented the same proposal as at the prior meeting. Portnoy told the Union that the Respondent needed economic assistance in the Union's proposals. Mucaria said that the Union could do so but that he first "had to come back with a more realistic proposal in a positive way, not just taking all the concessions we gave and then asking for additional concessions."

At that point, according to Mucaria, the Employer president, Andrew Stein, became irate, stood up, said that this is "ridiculous," he did not "need this," and would leave. Mucaria responded that although the Union had no official counterproposal it was "willing to come off our proposal; but you need to move in the correct direction in order for us to do that."

Portnoy stressed the fact that the Respondent was "still experiencing financial difficulties, and trying to help himself stay in business," and that it would not survive without economic help from the Union.

Stein left the room and Portnoy asked the union agents to give him some time to speak with his client. According to Mucaria, Portnoy told the representatives that the Union made "great concessions and a great deal of movement with the initial proposal" but the Employer needed more. Portnoy purportedly commented that the Union's proposal was "fair" and that Stein was being "totally unreasonable, greedy and wanting more" in refusing to agree to it.

In contrast, Portnoy testified that the Union's proposal was "horrible"—it was not a great cost-savings opportunity for the Employer and "we weren't going to accept it."

Portnoy stated that he reiterated the Employer's need to subcontract work and Mucaria said that he was "hesitant" to agree to that proposal. Portnoy wanted all employees to receive compensation in Tier II and Mucaria replied "absolutely not."

Portnoy said that he was "reluctant to impose any terms, but if you have nothing else to offer, I have nothing to offer. Let's just set another date." Mucaria stated that he was prepared to make a counteroffer to the Respondent's proposals but did not.

e. The June 25 meeting

No proposals were made at this 1-hour meeting. Portnoy testified that he asked the Union for a proposal and it did not produce one, with Mucaria replying, "[W]e don't need another proposal. The Tier II savings was of great value to the Employer and that we had to focus on it."

Portnoy replied that the Union's proposal was increasing the Respondent's cost. He was frustrated by the Union's refusal to make a second proposal. He said that Mucaria rejected his proposals that were still pending from the prior meeting. The Union agreed to add Ira Cure as an arbitrator and "explicitly" rejected the Employer's economic proposals but failed to make a counterproposal on economic terms.

f. The July 8 meeting

Portnoy testified that he asked the Union if it had a proposal. It did not, and he advised the Union that "we are not moving because you won't negotiate."

The Employer again presented its offer:

> 1. All employees wage and fringe package shall be the Union's described Tier II package for the duration of the contract. No current employee shall be paid less than $22.00 per hour. Tier I category is removed from the contract. New hires shall be paid no less than $20.00 per hour.
> 2. Add Ira Cure to the Arbitration Panel with Roger Maher.
> 3. The Employer shall have the unlimited right to subcontract work.
> 4. The Employer shall have the right to establish reasonable work standards.
> 5. Three year agreement. Other terms remain in effect.
> 6. These terms will be in effect on 7/15/14. The company is available to discuss these terms at any time between now and then.

This was the same proposal as previously made, with the addition in proposal number one that "new hires shall be paid no less than $20.00 per hour." This represented a reduction in the prior offer since the proposal made on March 4 was that *all* employees would be paid at the Tier II rate, which was $22 per hour.

According to the Respondent, proposal number 6 was omitted from a first draft given at this meeting, but was added later during the meeting. Mucaria denied that proposal 6 was on the paper given to him, conceding, however, that Portnoy advised him orally that the Employer was available to discuss the terms within the next week.

Mucaria testified that he rejected the offer of Tier II wages and benefits for all employees because he believed that he had a responsibility to the Union and its members to obtain the best deal possible and not go backwards. He believed that the Union's delegates were likely to reject that proposal. Portnoy quoted Mucaria as saying the proposal for Tier II wages and benefits for all employees "will never happen. One hundred delegates from all locals have to vote on anything we agree to. They're never going to agree to this. This won't fly. The delegates will vote and even if the members ratify it, it won't pass unless the delegates agree and this will never pass. You have mirrored the group all of these years."

Mucaria agreed that Ira Cure be added as an arbitrator,

Portnoy testified that he told Mucaria that "we are not moving because you won't negotiate." He specifically asked if the Union would agree to a 3-year contract as proposed by the Employer. Mucaria said, "[N]o, we're looking for a 10 year agreement." Portnoy's notes state, "[S]o you won't agree to three years?" and Mucaria said, "[N]o."

However, Mucaria testified that he told Portnoy that he would agree to a contract term other than 10 years. Mucaria denied saying that the Union was "bound" to a 10-year contract. Mucaria testified that he was willing to move down in the direction of a 3-year contract, and would "work out something other than a 3 year contract, but it did not have to be a 10 year deal."

He told Portnoy that he did not understand why the Employer would not want a long-term contract "but it that's what the

company is looking for, we're willing to do that," meaning that the Union would entertain some term less than 10 years. He told Portnoy that the Union would be willing to move off its 10-year proposal toward his 3-year proposal "upon a more favorable proposal on wages and benefits." In this regard, Mucaria testified that he did not propose a 3-year contract. His proposal was that he would "come off" the 10-year proposal but set no firm figure.

Mucaria also said that the Respondent's request for reasonable work standards was "too broad, unacceptable and totally against everything we ever stood for." However, he was willing to "work something out" if that clause was modified, but that the Employer still "needed to come back with a better proposal on wages and benefits." He added that he could include the work standards proposal in the agreement if it was "cut and dry" and would not create a quota of products an employee had to produce.

Portnoy then asked if the Union would change its proposals. Mucaria said that he wanted "some positive movement by you." Portnoy told Mucaria, "[Y]ou are not being responsive we're having trouble competing in our industry. We need help," and testified that Mucaria refused to make a counterproposal. Portnoy then said, "[W]e're not making any progress. You won't' change your proposal. You really can't change your proposal, so I'm going to give you a final offer," adding that he would be prepared to discuss the offer any time during the next week, but that the terms would be imposed 1-week later.

Then Portnoy presented a "final proposal" which consisted of the same terms he last made, with the addition that the Employer agreed to discuss its terms with the Union for 1 week before they were implemented. Portnoy conceded that there was nothing new in this final offer that he did not present to the Union in previous meetings.

Mucaria testified that the two agents were in "shock." He asked Portnoy, "[H]ow are you giving us your final offer? First of all we're still making positive movement, we just need you to also participate in the positive movement . . . we're not done negotiating." Portnoy replied that this was the Employer's final offer which would be implemented the following week.

Mucaria testified that he told Portnoy that it was "highly unlikely" that the Employer's proposal would be approved by the delegates, and that it must be modified and needs to be a more positive proposal. He noted that if he had a "decent" wage and benefit proposal it would be "easier" for the delegates to approve it.

Portnoy stated that he did not expect that his initial proposal would be accepted immediately without any quid pro quo, but that the Union believed its initial proposal would be accepted immediately. Accordingly, Portnoy believed that the Union had no intention to bargain. Mucaria's assessment of the negotiations was that he "did not think that he would likely reach an agreement with the Employer." He termed the Employer's proposals concerning wages, benefits, and the unlimited right to subcontract work "unfair and unrealistic." In addition, he stated that he had "no intentions of agreeing to anything until I had an entire MOU to agree on."

Mucaria testified that, as of July 8, no tentative agreement had been reached, and accordingly he did not refer any of the proposals to higher levels of the Union for approval.

g. Events following July 8

On August 5, Portnoy sent a letter to the Union advising that the Employer "presented its final offer on July 8, 2014, when we reached an impasse. No meetings or requests for further discussions have occurred since we last spoke on July 14. Accordingly, the company will implement that final offer on Monday. Employees, as needed, will be told that work is available under the implemented terms."

Mucaria called Portnoy, expressing surprise that he implemented his last offer. Mucaria offered to "sit down again, let's try and make some movement. I don't feel that we've reached impasse."

On August 11, the Employer sent a letter to employees advising that work was available "under the terms of employment recently implemented by the company. Your hourly rate will be $22.00 and your benefits will be with the Union's Tier II Package."

On August 13, the Union's attorney wrote, denying that an impasse had been reached, and said that the Union "fully intends to continue bargaining." The Union proposed two dates to meet to bargain, one being August 28. Portnoy conceded that following his declaration of impasse on July 8, Mucaria contacted him "on more than one occasion to set up successive meetings."

h. The August 28 meeting

Mucaria asked Portnoy to make another proposal. Portnoy replied that there was "no point" in doing so. Portnoy quoted Mucaria as saying that the Union had "room to move, but you have to come close enough to convince us that it's worth going to ask whether we can deviate from the agreement." Portnoy testified that he responded that he was "never going to get that close. Give me something that can be the savings that we're looking for and let's bargain."

The union agents told Portnoy and Stein that they would be "more than happy to move from our proposals but we couldn't do it in good conscience before [you] made a proposal that went forward instead of backward like [your] previous proposal."

The Employer stated that it was having economic hardships and difficulty competing in the market. Mucaria offered to help "but we needed to be realistic in the way that we did it."

According to Mucaria, he asked for a proposal from the Employer and, in turn, the Employer asked the Union for another proposal. Nothing was forthcoming from either party.

Portnoy suggested having a mediator enter the negotiations. Mucaria agreed with that suggestion but proposed that the Respondent "open up their financials to us to prove that they're having such financial difficulties." Mucaria suggested that, after the financial documents were reviewed, each party could make another proposal, and then the mediator could enter the negotiations.

Portnoy testified that Mucaria said, "[W]e have room to move but I need a better proposal from you. We offered concessions. We want the proposal from you." Portnoy replied, "[N]othing I propose can come close to your level. Give us a

package. There's no point in making small moves. Show us something."

Portnoy added, "[Y]ou showed us that we can be in the Hollow Metal Fund. If you can live with the wage and fringe package it would be a big help here. If you can live with this wage and fringe package is the goal here. We can't compete. Our competition is nonunion. Your benefits are too high. No one has the structure. Show us how to get the savings we are looking for."

Mucaria replied, [H]how do I know you aren't going to reject our next package?" Portnoy said, "[W]e'll review concessions that you show us. We used your package and just applied it to everybody. Give us another proposal to save money." Mucaria said, "[W]e gave you our proposal from the District Council. We're too far apart. The Council might let us move if you show movement . . . something more realistic . . . otherwise not."

Portnoy said that the $35-wage and fringe payments were too high. "There's no point in changing our position. Give us an offer. Maybe through a mediator we can protect our positions."

Portnoy again described the extreme financial distress the Employer was facing – wages and its cost of doing business were too high. Portnoy testified that he was frustrated. "They wouldn't make a proposal. I was not going to come in with a proposal." He told Mucaria, "[T]here's no point in going back and forth. This has gotten too far." Mucaria replied, "We don't want to make a proposal to you that you're going to reject and that is not going to make any progress." Portnoy answered, "[I]f you want to protect your position and you don't want to do it publicly, do it through a mediator. There's lots of ways to make proposals, but if you're not willing to move from your proposal, we're never going to make an agreement."

No meetings were held after the August 28 meeting. Mucaria stated that he intended to meet with the mediator once he received the financial records, noting that "I conditioned the next meeting on getting the financials." However, inasmuch as no complete financial documentation was sent to him, as described below, he saw no need to request another meeting.

Mucaria testified that certain of the Union's proposals were not discussed during bargaining. They included the capping of benefit contributions at 40 hours per week; special arrangements for manning which permitted the Employer to use additional employees for installations; and the proposal that once an employee was promoted from Tier II to Tier I he or she could not be reverted to Tier II; electronic recording of time worked by employees; the time limit for the Employer to make benefit contributions; and withdrawal of members from work if such payments are not made. There were minimal discussions concerning the proposed increases in wages.

Portnoy conceded not discussing union proposals concerning the electronic recording of time, and the time period for the payment of benefit contributions. As to the latter proposal, Portnoy testified that he assumed that the Employer is subject to the terms of the trust agreement, and that is an issue that is usually discussed on the last day of bargaining, and is not a matter to bargain about. He further stated that the Employer accepted, as part of the Tier II proposal, the capping of benefit contributions at 40 hours.

i. Later events

On September 9, Mucaria wrote to Portnoy "if the company is going to request that we give another proposal with further concessions I will need to see proof to his claim that the company is experiencing extreme financial hardship."

On September 11, Respondent Attorney Alan Pearl wrote to Board Attorney Erin Schaefer. The letter stated that the Employer was supplying letters from the Employer's accountant who filed U.S. Income Tax Returns and New York State Tax Returns for 2011, 2012, and 2013.

Pearl's letter, which was sent to the Union 1 week later on September 18, contained Pearl's analysis of the tax returns and his discussion with the firm's accountant in which Pearl concluded that in those 3 years, the Employer lost a total of $716,848, and that Stein contributed $484,000 to the Employer. The letter did not contain the accountant's letters.

Mucaria received Pearl's letter but did not receive any of the letters presumably supplied to Schaefer. Nor did he receive any other financial statements or supporting documentation from the Employer. The Employer concedes that Pearl's letter was the only document sent to the Union.

3. Pay received by employees

A pay stub from current employee Felix Rodriguez was received in evidence. It shows a pay rate of $30 per hour during the months of September through December 2014.

The Employer sent payments for Rodriguez to the Carpenters Benefit (Big) fund for fringe benefits at the lower rate provided by the Hollow Metal Fund. The checks were returned to the Employer with the notation that the Employer "does not have a signed current collective-bargaining agreement with the New York City District Council of Carpenters."

The Respondent was not eligible to participate in the Hollow Metal Fund because it had not signed a collective-bargaining agreement with the Union providing for coverage by that Fund. Accordingly, neither Rodriguez nor other Respondent's employees were covered by the Hollow Metal Fund.

The Respondent's Affirmative Defenses

The Respondent claims that the Union's negotiators, Mucaria and Villalta, were "only authorized to propose and agree to the terms bargained with the Association."

In contrast, Mucaria testified that he and Villalta had full authority to negotiate an agreement that they believe is fair for the employees and the Employer. He further testified that he had authority to "approve or decide not to approve prior to moving forward with negotiations." He had the authority to make decisions at the bargaining table and then the Union has "checks and balances" because of its democratic process requiring the negotiators to seek approval of the agreement at higher levels. He does not submit individual proposals to the Union until negotiations have been completed, resulting in a tentative agreement.

Mucaria testified that neither he nor Villalta spoke to Joseph Geiger, the Union's executive secretary-treasurer, regarding these negotiations. Nor did Geiger instruct them in tactics when he bargained with the members of the Independent Shop Association.

He stated that during the negotiations he told the Respondent that he had to obtain the Union's approval of the agreement, and gave his opinion whether certain proposals would or would not be approved by the Union, often saying, "[T]his will never get approved and will never pass," adding that they should "keep moving" until they agree on a term that is "more realistic that will get passed."

However, Mucaria stressed that the above procedure does not inhibit his ability to make a proposal, or negotiate, or reach agreement, although it does cause him to consider whether the agreement reached will be approved by the delegate body.

Following agreement with the Employer, the contract is presented to the Union's executive committee which is comprised of the president and vice president, and the executive delegate from each local. After they approve the agreement and recommend that it be ratified, it is presented to the delegate body comprised of 100 delegates which then votes to approve or disapprove.

Mucaria stated that the Respondent had the ability to negotiate independently, without being bound to the MOA of the Association, and the Union was willing to bargain a contract with it which differed from the MOU.

Indeed, Mucaria testified that the Respondent was the only independent shop which had not signed the Memorandum of Understanding as of July 8, 2014, noting that as the contracts were sent to the independent shop employers they would sign them and return them immediately. The Respondent was the only shop that did not do so.

Portnoy quoted Villalta, who did not testify, as saying that "I'm sure 99% we can't deliver anything other than the independent agreement." Portnoy protested that that was not fair, and Villalta replied that he agreed, but that it is "not in my control."

The expired MOA between the Association and the Union, and the expired Independent Shop Agreement between the Employer and the Union contains the following clause in article I, section 7:

> The Union shall utilize its best efforts to monitor all woodwork installed within its jurisdiction and confirm that said woodwork was manufactured by a shop, which either is a signatory to this agreement or in the alternative manufactured by a shop that is paying equal to or better than the wages and fringe benefits provided for in this agreement. The Union shall not allow the installation by any of its members of any woodwork, which is identified as not being furnished and/or manufactured by a signatory to this agreement or in the alternative which is not furnished and/or manufactured by a shop that is paying equal to or better than the wages and fringe benefits provided for in this agreement subject to applicable law.

When the MOU was renegotiated and executed in January 2014, the second sentence, above, was deleted. Thereafter, the MOU presented by the Union to the Respondent as its offer provides that that sentence "shall be deleted."

The apparent reason for the deletion of the second (most favored nation) sentence is that a grievance was filed by the Association against the Union claiming that the Union had entered into a contract with Gilbert Displays, Inc. which provided for better wages and benefits than those set forth in the Association contract.

An arbitrator sustained the grievance, and an award of $8 million to Gilbert was paid by the Union. The Respondent argues that the Union was precluded from granting more favorable terms to Stein than those in the Association contract because it feared another grievance and huge award. The Employer concludes, therefore, that the Union was unable to modify the terms of the Association contract and therefore had no choice but to refuse to change its original proposal.

The Respondent concludes from this that, despite its good-faith effort to bargain and reach agreement, the Union would not, and could not change its original offer which mirrored the Association (MOA) agreement.

Mucaria testified that neither he nor Villalta gave any assurance to Association members that members of the Independent Shops would receive more favorable terms and conditions in any renewal agreement.

Mucaria testified that if the Employer received better terms in these negotiations than other Independent shops, he would not expect that an arbitration matter would be filed against the Union by the Association because there is no most-favored-nation clause in the other contracts in force nor in the proposal offered to the Respondent. Indeed, because the second sentence of that clause has been deleted from the Association contact and the Independent Shop Agreement, the Union would have no liability if it deviated from the terms of those agreements.

The Respondent further asserts that although the second sentence was deleted, the first sentence remains in the MOU. The first sentence requires the Union to "utilize its best efforts to monitor" work performed by shops within its jurisdiction and "confirm" that such work is performed by employers who pay equal to or better than the wages and benefits set forth in the Association contract.

Accordingly, the Union now simply "monitors" and "confirms" that shops pay equal or better terms. There is no language in the new Association or Independent shop contracts which provide that the Union "shall not allow" the installation by its members of products which were manufactured in a shop paying terms more favorable than those provided in the Association contract.

Portnoy's notes added that Mucaria stated that the Union would take a strike vote.

Mucaria stated that he did not threaten to strike the Employer. However, he stated that in later meetings with Portnoy, in an effort to restart negotiations, Portnoy suggested that Mucaria take a strike vote to put pressure on the Employer to bring it back to the bargaining table.

The Respondent argues that it raised its wage offer. Its first position was a wage freeze. However, that is not set forth in its first written offer of March 4. It then modified its wage offer to adopt the Union's Tier II rate of $22 for all employees. Accordingly, its July 8 offer stated that no current employees shall be paid less than $22 per hour.

Portnoy stated that he needed a rate for new hires. Since he did not want to start new employees at the rate of experienced

workers, he established a rate for new hires at "no less than $20.00 per hour." That is set forth in the two offers dated July 8 at 1 p.m.

Portnoy stated that the Union did not make a counteroffer to any of the Employer's proposals during the entire course of negotiations, except its agreement that Ira Cure be added as an arbitrator.

Analysis and Discussion

The complaint alleges that the Respondent prematurely declared impasse in negotiations and that it implemented changes in the contract which differed from the final proposal made to the Union without first bargaining with the Union to a good-faith impasse.

I. THE ALLEGED IMPASSE

Section 8(a)(5) and (1) prohibits an employer from unilaterally instituting changes regarding wages, hours, and other terms and conditions of employment before reaching a good-faith impasse in bargaining.

It is well settled that the party asserting the existence of a bargaining impasse bears the burden of proof that impasse has occurred. *CalMat Co.,* 331 NLRB 1084, 1097–1098 (2000).

The question of whether a valid impasse has been reached is a "matter of judgment" and among the relevant factors are the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to why there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

"As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which, in almost all cases is eventually broken, either through a change of mind or the application of economic force." *Charles D. Bonnano Linen Service v. NLRB,* 454 U.S. 404, 412 (1982).

The Board will find that an impasse existed at a given time only if there is "no realistic possibility that continuation of discussion at the time would have been fruitful, and only if both parties believe that they are at the end of their rope." *Cotter & Co*., 331 NLRB 787, 787 (2000); *PRC Recording Co*., 280 NLRB 615, 635 (1986).

When interposed as a defense to allegedly unlawful unilateral changes, the evidence must demonstrate that impasse existed at the time the disputed changes were implemented. *Northwest Graphics, Inc*., 343 NLRB 84, 90–92 (2004).

In order to prove the existence of an impasse, the Respondent must prove that there was a contemporaneous understanding by both sides that they had reached impasse. *Essex Valley Visiting Nurses Assn.,* 343 NLRB 817, 841(2004). Here, the Respondent failed to establish that the Union believed that impasse had been reached when the Respondent implemented its proposals. See *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232, 233 (2008), where the Board found no impasse where the union stated that it was willing to consider an alternative medical plan proposals and would begin preparing a counterproposal of its own.

The Board has recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception. *PRC Recording Co.,* above at 635.

The Union's position was that it would consider making additional proposals and move closer to the Employer's proposals if the Respondent made a further proposal. Thus, the Union expressed its flexibility on all the Employer's proposals, if the Respondent responded in kind, is strongly indicative that further bargaining could be useful and that no impasse existed. In *Cotter & Co.*, 331 NLRB at 788, in finding that no impasse had taken place, the Board noted that prior to the employer's declaration of impasse, there had been movement on important issues and the union had demonstrated flexibility. Here, too, the Union expressed its flexibility in considering the Respondent's proposals, but only if it presented another proposal. The Union's insistence that the Employer make a further proposal does not require a finding that the Union was intransigent. Rather, it shows that the Union agreed to modify its proposal if the Employer acted in the same manner.

The limited number of sessions which took place prior to implementation belies a contention that the parties were at impasse at the time. *Monmouth Care Center*, 354 NLRB 11, 58 (2009); *PRC Recording Co*., above at 635, where the Board stated, "while . . . the number of negotiating sessions is not controlling, generally, the more meetings, the better the chance of finding an impasse." and *NLRB v. Powell Electrical Mfg. Co*., 906 F.2d 1007, 1012 (5th Cir. 1990), where the court stated:

> Little substantive bargaining had taken place before the time of the purported impasse. The parties only had met five times . . . . The existence of so few substantive sessions cannot alone lead to the conclusion that there was no impasse. But it certainly constitutes an important factor to be weighed in evaluating the Board's decision.

An employer has a "basic duty of allowing adequate time and opportunity for reasonable discussion of the essential details of its offer." *Firch Baking Co. v. NLRB,* 479 F.2d 732, 736 (2d Cir. 1973).

In *Betlem Service Corp*., 268 NLRB 354, 354 (1983), it was stated that "generally, the Board will not find that an impasse has occurred unless the negotiations between the parties have been exhaustive." Here, after only four negotiation sessions, it cannot be said that a "full discussion" of all the issues in dispute has taken place.

The Respondent argues that the Union was determined that it sign the master agreement and would not consider any changes thereto. The Employer cites the Union's refusal to make counterproposals following its initial offer of the Independent Employers Agreement as proof that the Union bargained in bad faith with no intention to reach agreement on any terms other than the master agreement.

The Respondent first cites Villalta's email message that the Union was prepared to meet "to discuss the Independent Agreement but not to negotiate." Villalta did not testify. The Respondent argues that the email message supports its position that the Union refused to deviate from the master agreement. I do not agree. Villalta's message was brief, vague, and ambiguous. I further find that Villalta's uncontradicted statement to

Portnoy that "there could be no deviation from the Union's proposal—this is where we have to go," even if it was made, was uttered at the first negotiation session. It could be expected that the Union's position would change at later sessions, and it did. Moreover, it was contradicted by his and Mucaria's subsequent meetings and negotiations with the Employer.

The Respondent further argues that the Union was locked into insisting on the same economic terms as it negotiated in the Association and Independent Employer agreement, and concludes that impasse was inevitable because the Union refused to grant the Respondent more favorable terms than those master contracts. There is some support for this position. Mucaria testified that he expected the Employer to sign the me-too industry agreement as it had for the past 40 years. However, this expectation did not harden into a fixed resolve not to accept terms different than the master agreement. There is no credible evidence that the union negotiators stated that any issue was nonnegotiable.

In addition, the Respondent is correct that the Union made no counteroffers other than the MOU it originally proposed. Further, even according to Mucaria's testimony, on July 8 he rejected the Employer's wage proposal and believed that the Union's delegates would likely not approve it. Further, Mucaria termed the Respondent's work standards proposal unacceptable and contrary to what the Union "ever stood for."

In agreeing with the Employer that the Union took a hard position on these issues, "the mere fact that the Union *now* refuses to yield does not mean that it never will. Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset. Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and late in the process." *Detroit Newspaper Local 13 v. NLRB,* 598 F.2d 267, 273 (D.C. Cir. 1979).

The Union's course of conduct, on the whole, demonstrates that it was willing to continue negotiations with the Respondent. While the Respondent may have been impatient with the Union's pace in agreeing to its proposals or even making proposals of its own, its frustration is not the equivalent of a valid impasse nor did it mean that a negotiated settlement was not within reach. *Newcor Bay Division of Newcor*, 345 NLRB 1229, 1240 (2005);*Grinnell Fire Systems, Co.,* 328 NLRB 585 (1999); Futility, not some lesser level of discouragement or apparent gamesmanship is necessary to establish impasse.

Moreover, Mucaria's statements do not compel or even suggest a finding that impasse had been reached. The Union's position at all times was that its agents would make further proposals and would move closer to an agreement if the Respondent made another proposal.

Thus, as set forth above, the Union's initial proposal represented a marked departure, in favor of the Employer, from that of the recently expired Independent Employers Agreement. Thus, the Union offered a Tier II category with significantly lower wages than the Tier I category which was the only category available in the prior, expired contract, and also reduced benefit contribution rates and proposed a 40-hour cap on benefit contributions for new employees. In addition, the Union accepted Ira Cure as an additional arbitrator. Further, at the March 4 and April 4 meetings, Mucaria told Portnoy that he would consider the Respondent's subcontracting proposal, and, in fact, agree to its work standards proposal if it made other, positive, progressive proposals on wages and benefits. At the July 8 meeting, Mucaria told Portnoy that he would be willing to consider less than a 10-year contract if he received a "more favorable proposal on wages and benefits." Further, Mucaria told Portnoy that if the Employer made a "decent" wage and benefit proposal the Union's delegates would find it easier to approve.

In *Serramonte Oldsmobile*, 318 NLRB 80, 98 (1995), the Board found that, although at the final bargaining session "all the elements of a genuine impasse in bargaining were in place" the Union's offer to alter its proposal if the Respondent did so, represented "serious movement—a substantial effort" to bridge the gap in positions. This case is stronger than *Serramonte* because here, at the final bargaining session, not all the elements of a genuine impasse were in place. Accordingly, Mucaria's offer, identical to that of the union in *Serramonte,* signaled that movement was possible. That does not mean that the Union could be expected to change its position, but it is "realistically possible" that continued discussion would have been fruitful. The Board found that no impasse had occurred in *Serramonte.*

In finding that no impasse occurred, the Board in *Newcor Bay*, above, observed that when the employer asserted that the parties were at impasse, the union agent asked to continue bargaining and assured the employer that it was prepared to negotiate. It was expected that the union would make concessions depending on what information the employer provided. The Board found that no impasse occurred even though the union "had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining." The Board also noted that although a "wide gap" existed between the parties' positions, no impasse occurred where there was a possibility of further movement on important issues. 345 NLRB at 1238–1240.

Here, the Union remained flexible and expressed a willingness to offer another proposal if the Employer did so. It must be emphasized that the Union's approach was in marked contrast to the Respondent's regressive proposals. Thus, the Employer's first wage offer was a wage freeze at $31 per hour for Tier I employees. Its next offer was that wages for those employees be reduced to $22 per hour. Finally, it offered to reduce the new hire rate from $22 per hour to $20 per hour.

There thus appeared to be prospects for future discussions even at the time the Respondent declared impasse even according to the Employer. Thus, on July 8, Portnoy offered to speak about the terms during the following week, before they were implemented on July 15. Such an offer to discuss the terms of the Respondent's "final offer" may be seen as the Employer's invitation to continue bargaining—surely an indication that impasse had not taken place.

In addition, on July 8, Mucaria expressed shock at the declaration of impasse, and told Portnoy that "we are not done negotiating" and offered to continue discussions. Accordingly, there was no contemporaneous understanding by both parties that

they had reached impasse.

Indeed, the evidence clearly shows that the union officials were not at the end of their negotiating rope, but were ready and willing to negotiate further. When the Employer declared impasse, the Union protested that it had not completed negotiations, and it could be expected, as the Union stated, that it would make further concessions and would be flexible upon the Employer's making an additional proposal. In addition, it offered to continue to bargain.

In addition, following the declaration of impasse, Mucaria contacted Portnoy several times to arrange further negotiations. Indeed, the Union's attorney wrote to Portnoy, denying that impasse had been reached, and suggested dates to bargain.

In fact, the parties met on August 28, nearly 2 months following the declaration of impasse. Mucaria told Portnoy at that time that the Union had "room to move" but asked him to come closer to what the Union sought. Portnoy asked that the Union make a proposal which would provide the Employer the savings it sought and, indeed, said, "[L]et's bargain."

Here, the Union's offer to modify its proposal if the Employer did the same, and the Respondent's suggestion that a mediator enter the discussion, certainly created a "new possibility of fruitful discussion." However, Mucaria asked for financial records which would prove the Respondent's claimed financial hardship. The Union agreed to meet with the mediator once those records were received. However, no detailed records were produced and a further meeting did not take place.

Accordingly, the Union sought additional bargaining sessions, and the Employer committed to doing so as well. Under these circumstances where the Union expressed flexibility, the Respondent "might reasonably be required to recognize that negotiating sessions might produce other or more extended concessions." *Royal Motor Sales*, 329 NLRB 760, 772 (1999),

Moreover, the parties had not discussed certain terms of the Union's proposal including proposals to cap the benefit contributions at 40 hours per week, arrangements for manning, electronic recording of time worked by employees, the time limit for the Employer to make benefit contributions, and the withdrawal of members from work if such payments were not made.

Portnoy's testimony that discussion of these items is usually reserved for the last day of negotiations, and that it accepted the capping of benefits as part of its implementation of Tier II benefits does not ring true. The last day of bargaining took place without such discussion and the Employer did not inform the Union that it accepted the capping of benefits proposal.

In light of the Union's willingness to continue bargaining at the time of the declaration of impasse and thereafter, I cannot find that the parties had reached a deadlock on all the issues set forth in the proposals.

Whether the parties could be expected to resolve their differences is unknown. What is known is that the Union offered to modify its proposals if the Respondent made a new proposal. Although the Respondent believed that there was an impasse the Union did not. Accordingly, there was no contemporaneous understanding by both parties that they had reached impasse.

In *Newcor*, above at 1239, the union advised the employer that it "was prepared to make further concessions on central issues, and that more extreme movement would be possible in the future, depending in part on what information the respondent provided." Here, as in *Newcor*, the union agents never stated that the Union would "not make further movement towards the Respondent's position on any issue, or even foreclosed the possibility that the union would eventually accept the Respondent's initial proposal." This is true even though the Union had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining.

Similar to the instant case, in *Grinnell Fire Protection Systems Co.*, 328 NLRB at 586, the Board found that no impasse had occurred where the union had not yet offered specific concessions, but on the last day of negotiations had declared its intention to be flexible, and sought another bargaining session. The Board stated that "even assuming arguendo that the respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the union was unwilling to do so."

"The essential question is whether there has been movement sufficient 'to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.'" *Hayward Dodge*, 292 NLRB 434, 468 (1989). I find that such ray of hope presented itself at the last bargaining session on July 8 before impasse was declared.

Moreover, there was no "most-favored nations" clause in the Union's proposed agreement. The Union therefore was not prohibited from deviating from the master agreement. The Union was accordingly able to be flexible in its proposals.

Nevertheless, the Respondent argues that the proposal requires the Union to insist on obtaining the same terms as the industry agreement. I do not agree. The proposal merely requires the Union to "utilize its best efforts to monitor" work performed by shops within its jurisdiction and "confirm" that such work is performed by employers who pay equal to or better than the wages and benefits set forth in the Association contract. Such language does not require the Union to refuse to allow the installation by its members of products which were manufactured in a shop paying terms more favorable than those provided in the Association contract.

Further, even if the Union was determined that the Employer sign the master contract, it has been recognized that a union has the legitimate right to seek for its members the same or similar terms and conditions of employment that have been negotiated with other employers. *Teamsters Local 282 (E. G. Clemente Contracting)*, 335 NLRB 1253, 1255 (2001); *Mine Workers v. Pennington,* 381 U.S. 657, 665 (1965). "A union may adopt a uniform wage policy and seek vigorously to implement it" among several employers. 381 U.S. at 665 fn. 2.

I reject the Respondent's argument that the two union negotiators could not independently negotiate the contract because they had to obtain the approval of union officials. The Union's internal procedure required such approval, and there is nothing improper with that procedure. Mucaria testified that the Union's bylaws were written by a review officer and that he was bound by that document. Its purpose was to ensure fairness and honest dealing by the union representatives with the Union's membership and oversight by the review officer. Moreover, Mucaria credibly testified that neither he nor Villalta was given any limitations by union officials on their ability to bargain

with the Employer.

Here, the overall course and conduct of the parties does not evince a mutual understanding that further bargaining would not take place or be fruitful. Based upon the foregoing, I conclude that the evidence is insufficient for me to find that the Respondent has met its burden of proof that, at the time of the promulgation or implementation of the final offer, the parties were of a contemporaneous mutual understanding that further bargaining would be futile.

The Respondent's reliance on *ACF Industries, LLC*, 347 NLRB 1040, 1040–1042 (2006), is misplaced as the facts therein are clearly distinguishable from the instant matter. There, the union's membership had twice voted to reject respondent's offers, after which respondent stated that it had nothing further to offer and would implement its last offer. The union stated that it had additional proposals to make but did not divulge what the proposals would be and did not request any further negotiations.

In *ACF,* the employer submitted several proposals during the course of 12 bargaining sessions, but here the Respondent submitted only 2, nearly identical proposals in only 4 sessions before it declared impasse. Here, the Union said that it was willing to make new proposals but expected the Respondent to do the same. In addition, unlike *ACF*, the Union offered to continue negotiations and did not exhibit an intransigent position. Rather, it asserted that it was flexible and would offer further proposals if the Employer did so.

The Respondent also relies on *E. I. du Pont & Co*., 268 NLRB 1075 (1984). In that case, the Board finding that impasse had occurred, emphasized that the parties bargained "long and hard" in 17 sessions over a specific issue during which the parties had "adequate opportunity to discuss their difference" but could not reach agreement on that matter. The Board also based its holding on the fact that the union "gave no indication that it would concede on [that issue] in return for a favorable trade-off in another area or otherwise that its positions on this and other matters were interchangeable."

In contrast, here, the negotiations comprised only four sessions during which the Union indicated that it would make further proposals, coming closer to agreement on the Respondent's offers, if the Employer made a better offer on wages and benefits. Thus, the parties did not have an "adequate opportunity to discuss their differences" and the Union offered to reach an accommodation on the contract's term and manning proposals in exchange for the Respondent's making a better offer concerning wages and benefits.

The Respondent also relies on *H & H Pretzel Co*., 277 NLRB 1327 (1985). In that case, the Board held that impasse had been reached, basing its finding on the facts that the employer provided financial data supporting its position that it suffered economic distress. Significantly, the union did not review such data and remained adamant in not reducing labor costs.

Here, of course, the Respondent did not provide the Union with detailed financial records. It submitted only a summary of such records with no supporting documentation. The Union correctly argues that without precise records it could not assess the degree of economic hardship the Employer claimed. Indeed, the Union suggested that following its receipt of back-up financial data, each party could then make additional proposals and meet with the mediator.

The Respondent further argues that the length of time prior to the start of bargaining is evidence of the Union's bad faith. I cannot agree. The Union had a legitimate reason to delay the start of bargaining until the master contract was executed. The Union expected that the Employer would sign it and accordingly was justified in waiting until the master contract was produced. The more important consideration is the length of time between bargaining sessions. It does not appear that an inordinate amount of time elapsed between sessions once they began, nor that the Union was responsible for any delay in meeting once bargaining began.

The Implementation of Changes by the Respondent

During negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While such negotiations are ongoing, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

As discussed above, I have found that the parties had not reached an impasse in bargaining. Accordingly, the Respondent was not entitled to make any changes in its employees' terms and conditions of employment, and, as set forth below in the remedy part of this decision, the Respondent shall be ordered to restore the terms of the expired contract until it bargains in good faith to impasse.

In the interest of completion, and assuming, arguendo, that impasse was reached, I will relate the changes that the Respondent made to its employees' wages and benefits. The Respondent's first oral proposal was for a wage freeze at the current wage rate of $31 per hour. Its first written offer was for a wage rate for all employees, current and new hires, of $22 per hour. Its next offer was that current employees be paid no less than $22 per hour and new hires paid no less than $20 per hour.

Following the declaration of impasse, the Respondent sent employees a letter advising that work was available "under the terms of employment recently implemented by the company" and that their hourly rate will be $22 per hour. Nevertheless, current employee Rodriguez was paid at a rate of $30 per hour from September through December 2014.

"Although impasse is one of the generally recognized exceptions permitting unilateral changes, the law is clear that an employer's post-impasse changes cannot be substantially different from the terms of its prior offers." See, e.g., *Grondorf, Field, Black & Co. v. NLRB,* 107 F.3d 882, 886 (D.C. Cir. 1997) ("When impasse occurs, an employer may implement only those changes reasonably falling within its pre-impasse proposal."); and *Atlas Tack Corp.,* 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977) (impasse enables an employer to make unilateral changes that are "not substantially different or greater than any which the employer … proposed

during the negotiations." *Church Square Supermarket*, 356 NLRB 1357, 1361 (2011).

Here, the payment to employee Rodriguez, and perhaps other employees of a wage rate of $30 per hour is "substantially different" than that set forth in its last offer. The Respondent's last offer was that they would be paid not less than $20 per hour. Concededly, a rate of $30 is not less than $20 per hour. However, such a rate is much different than the rate provided in its last offer. Moreover, the $30-per-hour wage rate substantially differed and was greater than the wage rate of $22 which the Employer's letter said they would be paid.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By prematurely declaring impasse in bargaining, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

4. By implementing terms and conditions of employment upon its employees when a valid impasse has not been reached, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to bargain with the Union in the following appropriate collective-bargaining unit, the Respondent has violated Section 8(a)(5) and (1) of the Act:

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as the Respondent unlawfully failed and refused to bargain with the Union for a successor contract by unlawfully declaring that impasse had taken place and unlawfully implementing the terms of its last offer, the Respondent shall be ordered to bargain with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

The Respondent shall immediately put into effect all terms and conditions of employment set forth in its contract which expired on June 30, 2012, and shall maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes.

The Respondent shall also be ordered to rescind any changes to the terms and conditions of employment of its employees, and to make whole those employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions. In addition, the Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decision to, on or about July 15, 2014, implement its final offer. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). This includes reimbursing unit employees for any expenses resulting from the Respondent's unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, supra. I further recommend that the Respondent be ordered to make all contributions to any fund established by the collective-bargaining agreements with the Union which were in existence on June 30, 2012, and which contributions the Respondent would have made but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Stein Industries Inc., Amityville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to follow the terms and conditions of the collective-bargaining agreement with the Union that expired on June 30, 2012, until a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(b) Implementing terms and conditions of employment that are different than those in the collective-bargaining agreement that expired on June 30, 2012, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(c) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union for a new contract for the employees in the following unit and, if an understanding is

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

reached, embody the understanding in a signed agreement.

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

(b) Restore, honor, and continue the terms and conditions of the contract with the Union which expired on June 30, 2012, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(c) Rescind the unilateral changes to the terms and conditions of employment of the employees until such time as the parties have bargained in good faith to an agreement or impasse on the terms and conditions of employment of such employees.

(d) Make employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions, with interest, as set forth in the remedy section of this decision.

(e) Make all contractually-required benefit fund contributions, if any, that have not been made to the fringe benefit funds on behalf of the employees and reimburse those employees for any expenses ensuing from its failure to make the required payments, with interest, as set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 27, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail to follow the terms and conditions of the collective-bargaining agreement with the Union that expired on June 30, 2012, until a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL NOT implement terms and conditions of employment that are different than those in the collective-bargaining agreement that expired on June 30, 2012, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the union agrees to changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union for a new contract for you in the following unit and, if an understanding is reached, embody the understanding in a signed agreement.

> All foremen, journeymen mechanics, carpenters, bench hands, machine men, cabinet makers, model makers, sprayers, varnishers, wood finishers, wood carvers, and turners, kalamein men, apprentices, helpers, unskilled and semi-skilled production workers, metal workers and all other employees doing production and maintenance work, except a caretaker of a building.

WE WILL restore, honor, and continue the terms and conditions of the contract with the Union which expired on June 30,

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2012, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL rescind the unilateral changes to your terms and conditions of employment until such time as we and the Union have bargained in good faith to an agreement or impasse on your terms and conditions of employment.

WE WILL make you whole for any loss of earnings and other benefits you may have suffered as a result of our unlawful actions, with interest.

WE WILL make all contractually-required benefit fund contributions, if any, that have not been made to fringe benefit funds on your behalf and reimburse you for any expenses ensuing from our failure to make the required payments, with interest.

STEIN INDUSTRIES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-134711 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.