Noah's Ark Processors, LLC d/b/a WR Reserve *and* United Food and Commercial Workers Local Union No. 293. Case 14–CA–255658

April 20, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

On May 27, 2021, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

Background

The parties have been involved in negotiations for a new contract since early 2018, with the first round of negotiations lasting approximately 10 months between 2018 and 2019. The Respondent's conduct during that round of negotiations resulted in an injunction, contempt findings, sanctions, and unfair labor practice charges.

On January 27, 2021, the Board affirmed an administrative law judge's findings that, during the 2018 to 2019 round of negotiations, the Respondent, among other things, bargained in bad faith and declared impasse and imposed a final offer without a valid impasse.[2] See *Noah's Ark Processors, LLC d/b/a WR Reserve*, 370 NLRB No. 74 (2021) (*NAP I*), enfd. 31 F.4th 1097 (8th Cir. 2022).[3]

As a result of a May 10, 2019 Section 10(j) injunction related to the 2018 to 2019 round of negotiations, the parties met for court-ordered bargaining on three occasions in July and August 2019. With very little progress made during those sessions, the Region filed a motion with the court alleging that the Respondent was violating the Section 10(j) injunction. On October 17, 2019, the court granted the Region's motion and issued orders finding the Respondent in contempt and,[4] on November 1, 2019, imposed sanctions and established a purge plan requiring the Respondent to offer bargaining dates and prepare status reports after each session.

In accordance with the court's purge plan, the parties met for a third round of bargaining on six occasions in November and December 2019 and once in January 2020.

[1] We correct certain errors in the judge's analysis. First, the judge erroneously found that the Respondent misled the Union by stating that a claim for breach of the parties' contract could be brought and litigated in state court if the contract did not have an arbitration provision. State and federal courts have concurrent jurisdiction to adjudicate the merits of such a claim brought under Sec. 301 of the Labor Management Relations Act. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Second, the judge inadvertently stated that the Union modified its position on funeral leave on December 9, 2019; it is undisputed that the Union did so on November 26, 2019. Finally, the judge inadvertently included the phrase "at its Hastings, Nebraska facility" when describing the unit here. There is no record evidence that the parties ever included that phrase in the unit description, nor did the Board use it when describing the unit in *Noah's Ark Processors, LLC d/b/a WR Reserve,* 370 NLRB No. 74 (2021) (*NAP I*), enfd. 31 F.4th 1097 (8th Cir. 2022).

[2] In addition to bargaining in bad faith, declaring impasse, and imposing a final offer without a valid impasse, the Respondent also: threatened employees with discharge for engaging in protected concerted activities; told employees they were terminated for engaging in protected concerted activities; threatened to call the police because employees engaged in protected concerted activities; coerced employees into signing preprinted forms prohibiting disclosure of their employment information without their written consent; failed and refused to deduct and remit dues to the Union pursuant to valid, unexpired, and unrevoked checkoff authorizations during the term of any collective-bargaining agreement; coercively interrogated employees about whether they had received a subpoena from the National Labor Relations Board; coercively interrogated employees about their union activities; coercively interrogated employees about their communications with agents of the National Labor Relations Board; told employees that they must meet with a company attorney before meeting with an agent of the National Labor Relations Board investigating unfair labor practices filed against the Respondent; discharged employees for engaging in protected concerted activities; bypassed the Union and dealt directly with unit employees regarding their terms and conditions of employment; changed the terms and conditions of employment of unit employees by granting wage increases and implemented a new wage system without first notifying the Union and giving it an opportunity to bargain; and changed unit employees' hourly wage rates and paid them wages contrary to the parties' collective-bargaining agreement without the Union's consent. *NAP I*, supra.

[3] To remedy the bargaining violations, the *NAP I* Board ordered the Respondent to, among other things: (1) on request, bargain with the Union in good faith and at reasonable times on the terms and conditions of employment for unit employees and, if an understanding is reached, embody the understanding in a signed agreement, with bargaining sessions being held a minimum of 24 hours per month for at least 6 hours per session or, in the alternative, on another schedule to which the Union agrees, and submit written bargaining reports every 30 days to a compliance officer; and (2) hold a meeting during work hours and have the notice read in English and Spanish by a high-ranking management official in the presence of a Board Agent and an Agent of the Union if the Region or Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking management official and, if the Union so desires, the presence of a Union agent. See *NAP I*, supra at slip op. at 7–9.

It is not apparent from the record whether the Respondent has complied with the Board's order.

[4] *Sawyer v. Noah's Ark Processors, LLC*, 2019 U.S. Dist. LEXIS 180011 (D. Neb. 2019).

During the November 11, 2019 session, in which the Respondent was represented by CEO Fischel Ziegelheim and attorney Jerry Pigsley, the parties exchanged proposals. The Respondent renewed a regressive proposal it offered earlier in the year and proposed removing additional employee benefits and union rights. During the January 13, 2020 session, in which the Respondent was represented by Pigsley, the Respondent presented a proposal that it declared to be its last, best, and final offer. The proposal included a final offer the Respondent had proposed in January 2019, to which the Union had objected, and language allowing management to unilaterally increase pay rates during the contract. The proposal also included the removal of binding arbitration from the grievance provision; additional cuts to various types of paid time off; the elimination of multiple articles related to safety; and the creation of new management rights to subcontract any existing operation, to assign unit work to a non-unit foreman, and to change work rules unilaterally. In an email dated January 14, 2020, the Respondent advised the Union that it would consider the parties to be at impasse if the final offer was not accepted. The Union replied that it was willing and able, and desired, to continue negotiations. Ultimately, the Union declined to accept the final offer and, on January 24, 2020, the Respondent formally declared that the parties were at impasse. Sometime shortly thereafter, the Respondent implemented its last, best, and final offer. The Union again filed unfair labor practice charges alleging that the Respondent bargained in bad faith by unlawfully declaring impasse and unlawfully implementing its last, best, and final offer.

The judge found that, looking at the totality of the circumstances, the Respondent bargained in bad faith. The judge relied on the following factors: (1) deeply regressive proposals; (2) unwillingness to consider even minor changes; (3) general unwillingness to consider most other union proposals; (4) adherence to most of its own initial proposals without modification;[5] (5) unwillingness to wait for the Union to make all of its proposals; and (6) the Respondent's wage proposal. The judge further found that the Respondent failed to demonstrate the existence of a valid, good-faith impasse and that its implementation of the second final offer was therefore unlawful. To remedy the above violations, the judge recommended ordering the Respondent to, among other things: (1) on request, bargain with the Union about unit employees' terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement; and (2) hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the notice will be read to employees in both English and Spanish by CEO Fischel Ziegelheim or, at the Respondent's option, by a Board agent in Ziegelheim's presence.

Analysis

The key issue before the Board is whether the judge correctly concluded that the Respondent was bargaining in bad faith prior to declaring impasse in January 2020. On that basis, the judge concluded that the Respondent had not reached a valid overall impasse and thus violated the Act by implementing its proposals. We agree.

The essence of bad-faith bargaining is a purpose to frustrate the possibility of arriving at any agreement. In determining whether an employer has bargained in bad faith, the Board employs a "totality of the circumstances" test. "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or if it is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

Based on the totality of the circumstances, we find, like the judge, that the Respondent bargained in bad faith with the Union over a successor contract during the third round of bargaining, which occurred between November 2019 and January 2020.[6] In doing so, we emphasize that although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine a party's proposals "to determine, not their merits, but 'whether in combination and by the manner proposed they evidence an intent not to reach agreement.'" *Altura Communication Solutions, LLC*, 369 NLRB No. 85, slip op. at 4 (2020) (quoting *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993), enfd. 848 Fed.Appx. 344 (9th Cir. 2021)).

We agree with the judge that the Respondent's deeply regressive proposals, unwillingness to consider minor changes proposed by the Union (without explanation), unwillingness to consider most of the Union's proposals, adherence to most of its initial proposals without modification, unwillingness to wait for the Union to even make all of its proposals, and its discretionary wage proposal are,

[5] The judge mistakenly cited to *Atlas Guard Service*, 237 NLRB 1067 (1978), as holding that an employer violates the National Labor Relations Act when it "would only reach agreement on its own terms." Although the Board has long held that a "party who enters into bargaining negotiations with a 'take-it-or-leave-it' attitude violates its duty to bargain," *General Electric Co.*, 150 NLRB 192, 194 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970), the case cited by the judge does not so hold or otherwise address the issue.

[6] See, e.g., *Overnite Transportation Co.,* 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991) (applying totality of the circumstances test to bad-faith bargaining allegation).

taken together, evidence of bad faith.[7] Additionally, the Respondent's refusal to include an arbitration provision, while demanding a no-strike provision (and other broad management rights) also suggests bad faith. Looking at the totality of the circumstances, we adopt the judge's finding that these actions by the Respondent support a finding of bad faith.

In light of our adoption of the judge's finding of bad faith, we also adopt the administrative law judge's findings that the Respondent unlawfully declared impasse and implemented a last, best, and final offer in the absence of a valid impasse.[8]

AMENDED REMEDY

Despite having been found to have violated multiple provisions of the Act in an earlier proceeding, having been the subject of a successful injunction action in the federal district court, and having been found in contempt of court, the Respondent has continued to engage in some of the same unlawful activity. By its actions, the Respondent has made plain its open hostility toward its responsibilities under the Act, a hostility that by now must be obvious to the Respondent's employees. Under these circumstances, the Board must carefully consider what remedies are necessary and appropriate to remedy the Respondent's misconduct and to ensure that its employees understand their rights under the Act and feel free to exercise them going forward, despite what has come before.

In addition to the Board's standard remedies for the violations found in this case, the judge has recommended and justified additional remedies, specifically compensating the Union for all bargaining expenses from November 11, 2019 through the date in the future when good-faith negotiations begin, and a reading of the notice to employees by CEO Fischel Ziegelheim, or at the Respondent's option, by a Board agent in his presence. We agree with the judge that these remedies are warranted here.[9]

We have also modified the judge's recommended remedy to include the same bargaining-schedule, progress-

[7] The judge erroneously found that the Respondent's pursuit of a wage proposal that gave it the unilateral right to increase pay without regard to definable objective procedures and criteria is unlawful in and of itself. However, the cases cited by the judge merely hold that it is the unilateral implementation of such a discretionary wage proposal, even after reaching a valid overall impasse, that is unlawful, not the proposal itself. See, e.g., *McClatchy Newspapers*, 321 NLRB 1386, 1390–1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997). While the wage proposal is not, in and of itself, per se unlawful, "[a]n inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract." *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005). In this case, as the judge found, the Respondent's discretionary wage proposal, advanced in conjunction with the elimination of arbitration, the continuation of the no-strike clause, and insistence on a broad waiver and management rights, was part of such an unlawful bargaining effort. In any event, we also agree with the judge that even without consideration of the wage proposal, the Respondent's bad-faith bargaining is amply demonstrated on this record.

[8] In so finding, we reject the Respondent's single-issue impasse argument, as it is precluded by the bad faith finding.

[9] We further note that the Respondent failed to raise particularized exceptions to any of the remedies recommended by the judge. Because the Respondent failed to raise a particularized exception to the recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007) (citing *Heritage Container*, 334 NLRB 455 fn. 4 (2001), and *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (noting that, in the absence of particular exceptions, the Board may issue an affirmative bargaining order without specifically stating the basis for such)).

As to the notice reading, our colleague agrees that a reading is warranted but would not order that it be done by CEO Ziegelheim or by a Board agent in Ziegelheim's presence. We find no merit in his objections, as we explain below in Sec. B.2.

As to bargaining expenses, we agree with the judge that the Respondent's "'unusually aggravated misconduct'" has "'infected the core of [the] bargaining process to such an extent that [its] effects cannot be eliminated by the application of traditional remedies[.]" *Bemis Co.*, 370 NLRB No. 7, slip op. at 4 (2020) (quoting *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997)). Here, as in *Bemis Co.*, "an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.… [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses." *Bemis Co.*, supra (citing *Frontier Hotel*, supra at 859). In reimbursing the Union, the Respondent shall include reimbursement for any lost wages the Union paid to employee bargaining committee members for bargaining conducted during working hours. See *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 371 NLRB No. 118, slip op. at 2 (2022), and cases cited therein. Further, to the extent any employee bargaining committee members lost earnings because of bargaining during working hours and were not reimbursed by the Union, the Respondent shall make the employees whole for those losses. See id. at slip op. at 2–3, and cases cited therein. We order these remedies because the Union and any of its employee bargaining committee members expended significant time and expense bargaining with a respondent which bargained in bad faith. Consequently, the Union was denied the benefit of the good-faith bargaining required by the Act. It expended resources and funds, and employees may have sacrificed wages, to engage in bargaining that, because of the Respondent's unfair labor practices, was denuded of its statutory purpose. Accordingly, we find reimbursement to the Union of bargaining expenses, including any lost wages the Union paid to employees for bargaining conducted during working hours and compensation to the Union's employee bargaining committee members for wages lost during time spent bargaining instead of working, necessary to ensure that the Union and its representatives at the bargaining table are made whole for the Respondent's unlawful bargaining. While we agree with the judge that an order requiring bargaining expenses is warranted, we modify the duration of this remedy and order the Respondent to reimburse the Union for bargaining expenses through January 24, 2020, the date the Respondent formally declared that the parties were at impasse, and on that basis, unlawfully implemented its proposal. The Respondent's unlawful bargaining conduct continued through that date. We leave it to compliance to determine the bargaining expenses reimbursable to the Union.

report, and bilingual requirements as our remedy in *NAP I*. See *Noah's Ark Processors, LLC*, above at slip op. at 7–8.[10] Where, as here, a respondent continues a course of unlawful conduct that already warranted such remedies, the conduct's continuation—and its attendant continuing deleterious effect on employee rights—typically calls for, at a minimum, all the remedies previously ordered.

Additionally, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), we have amended the make-whole remedy and modified the judge's recommended order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the Respondent's unlawful implementation of its last, best, and final offer in the absence of an impasse.

Lastly, we have concluded that remedies beyond those ordered by the judge are appropriate. We have broad discretion to exercise our remedial authority under Section 10(c) of the Act even when no party has taken issue with the judge's recommended remedies or requested additional forms of relief.[11] That statutory provision directs us, upon finding a violation, to require "such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act." We tailor the remedies to the violations, including their nature, severity, and extent.[12] Among our remedial goals is to reaffirm to employees their Section 7 rights and to reassure them that the Respondent must respect those rights in the future.[13]

Today, as further discussed below, we explain the potential remedies the Board will consider in cases involving respondents who have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct. Although the Board has previously ordered these remedies in cases where appropriate to do so, we more fully describe the role each remedy plays in fulfilling the Act's overall remedial scheme. In addition, we describe why certain remedies, when ordered in combination, may encourage compliance with the Act and offer better protection of employees' Section 7 rights.

A.

To begin, we modify the judge's recommended order to include a broad cease-and-desist provision, which, in addition to the cease-and-desist provisions directed at specific violations of the Act, prohibits the Respondent from "in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

The Board in *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), held that a broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Here, we find that each alternative prong of this standard is met: the Respondent has both shown a "proclivity to violate the Act" and has engaged in "such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Id.

First, the record shows that the Respondent violated the Section 10(j) injunction related to the 2018–2019 negotiations, but despite facing sanctions and a "purge plan" from the court, simply chose to again refuse to bargain in good faith. It offered regressive proposals, refused to consider even minor changes or the Union's proposals, adhered largely to its initial positions, and implemented its final offer without a lawful impasse. These violations seriously affected the entire unit by undermining their chosen bargaining representative, violating their right to have the Union negotiate on their behalf, and demonstrating to them in no uncertain terms that the Respondent was willing to ignore a court order in order to violate their rights. We find this more than satisfies the *Hickmott* standard of misconduct that is so "egregious or widespread" as to

[10] The bargaining-schedule and progress-report requirements clearly go hand-in-hand, and the Board typically orders them together. See, e.g., *Serenethos Care Center LLC*, 371 NLRB No. 54, slip op. at 2–3 (2022); *NAP I*, 370 NLRB No. 74, slip op. at 7, enfd. 31 F.4th 1097 (8th Cir. 2022); *Bemis Co.*, 370 NLRB No. 7, slip op. at 4 (2020); *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 23 (2018), enfd. 2019 WL 12276113 (D.C. Cir. 2019); *UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111, slip op. at 4 (2018); *Professional Transportation Inc.*, 362 NLRB 534, 536 (2015); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011), enfd. mem. 540 F. App'x 484 (6th Cir. 2013). Where the Board has ordered only one of the two remedies, it has not explained why. See, e.g., *J.G. Kern Enterprises, Inc.*, 371 NLRB No. 91, slip op. at 9 (2022); *Thermico, Inc.*, 364 NLRB 1830, 1833 (2016); *Camelot Terrace*, 357 NLRB 1934, 1942 (2011), enfd. in rel. part. 824 F.3d 1085, 1095 (D.C. Cir. 2016). Ordering the two remedies together is the better practice, which the Board intends to follow going forward.

[11] *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001), enfd. mem. No. 01-1513 (D.C. Cir. 2003) (consent judgment); *WestPac Electric*, 321 NLRB 1322, 1322 (1996); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

[12] See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938); *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (Board may impose additional remedies "where required by the particular circumstances of a case").

[13] See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007); see also *Tiidee Products, Inc.*, 196 NLRB 158, 159 (1972), enfd. sub nom. *International Union of Elec., Radio & Mach. Workers, AFL–CIO v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1974).

demonstrate a "general disregard for the employees' fundamental statutory rights." Id.[14]

Moreover, the Respondent's repeated misconduct within only a short length of time provides ample evidence of its "proclivity to violate the Act," the second basis for a broad order under *Hickmott*. Id. In addition to its violations here, we note that, as detailed in *NAP I*, the Respondent committed numerous serious violations in 2018 and 2019. These include bargaining in bad faith, declaring impasse, unlawfully imposing a final offer, threats to employees, coercion, failure to process union dues, interrogations (including about communications with the Board), unilateral changes to terms and conditions of employment, discharges for protected activity, and failure to pay employees as agreed in its collective-bargaining agreement. Only months later, it engaged in the conduct at issue in this case. The Respondent's actions therefore demonstrate its habitual violation of the Act, to the point of seeming to consider it appropriate to do so.[15]

As described above, where a respondent's conduct meets the standard for a broad order—i.e., where a proclivity to violate the Act has been established or where widespread or egregious misconduct demonstrates a general disregard for employees' Section 7 rights—the Board must order commensurate remedies to "effectuate the policies of th[e] Act" (in the words of Section 10(c) of the Act). Cases in which the broad order standard is met necessarily involve circumstances that would lead employees to reasonably believe that the respondent does not respect their rights. In such circumstances, employees will reasonably fear that the respondent will continue to disregard the Act; consequently, to ensure that they are not chilled from exercising their rights under the Act, employees will need extra information about those rights and credible assurances that the respondent is bound by the Act and not free to violate employees' rights.

To bring greater consistency to the Board's exercise of its remedial discretion, and to better ensure that all appropriate remedies are ordered in any given case, we take this opportunity to present a non-exhaustive list of potential remedies that the Board will consider when a respondent has engaged in unlawful conduct warranting a broad order. We do not imply that only these listed remedies may be warranted. Nor do we intend to establish a rule that each of these remedies is always necessary where the broad-order standard is met. Nor do we hold that these remedies are appropriate *only* in that situation.[16] Instead, our aim is to ensure that in every case involving the type of repeated or serious misconduct recognized as permitting a broad order, the Board will consider a full range of established, potential remedies, and will not inadvertently stop short, at the expense of protecting both employees' exercise of Section 7 rights and their willingness to exercise those rights, in determining which remedies to order. The Board's exercise of remedial discretion, in short, should be reasoned and regular, even while it takes into account the particular circumstances of a case.[17]

While we will continue to evaluate the nature, severity, and extent of a respondent's violations when determining which remedies are appropriate in particular cases, when a broad order is appropriate, the Board will consider at least the following established remedies, ordered in addition to its standard remedial provisions, as some or all of them may be particularly well-suited to dispelling the chilling effect of repeated or serious misconduct, especially when ordered together.[18]

Explanation of Rights: In cases "involving egregious and pervasive unfair labor practices," we have at times ordered an explanation of rights that "ensures that employees are fully informed of their rights, mitigates the chilling effect of past unlawful conduct, and may help prevent further unlawful conduct." *David Saxe Productions*, 370 NLRB No. 103, slip op. at 6 (2021). "This is especially true when [ ] the rights of so many employees have been broadly suppressed for an extended period of time and in numerous ways." *HTH Corp. d/b/a Pacific Beach Hotel*, 361 NLRB 709, 714 (2014), enfd. in rel. part sub nom. *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). This document, which may be posted, read aloud along with the notice, and/or mailed, informs employees of their rights in a more comprehensive manner, as is appropriate given the greater severity of the chilling effect on their willingness

[14] While the Respondent's actions easily satisfy the standard of misconduct that is so "egregious or widespread" as to demonstrate a "general disregard for the employees' fundamental statutory rights," *Hickmott*, above at 1357, we do not mean to suggest that only misconduct as serious as the Respondent's will meet the standard. In considering whether a broad order is warranted, the Board will remain guided by longstanding precedent applying *Hickmott*.

[15] Again, while we find that the Respondent's repeated disregard for employee rights demonstrates its clear "proclivity to violate the Act," *Hickmott*, above at 1357, we do not mean to imply that a broad order is only available in cases involving the same degree of habitual recidivism at issue in this case.

[16] Thus, contrary to our colleague's assertion, we have not made a broad order the "predicate" for any of these remedies.

[17] Our colleague objects to this portion of our decision as "serv[ing] no real purpose." We disagree. There is value both in promoting consistency and in providing parties with notice of the remedies the Board will consider in future broad order cases. This notice gives parties multiple opportunities to advocate for (or against) certain remedies they know the Board will consider once the case is before them.

[18] Nothing in this decision should preclude the General Counsel from seeking, or the judge or Board from ordering, other remedies in addition to those described here based on the facts in a particular case.

to exercise those rights in the face of repeated, egregious, or widespread unfair labor practices. Broad order cases, by their very definition under *Hickmott Foods*, above, will often satisfy the criteria for an explanation of rights. These cases particularly necessitate such detailed information because they involve respondents that have been found to violate and disregard employees' rights in numerous, egregious, or repeated ways. Mitigating the chilling effect of the unfair labor practices on employees and ensuring that they understand their rights is a part of making them whole after the widespread violations they have experienced. The explanation of rights does this in an accessible manner.

Notice/Explanation of Rights reading: The Board has ordered the notice-reading remedy in cases where the respondent's unlawful conduct has been "sufficiently serious and widespread" to ensure that the content of the notice is disseminated to all employees.[19] The same considerations are present in broad order cases.[20] Notice reading is a way to let in a "warming wind of information" to not only alert employees to their rights but also impress upon them that, as a matter of law, their employer or union must and will respect those rights in the future.[21] Reading the notice (and any explanation of rights) aloud disseminates that information through the work force in a clear and effective way. This awareness, in turn, means that respondents will be less able to violate the Act unnoticed as a matter of course. By the nature of their violations, broad-order respondents have either sent a message that they have little regard for employees' statutory rights or the Board's authority, or their egregious and widespread violations have shown their determination to chill employees from exercising their rights and impose adverse consequences on them for doing so. Notice reading offers employees a chance to hear, in a formal setting and in the presence of other employees and a Board agent, that their rights have value and that the Board takes those rights seriously.[22] Notice reading also underscores for the respondent that, under a broad order, it cannot simply find another more creative way to violate the Act. Both results help undo the chill caused by the broad-order conduct on employees' willingness to exercise their rights. The Board may also consider including a provision allowing a union agent to attend the notice reading in cases where the union is a charging party and/or the certified bargaining representative.[23] In cases where a particular high-ranking manager or corporate official was directly responsible for violations that justify the reading, the Board has required that individual (or, at the individual's election, a Board agent in that individual's presence) to read the notice in order to make the remedy fully effective and provide a counterweight to the significant chill they have created by their unlawful conduct.[24] If warranted, that provision should also be considered in broad order cases for the same reason.

In broad order cases where a reading of the notice (and/or any explanation of rights) is ordered, we will also require the Board agent to distribute the notice and explanation of rights to employees at the meeting before the reading.[25] Such distribution will facilitate employee comprehension as employees will be able to follow along as the notice and explanation of rights are read aloud. Lastly,

[19] *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (citing *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003)), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).

[20] See generally *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 6 (2021) (finding a broad order appropriate based on the egregiousness of the respondent's unfair labor practices and, "for the same reason," ordering notice reading). See also *ADT, LLC*, 371 NLRB No. 67 (2022) (imposing broad order and notice reading on recidivist respondent that committed multiple serious unfair labor practices); *Apex Linen Service, Inc.*, 370 NLRB No. 75, slip op. at 3, 48 (2021) (broad order and notice reading based in part on respondent's recidivism); *Stern Produce Co., Inc.*, 368 NLRB No. 31, slip op. at 5 (2019).

[21] E.g., *Ozburn-Hessey Logistics*, 366 NLRB No. 177, slip op. at 13–14 (2018); *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969) ("[Notice reading] is an effective but moderate way to let in a warming wind of information and, more important, reassurance"); *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 930 (D.C. Cir. 2005) ("[Notice reading ensures] that employees will fully perceive that [the employer] and its managers are bound by the requirements of the [Act]").

[22] Additionally, Member Prouty believes that notice reading, and the concomitant presence of a Board agent, provides the best opportunity for employees to gain a better understanding of their rights in light of the unfair labor practices that have been found by asking clarification questions. As such, in broad order situations, where the respondent has shown itself to have a proclivity to violate the Act and/or has engaged in egregious or widespread misconduct, Member Prouty would have Board agents who are present at notice readings make themselves available, and ideally announce prior to the reading that they will be available, to answer employees' questions after the reading. Member Prouty would also require the respondent to allow employees to have their questions answered after the reading, even if those employees are on the clock. Member Prouty finds that providing employees with the opportunity to seek a better understanding of the violations, remedies, and how it impacts their work lives from a neutral party—the Board agent, as outlined above—effectuates the policies of the Act.

[23] *Ozburn-Hessey*, above, slip op. at 13.

[24] *Amerinox Processing, Inc.*, 371 NLRB No. 105, slip op. at 3 (2022); *AdvancePierre Foods*, 366 NLRB No. 133, slip op. at 5 (2018); *Ingredion, Inc. d/b/a Penford Products co.*, 366 NLRB No. 74, slip op. at 1 fn. 2 (2018); *Domsey Trading Corp.*, 310 NLRB 777, 779–780 (1993), enfd.16 F.3d 517 (2d Cir. 1994).

[25] The Board in some notice-reading cases has required the respondent to give each supervisor a copy of the notice and any explanation of rights at the reading. See *Ozburn-Hessey*, above at slip op. at 14; *Pacific Beach*, above at 716. While requiring distribution to employees is an expansion of that remedy, we find it is warranted not only to acknowledge the chill that employees face in broad order situations, but also to provide them with the reassurance and information they need in the most safe and comprehensible manner possible.

it offers employees a chance to retain the documents for future reference and to review them in private free from their employer's or union's possible observation should they choose to do so.[26] A copy of the notice and explanation of rights distributed by the Board agent to all attendees is a neutral method of providing them with the information they need to understand their rights and the offending party's obligations.[27]

Notice/Explanation of Rights mailing: Similarly, mailing the notice and explanation of rights not only reaches employees and former employees who would not see a posted document or be able to attend the reading, but also allows them to "privately review the documents free from [a] [r]espondent's potential scrutiny for as long as necessary to understand their rights and as often as necessary to reinforce their rights in the future." *Pacific Beach*, 361 NLRB at 715. In broad order cases, which involve multiple types of violations, violations that pervade a workplace, or a respondent with a proclivity to violate the Act, the privacy accorded employees by a mailing will help to rebuild employees' confidence in and understanding of their rights without fear of retaliation or calling attention to their choice to accept and view the notice and explanation of rights (or refrain from doing so). A mailed notice that they can keep and refer to in the future also serves as a practical document for employees who have seen a broad order respondent repeatedly or egregiously trample their rights, and who now particularly need to be aware of the protections they have under the broad order in case that respondent continues its unlawful behavior.[28]

Presence of supervisors/managers at the notice/Explanation of Rights reading: In cases where supervisors have been directly involved in the unfair labor practices that necessitate a broad order, the Board will consider also requiring their presence at the notice reading (and reading of the explanation of rights, if ordered). Supervisors have a significant role in an employer's compliance with the Act. Because they are frequently the most direct links between employees and management, the conduct of supervisors and managers immediately influences employees' confidence in their rights under the Act—and their understanding of their employer's or union's willingness to respect those rights. They may have been the means by which the respondent engaged in the unfair labor practices that support a broad order. They may have been a part of a culture that threatened employees' free exercise of their rights to engage in protected activity or to refrain from doing so. Therefore, their attendance at the notice reading not only "convey[s] a message to employees that their supervisors are just as responsible as upper management for adhering to the law, it also exposes the supervisors to information concerning their own substantive obligations under the Act." *Pacific Beach*, above, at 716. Supervisor attendance means that those with whom employees will have the most direct contact, and who may have been directly responsible for the violations, have been made aware, in no uncertain terms, of the employees' rights, the respondent's violations, and the obligations to not only cease the unlawful conduct but also to refrain from infringing on those rights in other ways in the future.[29] After the kinds of violations that prompt a broad order, this information helps undo the chill that settles over employees as they move forward in their work with, potentially, the very same individuals who harmed them in the past. It also means that supervisors cannot in future claim ignorance or non-involvement with infringements on employees' protected rights. To ensure that records exist to show the supervisors' compliance and to reassure employees that they will not simply fail to appear for the reading as ordered, the Board may also consider ordering the respondent to retain sign-in sheets recording the presence of each supervisor at the reading. The Board may also include a requirement that the respondent give each supervisor a copy of the notice and any explanation of rights at the reading, and that it maintain proof that this has been done.[30]

Notice signing: We have previously ordered a responsible representative of both union and employer respondents to sign the notice to underscore their obligation to cease their unlawful conduct and respect employees' rights under the Act.[31] In broad order cases, a notice signed by a person who bears significant responsibility in the

[26] This remedy is particularly appropriate where the allegations that support the broad order include surveillance or threat-based violations. Such unfair labor practices reasonably leave employees hesitant to view a posted notice where the respondent may monitor employees viewing the notice.

[27] Member Prouty would make the distribution to employees of copies of the notice at meetings where it is to be read a requirement in all instances where the Board orders a notice-reading remedy.

[28] *Amerinox*, above, slip op. at 4; *Pacific Beach,* above, at 714–715.

[29] *Ozburn-Hessey*, above at slip op. at 14 (requiring supervisor attendance at notice reading and observing that "the persistent repetition of the same unfair labor practices by different supervisors and managers shows that the Respondent has not sufficiently trained its managers and supervisors in their duty to abide by the Act's requirements.")

[30] *Ozburn-Hessey*, above at slip op. at 14; *Pacific Beach*, above at 716.

[31] E.g., *Fruin-Colnon Corp.*, 227 NLRB 59 (1976) (ordering the union respondent's named agent to personally sign the notice), enfd. 571 F.2d 1017 (8th Cir. 1978); *S.E. Nichols, Inc.*, 284 NLRB 556 (1980) (ordering the notice to be signed by the employer respondent's president, district supervisor, and the highest regional manager of the store in which the notice is posted), enfd. 862 F.2d, 952 (2d Cir. 1988); *Pacific Beach*, above at 716 fn. 27 (ordering the employer respondent's president to sign the notice); *Three Sisters Sportswear Co.*, 312 NLRB 853, 853 (1993) (affirming the judge's recommended remedy ordering the respondent's

respondent's organization helps reassure employees that the respondent is officially committed 'from the top down' to compliance with the Board's order—an important restorative component when systematic egregious or repeated violations reasonably leave employees with the impression of a culture of hostility toward protected activity.[32] Moreover, we find this remedy particularly appropriate where the individual ordered to sign either committed the unfair labor practice found or is viewed by employees as the face of the conduct underlying the violations.[33]

Publication: A publication remedy requires a respondent to publish the notice and any explanation-of-rights document in "local publications of broad circulation and local appeal."[34] *Pacific Beach*, above, at 715. As courts have long recognized, "where the violations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in a warming wind of information and, more important, reassurance." *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 12 (1st Cir. 1976) (internal quotations omitted), cert. denied 429 U.S. 1039. We have ordered publication in egregious cases, in both broad order and non-broad order situations, and will continue to do so as necessary to remedy the harms found. However, we find the publication remedy particularly warrants consideration in broad order situations where there may be many employees affected by any number of unfair labor practices over a potentially lengthy period of time by an employer with a proclivity to violate the Act. In those cases, a respondent may not have current mailing information for former employees who will not see a posted notice.[35]

Extended posting of the notice and Explanation of Rights: Although the Board's standard notice posting period is 60 days, we have ordered extended posting periods to better mitigate the chill of what the Fifth Circuit described as the "lore of the shop." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978). In broad order cases, particularly those involving coercion, threats of facility closure, discharge of union supporters, refusals to bargain or recognize the union, and other repeated or flagrant violations, a respondent's unfair labor practices are often so pervasive that their memory and impact on employees cannot be quickly erased. To the contrary, such violations are likely to continue to erode employees' willingness to exercise their rights for a period potentially extending into years, with the information about what the respondent is willing to do transmitted to new hires by existing employees who want to warn them of the risk of infringement on their protected rights. Even employees who were not direct targets will be likely to have experienced a chill in their willingness to exercise rights from watching coworkers face the consequences of protected activity. This is especially true for broad order cases, when the effects of the unfair labor practices linger longer because of the respondent's repeated violations or because of the widespread or egregious nature of the conduct.[36] The length of time for the extended posting will necessarily vary depending on the facts of each case.[37]

Visitation: Visitation permits the Board to inspect a respondent's bulletin board to ensure that the notice is posted in accordance with our order. Visitation also permits the Board to inspect the records of a respondent, and to take statements from its officers and employees (and others) for the purpose of determining or securing compliance with our orders, including, where appropriate, compliance with the procedures we herein establish for notice readings, including distribution of the materials to be read and attendance by supervisors (where ordered).[38]

chief executive, who was responsible for and directly implicated in most of the violations found, personally sign the notices), enfd. 1995 U.S. App. LEXIS 12208 (D.C. Cir. Apr. 28, 1995); *Fieldcrest Cannon*, 318 NLRB 470, 473 (1994), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (ordering that notice be personally signed by vice president of human resources).

[32] This directive, which does not require the signing to occur in employees' presence, is consistent with the Board's practice of having the notice signed by an authorized representative. It is reasonable for the Board to direct the individual involved (and considered by employees to have been involved) with the unfair labor practices, to attest to the Respondent's commitment to righting its wrongs.

[33] Compare *Avondale Industries, Inc.*, 329 NLRB 1064, 1068 (1999) (declining to order that the respondent's president or vice president personally sign the notice where they did not personally commit any unfair labor practices, but noting that the Board "has imposed this personal requirement on an executive of a flagrant wrongdoer in circumstances where it is necessary to dispel the atmosphere of intimidation that the executive personally created").

[34] Publication should be understood to include not only the print version of the publications, but also the corresponding electronic versions.

[35] See *Electrical Workers Local 3 (Northern Telecom)*, 265 NLRB 213, 219 (1982), enfd. 730 F.2d 870, 880–881 (2d Cir. 1984) (citing cases); *Haddon House Food Products,* 242 NLRB 1057, 1060 (1979), enfd. in rel. part sub nom. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981), cert. denied 454 U.S. 827 (1981), and cert. denied sub nom. *Haddon House Food Products, Inc. v. NLRB*, 454 U.S. 837 (1981).

[36] See *Ozburn-Hessey*, above slip op. at 13.

[37] We have previously ordered extended notice posting for as long as 3 years, but do not discount the possibility that a longer time may be appropriate. See *Ozburn-Hessey*, above slip op. at 13; *Pacific Beach*, above at 714. Similarly, we recognize that a shorter period may also be warranted and sufficient to remedy the violations found. E.g., *UPMC*, 366 NLRB No. 185, slip op. at 7–8 (2018) (ordering an extended posting period of 120 days).

[38] See, e.g., *Pacific Beach*, above at 717; *Hilton Inn North*, 279 NLRB 45 (1986), enfd. 817 F.2d 391 (6th Cir. 1987); *Cherokee Marine Terminal*, 287 NLRB 1080 (1988); *299 Lincoln Street,* 292 NLRB 172, 175 (1988); *El Mundo Corp.*, 301 NLRB 351 (1991). Contrary to our dissenting colleague, we do not read the Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), to suggest that the Board's long-established visitation-clause remedy poses an issue under

Although the Board has rejected so-called standard visitation clauses, it will grant narrowly tailored visitation on a case-by-case basis "when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance" and "it appears possible that the respondent may not cooperate in providing relevant evidence unless given specific, sanction-backed directions to do so." *Cherokee Marine Terminal*, above at 1083 fn. 14.[39] The visitation remedy is particularly appropriate in conjunction with remedies that require compliance over time, such as (but not limited to) extended notice posting or record-keeping requirements.[40] In broad order cases where the often egregious or widespread nature of the violations may reasonably be found to justify a longer posting period or other ongoing remedies, a visitation order helps employees feel confident that the respondent will have to comply for the entire period and will not as easily be able to ignore its obligations under the Board's order.[41] The visitation remedy, then, is a form of support for employees to better ensure they continue to have consistent access to the information that the Board has ordered for them.[42] It will further "relieve employees of the onus of a watchdog role with respect to the Respondents' compliance, a factor we find particularly important in reducing the risk of retaliation against them and in restoring their confidence in their statutory rights." *Pacific Beach*, above at 717.

B.

Having found a broad order appropriate in this case, then, we now consider these additional remedies. For the reasons below, in addition to those ordered by the judge,[43] and the modifications and broad order we discussed above, we have carefully considered the list of established remedies already described, and we order the following remedies based on the facts before us to inform employees of their rights, restore their confidence in those rights after the Respondent's violations, and undo some of the chill to the free exercise of those rights that the Respondent has caused: (1) an explanation-of-rights document; (2) reading of the notice and explanation of rights by the Respondent's CEO Fischel Ziegelheim or a Board agent in Ziegelheim's presence, and distribution of the notice and explanation of rights at the meeting by a Board agent; (3) signing of the notice and explanation of rights by Ziegelheim; (4) mailing of the notice and explanation of rights; (5) extended posting periods for the notice and explanation of rights; and (6) visitation to ensure compliance with the extended posting period. We emphasize that in other cases, different combinations of remedies or additional remedies may be appropriate under the particular circumstances.[44]

1. An explanation of rights. In cases (like this one) involving egregious and pervasive instances of bad-faith bargaining that impact the entire unit, ordering the posting of an explanation of rights, with clear general examples of unfair labor practices that are specifically relevant to the unfair practices found in this case, ensures that employees are fully informed of their rights, mitigates the chilling effect of the Respondent's violations, and may help prevent further unlawful conduct.[45] Thus, we have attached an explanation of rights as Appendix B to this Decision and Order.[46] We order the Respondent to post the explanation of

the Takings Clause. Id. at 2079. In addition, and importantly, the visitation remedy is not to be used to search for future independent violations and must be clearly defined to meet compliance goals of specific remedies.

[39] See also *299 Lincoln Street*, above at 175 (narrow visitation clause warranted).

[40] *Pacific Beach*, above at 717 (ordering a three-year visitation period for the limited purpose of determining whether the respondents were in compliance with posting, distribution, and mailing requirements).

[41] Contrary to our dissenting colleague's assertion, our discussion of the visitation remedy here does not mean that it is presumptively warranted in all broad order cases. Nor, as he claims, is it a blanket endorsement of the remedy. Rather, as with the other remedies we outline, visitation will be considered on a case-by-case basis and ordered where appropriate in light of the facts and violations in a given broad order case.

[42] This is particularly true when an extended compliance period may cover unforeseen changes in an employer's management or a union's leadership.

[43] The judge recommended ordering the Board's standard remedies for the violations found in this case as well as additional remedies specifically compensating the Union for all bargaining expenses from November 11, 2019, through the date in the future when good-faith negotiations begin, and a reading of the notice to employees by CEO Fischel Ziegelheim, or at the Respondent's option, by a Board agent in his presence. As noted above, the Respondent failed to raise particularized exceptions to the judge's recommended remedies.

[44] For example, here we choose not to order publication because that remedy would serve no purpose not adequately addressed by the other methods of communication we order today. Nor do we order the presence of supervisors at the reading of the notice and explanation of rights, because the bad-faith bargaining violation in this case was not driven by supervisory misconduct. While we recognize—and are troubled by—the role that supervisors and managers played in the violations we found in the Respondent's earlier cases before us, those violations are not directly a part of this case. To be clear, in listing these examples, we do not impose a requirement that subsequent broad order cases include explanations of why certain remedies are not being ordered. Nor does our explanation of why we choose not to order certain remedies mean that there is a presumption in favor of awarding other remedies in broad order cases. We are merely highlighting that remedies should fit the facts of the case and noting, as an example in this case, why we find that certain remedies are not necessary here.

[45] See, e.g., *Amerinox Processing*, 371 NLRB No. 105, slip op. at 6 (2022), enfd. 2023 U.S.App. LEXIS 8442, 2023 WL 2818503 (D.C. Cir. 2023); *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 6 (2021); *Purple Communications, Inc.*, 370 NLRB No. 26, slip op. at 1 fn. 5, 57 & fn. 85 (2020); *Pacific Beach, above at* 714.

[46] Our colleague notes that the Board has rarely ordered an explanation of rights. It is true that this remedy may have been underutilized,

rights for the same period and under the same conditions as the notice, and, as discussed below, read and mail the explanation of rights to its employees. The notice and explanation of rights meet the same bilingual requirements as our remedy in *NAP I.* See *Noah's Ark Processors, LLC*, above at slip op. at 7–8.

2. Reading of the notice and explanation of rights by the Respondent's CEO Ziegelheim. We agree with the judge that notice-reading, by Ziegelheim or a Board agent in Ziegelheim's presence, is amply warranted under our existing precedent.[47] For the same reasons, we will order the explanation of rights also be read aloud by Ziegelheim or a Board agent in his presence. Where, as here, there is a recalcitrant or recidivist employer, or one who has committed widespread or egregious violations, a public reading is an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969). We also order simultaneous distribution of the notice and explanation of rights at the notice reading to facilitate employee comprehension of both documents as they hear them read.[48]

3. Signing of the notice and the explanation of rights by Ziegelheim. Ziegelheim represented the Respondent at two negotiation sessions during the most recent round of bad-faith bargaining and, as CEO, he would have been significantly involved in the creation and approval of the Respondent's positions. Because the Union understood Ziegelheim to be the Respondent's "chief negotiator," it would be clear to employees that one of the most senior members of management chose to disregard one of the Respondent's most fundamental obligations: to bargain in good faith with the employees' chosen representatives. We therefore order Ziegelheim to sign the notice and the explanation of rights. We find this remedy appropriate because the Respondent's unlawful conduct emanated from the top, and so too should the reassurances that the unlawful conduct will end.[49] Doing so will help restore employees' confidence in the Respondent's commitment, from its most senior representative, to respect the bargaining

but we find it well justified here. As we note, providing employees who have faced multiple rounds of violations with clear examples of unfair labor practices that are specifically relevant to the ones they experienced, which are unfair labor practices that go to the heart of the Act—collective bargaining, is another way in which the Board can ensure that employees are fully aware of their rights with an employer who failed to refrain from committing violations after being held accountable on at least one prior occasion.

Additionally, the underutilization of the explanation of rights remedy highlights an important aspect of our decision today: providing all interested parties with a reminder of the remedies that may be particularly appropriate in broad-order cases, with the goal of achieving greater consistency in the administration of the Act and the remediation of violations.

[47] See *Salem Hospital Corp.*, 363 NLRB 515, 515 fn. 3 (2015) ("[W]e shall order that the Board's notice be read aloud to the Respondent's employees by the Respondent's chief executive officer or, at the Respondent's option, by a Board agent in that officer's presence. We find that requiring the notice be read aloud is warranted by the serious and persistent nature of the Respondent's unfair labor practices, especially in light of its repetition of the same type of misconduct previously found unlawful"); see also *Amerinox Processing, Inc.*, 371 NLRB No. 105, slip op. at 3 (2022) (finding notice reading by a particular manager appropriate where the manager, to the knowledge of employees, was directly responsible for violations that justified the notice reading remedy), enfd. 2023 U.S.App. LEXIS 8442, 2023 WL 2818503 (D.C. Cir. 2023), and cases cited therein. The presence of a management official when a notice is read serves as a "minimal acknowledgment of the obligations that have been imposed by law" and provides employees with some "'assurance that their organizational rights will be respected in the future.'" *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (quoting *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005)), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).

While our colleague agrees that notice reading is appropriate here, he would not order the notice to be read by Ziegelheim, or by a Board agent in Ziegelheim's presence. Our colleague cites two cases—*Denton County Electric Coop., Inc. v. NLRB*, 962 F.3d 161, 174–175 (5th Cir. 2020), and *Sysco Grand Rapids, LLC v. NLRB*, 825 Fed.Appx. 348, 350 (6th Cir. 2020)—which he asserts rejected notice reading by a named individual, even where the Board-agent option is provided. Both cases are inapposite, as neither involved a recidivist employer, and *Denton* did not involve a broad cease-and-desist order. In *Denton County*, the court rejected notice reading where the employer, contrary to the Respondent herein, was not a repeat violator and the employer's conduct did not create a "chill atmosphere of fear." *Denton County Electric Coop*, supra at 174. In *Sysco Grand Rapids*, the court rejected the notice reading remedy because, among other things, the employer was not "a recidivist subject to 'broader and more stringent' Board remedies." 825 Fed. Appx. at 359.

[48] Member Prouty would also allow employees to seek clarification through a question-and-answer session with the Board agent present at the notice reading, as discussed in fn. 20.

[49] See generally *Three Sisters Sportswear Co.* 312 NLRB at 880 (citing *United Dairy Farmers' Coop*, 242 NLRB 1026, 1029 (1979), enfd. in part, remanded in part on other grounds 623 F.2d 1054 (3d Cir. 1980)), enfd. 1995 U.S. App. LEXIS 12208 (D.C. Cir. Apr. 28, 1995), and ordering the employer's chief executive, who was responsible for and directly implicated in most of the violations found, to personally sign the notices).

We disagree with our colleague's assertion that this directive raises a First Amendment compelled speech issue. Indeed, the Board has ordered in multiple cases that the notice be personally signed by a named individual (see fn. 31, supra), and our colleague cites no decision in which a court has found it to constitute compelled speech. We find this remedy to be consistent with the Board's longstanding practice of having the notice signed by an authorized representative of the respondent. It is reasonable for the Board to direct the individual involved (or considered by employees to have been involved) with the unfair labor practices—here, the Respondent's chief agent—to attest to the Respondent's commitment to righting its wrongs. Furthermore, because Ziegelheim need not sign the notice in the presence of employees, the signature requirement is far from the type of public "confession of sins" that has troubled some courts. The notice simply summarizes the violations the Board has found and the action the Respondent must take—by order of the Board—to remedy them. There is no First Amendment concern in requiring the Respondent's chief agent to commit to honoring the Respondent's legal obligations.

process as well as its assumption of the remedial obligations imposed by law.

4. Mailing of the notice and the explanation of rights. Mailing the notice and explanation of rights to each employee will reach individuals who would not otherwise see the posted and distributed documents but who were affected by the Respondent's unlawful conduct. This includes individuals who, because of the significant length of time that has passed between the violations and this decision, such as former employees, now lack access to the facility,[50] and those unable to attend the meeting at which the documents are to be read and distributed.[51] In addition, a mailing remedy will give employees who do attend the meeting a chance to review the documents in private, particularly if they are uncomfortable publicly accepting and reviewing the notice and explanation of rights in the facility in possible view of their employer. Accordingly, we order mailing of the notice and explanation of rights, in addition to ordering the Respondent to provide both documents to employees in all the ways the Respondent customarily communicates with its employees.[52] The Respondent shall mail copies of the signed notice and explanation of rights to each employee who was employed in the unit at any time since November 11, 2019 (the date of the first court ordered negotiation session during which the Respondent renewed an earlier presented regressive proposal), within the time set forth in our Order. The Respondent must maintain and make available for inspection proofs of mailings and receipts in connection with this mailing obligation.[53]

5. Extended posting periods for the notice and explanation of rights. We further find that extended posting of the notice and explanation of rights is essential to achieve the goals of making sure employees understand their rights while also helping to mitigate what the Fifth Circuit has called the chilling "lore of the shop." See *Pacific Beach,* supra at 714 (citing *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978), and noting that pervasive unfair labor practices "likely live on in employees' memories and could continue to erode employees' willingness to exercise their rights years after the actual violations"). Extended posting "also serves as a constant reminder of the

[50] See, e.g., *Amerinox Processing*, above, at slip op. at 4; *Veritas Health Services, Inc.*, 363 NLRB 963, 963 (2016) (finding a notice-mailing remedy was appropriate to effectuate the policies of the Act because "former employees lack[ed] access to respondents' facility and will not see the posted notice"), enfd. in rel. part 895 F.3d 69 (D.C. Cir. 2018); *Pacific Beach*, above (ordering a notice-mailing remedy where the employer's violations were "unquestionably deliberate, targeted, and egregious" and the notice would reach individuals who no longer had access to the employer's facility but who were affected by the violations).

[51] "The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act." *Bill's Electric*, 350 NLRB 292, 297 (2007).

[52] Our colleague claims that the Board "does not order notice mailing outright unless the respondent has *already* gone out of business or closed [the facility where the unfair labor practices were committed], or other circumstances would make notice posting futile," and notes that the facility involved herein "remains in business… and its employees regularly report to that facility." He states that we have "no valid basis for linking notice mailing to broad orders." We disagree. First, we note that notice mailing is not limited to situations where the respondent has gone out of business. See *Newman Livestock-11, Inc.*, 361 NLRB 343, 344 (2014) (citing *3E Co.*, 313 NLRB 12, 12 fn. 2 (1993), enfd. 26 F.3d 1 (1st Cir. 1994), and ordering notice-mailing "regardless of whether the [r]espondent remains in business"). Contrary to our colleague's assertion, "[n]otice mailing is a well-established part of the Board's remedial repertoire when traditional posting is insufficient to dissipate the effects of the unfair labor practices." *Pacific Beach Hotel*, 361 NLRB at 714. See also *Amerinox Processing*, above, at slip op. at 4 fn. 10 (citing cases). Second, we find that circumstances in which a broad order is appropriate often, as here, make notice posting on its own inadequate and make the addition of notice mailing appropriate. As we have noted, broad orders involve repeat offenders or those who have engaged in egregious or widespread misconduct, including, but not limited to, surveillance, threats, and other coercive activity towards employees who exercise their Section 7 rights. Any of those circumstances create a workplace where employees, frustrated by their working conditions, reasonably would be more likely to leave. Accordingly, to fully remedy violations herein, we find it appropriate to advise former employees of the unlawful conduct they may have experienced during their time with the Respondent and how that misconduct is being addressed. Former employees, whose last experience with an employer was an unremedied violation, should know, as they navigate other workplaces, that Section 7 rights are important and will be protected. Additionally, because broad order cases are those where the respondent has demonstrated its proclivity to violate the Act or has engaged in such egregious or widespread misconduct so as to demonstrate a general disregard for employees' statutory rights, the resultant chill to employees' protected activity can be better dispelled by a notice mailing that allows them to read and understand the notice in private without fear of observation, rather than reading a posted notice in the workplace under their employer's scrutiny. In this regard, we reject the dissent's challenge to the common-sense principle that employees may be hesitant to be seen reading the posted notice. "An employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be as able to absorb its meaning and hence to understand his legal rights as one who reads it at home in a more leisurely fashion." *J.P. Stevens. Co. v. NLRB*, 380 F.2d 292 (2d Cir. 1967), cert. denied 389 U.S. 1005 (1967). Of course, the concern is particularly heightened in a broad-order case where, as here, the employee will be reading the posted notice in the workplace of a respondent that has been found to have "demonstrated a general disregard for the employees' fundamental statutory rights." *Hickmott*, supra at 357. That the posting of a Board remedial notice is the result of unlawful conduct violating employees' statutory rights, fundamentally distinguishes it from our colleague's comparison of it to "numerous other notices that are routinely posted in workplaces," such as "[EEOC] notices or state wage and hour notices."

[53] By setting out his "back-of-the envelope" calculations, our colleague appears to take issue with the potential cost of the notice mailing remedy. But the fact that this remedy will cause the Respondent to incur postal charges is not a reason to refrain from ordering it. As we have noted above, mailing the notice, a remedy the Board has ordered for decades in various situations, will help to ensure that *all* employees (current and former) are able to receive and review the notices away from their workplace (in a setting free from observation).

Respondents' obligation to abide by the Act, thus helping to change its workplace culture while also ensuring that supervisors and managers are aware of their own responsibilities to adhere to the law and understand what rights the Act protects." Id. This is particularly important where, as here, the Respondent has engaged in unlawful conduct that impacted the entire bargaining unit and was so egregious as to warrant a broad order. An extended posting period will help dispel the likely lingering effects of the Respondent's unfair labor practices on employees. We therefore shall order the Respondent to post the remedial notice and explanation of rights for 1 year.

6. Visitation to ensure compliance with the extended posting period. Because we have ordered the Respondent to post the notice and explanation of rights for a period of 1 year, we deem it necessary and appropriate to take further action to ensure that our Order is fully carried out during that period. This conclusion is strengthened by the fact that the Respondent's conduct in this case, as well as in its earlier appearances before us (and the court), "demonstrate[s] a likelihood that [it] will fail to cooperate or otherwise attempt to evade compliance" and "it appears possible that the respondent may not cooperate in providing relevant evidence unless given specific, sanctioned-backed directions to do so." *Cherokee Marine Terminal,* above at 1083 fn. 14. The Respondent, through its continuous misconduct and unwillingness to comply with prior directives placed on it by the Board and the court, has undermined any reasonable expectation that we can rely on it to accurately and sufficiently self-report its compliance and, therefore, we find a narrowly tailored visitation clause appropriate.[54] Under our order, a duly-appointed Board agent may enter the Respondent's facility for a period of 1 year, at reasonable times and in a manner not to unduly interfere with the Respondent's operations, for the limited purpose of determining whether the Respondent is in compliance with our posting and mailing requirements. In this broad-order case with egregious violations that affected every member of the bargaining unit, we note that visitation will help relieve employees of the burden of a watchdog role with respect to the Respondent's compliance. As we have explained, this is "particularly important in reducing the risk of retaliation against them and in restoring their confidence in their statutory rights." *Pacific Beach*, above, at 717. Our visitation clause carries a 1-year time limit, directly corresponding with the requirements concerning the posting of the notice and explanation of rights. The purpose of the visitation is limited and clearly defined in relation to compliance with that remedy (as opposed to general compliance or a search for new violations). Finally, the clause specifically defines the third parties included in its scope to cover those with knowledge regarding posting and maintenance of the notice and explanation of rights in the manner and time required.[55]

ORDER

The National Labor Relations Board orders that the Respondent, Noah's Ark Processors, LLC d/b/a WR Reserve, Hastings, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food and Commercial Workers Local Union No. 293 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Changing unit employees' terms and conditions of employment by implementing its collective-bargaining proposal without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

(c) In any other 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 in good faith and at reasonable times 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. Such bargaining sessions shall be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. The Respondent shall submit written bargaining progress reports every 15 days to the compliance officer for Region 14, serving copies thereof on the Union. The appropriate unit is:

> All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(b) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented under the January 13, 2020 final offer.

[54] We disagree with our colleague that photographic evidence of a notice posting would be an adequate alternative. A respondent willing to flout Board and court orders could easily circumvent such a requirement by posting the notice long enough to snap a photograph and then removing it.

[55] See *Cherokee Marine Terminal*, above at 1081–1082; *Pacific Beach*, above, at 717.

(c) Make unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful changes in terms and conditions of employment that were unilaterally implemented under the January 13, 2020 final offer, in the manner set forth in the remedy section of the judge's decision.

(d) Make whole any affected employee bargaining committee members for any earnings lost while attending bargaining sessions in the manner set forth in the amended remedy section of this decision, to the extent those earnings were not reimbursed by the Union.

(e) Compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) File with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting their backpay award.

(g) Reimburse the Union for its costs and expenses incurred in collective bargaining during the period beginning November 11, 2019, through January 24, 2020, including but not limited to any lost wages the Union paid to employee bargaining committee members for bargaining conducted during working hours. Upon receipt of a verified statement of costs and expenses from the Union, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 14 of the National Labor Relations Board, who will document receipt and forward the payment to the Union.

(h) Preserve and, within 14 days of a request or such additional time as the Regional Director for Region 14 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.

(i) Post at its Hastings, Nebraska facility, copies of the attached notice and explanation of rights marked "Appendix A" and "Appendix B."[56] Copies of the notice and the explanation of rights, on forms provided by the Regional Director for Region 14, after being personally signed by CEO Fischel Ziegelheim, shall be posted by the Respondent and maintained for 1 year 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 its Hastings facility at any time since November 11, 2019.

(j) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent's CEO Fischel Ziegelheim, copies of the attached notice marked "Appendix A" and the attached explanation of rights marked "Appendix B" in both English and Spanish to all current and former unit employees employed by the Respondent at its Hastings, Nebraska facility at any time since November 11, 2019, at their home addresses. The Respondent shall maintain proofs of mailings as set forth in the Amended Remedy section of this Decision.

(k) Hold a meeting or meetings during work hours at its facility in Hastings, Nebraska, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the attached Notice to Employees marked "Appendix A" and the attached explanation of rights marked "Appendix B" will be read to employees in English and Spanish (and any other languages deemed appropriate by the Regional Director) by CEO Fischel Ziegelheim in the presence of a Board Agent and, if the Union so desires, a union representative, or, at the Respondent's option, by a Board agent in the presence of CEO Fischel Ziegelheim and, if the Union so desires, a union representative. A copy of the notice and the explanation of rights, in English and Spanish (and any other languages deemed appropriate by the Regional Director) will be distributed by a Board agent during this meeting or meetings to each unit employee in attendance before the notice is read.[57]

[56] 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."

[57] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted and

(l) For a 1-year period, allow the Board or any of its duly-authorized representatives to obtain, in oral and documentary forms, discovery and evidence from the Respondent, its officers, agents, successors or assigns, and its employees or former employees having knowledge concerning the posting and maintenance of the notice and the explanation of rights as well as the mailing and dissemination of those documents as set forth in the Amended Remedy section of this Decision in the manner and for the time required. Such visitation shall be conducted under the supervision of the Regional Director for Region 14 and shall be narrowly limited to assessing and ensuring the Respondents' compliance with this Order as described in the Amended Remedy. The Respondent shall make available for inspection proofs of mailings and receipts as set forth in the Amended Remedy.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. April 20, 2023

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

read within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted and read within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

MEMBER KAPLAN, concurring in part and dissenting in part.

I agree that the Respondent violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith with the Union and by implementing its final offer in the absence of a valid impasse.[1] I also agree that a broad cease-and-desist order is warranted here.[2] And like my colleagues, I would order the Respondent to reimburse the Union for its bargaining expenses and to read the remedial notice to its employees, although my versions of these remedies differ from theirs, as explained below.

Given the unanimous decision to find the violations as alleged and to order some extraordinary remedies, this case should have been simple. My colleagues, however, decided to use this case not only to order numerous additional extraordinary remedies but also to engage in an extended discussion of extraordinary remedies in general. This is especially puzzling because my colleagues note, correctly, that the Board has broad discretion in exercising its remedial powers under Section 10(c) of the Act. The Board's determination of appropriate remedies in a particular case is not limited by the General Counsel's or judge's recommendations or the parties' exceptions.[3] Accordingly, the majority easily could have written a decision setting forth the extraordinary remedies they deem warranted here, with supporting justifications for each based on the facts and circumstances this case presents. If they had, I would have limited myself to explaining, as I do below, whether, remedy by remedy, I agree or disagree, and why. But rather than follow this regular practice, the majority takes a different—and troubling—path.

My colleagues say that "an important aspect" of their decision is to "provid[e] all interested parties with a

[1] Based on the totality of the circumstances, I join my colleagues in finding that the Respondent bargained in bad faith from November 11, 2019, until January 13, 2020. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989) (applying totality-of-circumstances test to bad-faith bargaining allegation), enfd. 938 F.2d 815 (7th Cir. 1991). I also agree that the judge erred in finding that the Respondent's pursuit of a wage proposal giving it the unilateral right to increase pay without regard to definable objective procedures and criteria was unlawful in and of itself. See *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996) (rejecting Board's prior finding that the employer's bargaining proposal seeking to retain discretion over wage increases was a violation, finding that the proposal itself was "not inimical to the policies of the Act"), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

[2] A broad cease-and-desist order is warranted when a respondent is shown to "have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). I agree that this standard is satisfied here.

[3] See, e.g., *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001) (ordering the respondent to reimburse negotiation expenses, where no party excepted to the judge's failure to include such a remedy in the recommended order); *WestPac Electric*, 321 NLRB 1322, 1322 (1996) (observing that "the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct" and awarding remedy not recommended by the judge or sought by any party); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996) (noting that "the Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act" and that "remedial matters . . . may be addressed by the Board in the absence of exceptions") (internal quotation marks omitted). Accordingly, apart from the recommended affirmative bargaining order, the majority's repeated observation that the Respondent did not except to the judge's recommended remedies is entirely irrelevant.

reminder of the remedies that may be particularly appropriate in broad-order cases." But the Board does not issue advisory opinions (except in narrow circumstances not present here).[4] And, because the Board has never previously said that a broad cease-and-desist order may make other remedies "particularly appropriate," let alone enumerated what those "particularly appropriate" remedies are, it is not accurate to say that the majority's position is merely a reminder of available remedies.

The fact of the matter is that my colleagues are advising the General Counsel regarding extraordinary remedies she might seek in future cases and (implicitly but unmistakably) even encouraging her to seek them. And by making broad cease-and-desist orders the predicate for these extraordinary remedies, the majority's opinion also tacitly encourages the General Counsel to seek broad orders more frequently in order to put those remedies in play.

My colleagues clearly believe that it is appropriate to provide litigation advice to the General Counsel. I do not. My colleagues are improperly involving the Board in the General Counsel's decisions regarding how to prosecute unfair labor practice cases, decisions the Act clearly gives the General Counsel exclusive authority to make.[5] I have not found any other case in which the Board has directly advised the General Counsel how to litigate future cases,[6] with good reason. In addition to the fact that doing so constitutes an improper intrusion into the General Counsel's exclusive authority under Section 3(d), any one of those cases may end up before the Board, and many will. Surely the Board ought not provide litigation advice to a party that will ultimately appear before it as a litigant. Making matters worse, all this is entirely unnecessary because the Board has authority under Section 10(c) to order appropriate remedies whether the General Counsel asks for them or not. Therefore, the Board's remedial options in future cases will be the same, regardless of the General Counsel's litigation choices.

Further, my colleagues include in their decision a long discourse about remedies in general. In doing so, they seem to be under the impression that they are making new law. They are not. Contrary to my colleagues' apparent misunderstanding, any discussion that is not necessary for deciding the case before us is mere dicta, and my colleagues' discussion of remedies that *may* be appropriate whenever they deem a broad cease-and-desist order warranted is unnecessary to decide what remedies *are* warranted here.[7] *That* decision is based on the facts and circumstances presented in this case. Indeed, my colleagues acknowledge as much. They do not hold that certain remedies *must* be ordered whenever a broad order issues, nor do they hold that certain remedies *cannot* be ordered except in tandem with a broad order, or that remedies they do not discuss are precluded. In fact, they state to the contrary on each of these points. "We do not imply," they write, "that only these listed remedies may be warranted. Nor do we intend to establish a rule that each of these remedies is always necessary where the broad-order standard is met. Nor do we hold that these remedies are appropriate *only* in that situation." In other words, my colleagues admit that the decision whether to order one or more extraordinary remedies and, if so, which ones is entrusted, in each case, to the Board's discretion. I agree. That was the law before today's decision, and that remains the law after today's decision.

Accordingly, the majority's treatise on extraordinary remedies does not change Board law. Neither does it limit the Board's discretion going forward. My colleagues say that the "aim" of their lengthy musings is "to ensure that in every case" where a broad order is deemed warranted, "the Board will consider a full range of . . . potential remedies, and will not inadvertently stop short . . . in

[4] See *James M. Casida*, 152 NLRB 526 (1965); *Broward County Port Authority*, 144 NLRB 1539 (1963).

[5] By statute, the General Counsel has "final authority" not only "in respect of the investigation of charges and issuance of complaints," but also "in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). The choice of remedies to recommend for violations alleged is an aspect of, and within, the General Counsel's exclusive prosecutorial authority.

[6] The Board has expressed a willingness to *consider* ordering a particular remedy in a future appropriate case. See *HTH Corp. d/b/a Pacific Beach Hotel*, 361 NLRB 709, 719 (2014) (signaling openness to considering whether the Board may and, if so, should order a front-pay remedy in appropriate cases), enfd. in part *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). Individual Board members also sometimes indicate an interest in reconsidering extant precedent in a future case should occasion arise to do so. Neither situation compares with what my colleagues do here.

[7] My colleagues hinge their consideration of extraordinary remedies to issuance of a broad cease-and-desist order, and they signal their intention to continue doing so in any case in which they deem a broad order warranted. Historically, the Board has been sparing in its use of broad orders. Recently, broad orders have become more frequent. The Board has issued four such orders just since the middle of last year. See *Grill Concepts Services, Inc. d/b/a The Daily Grill*, 372 NLRB No. 30, slip op. at 5 (2022); *North Texas Investment Group d/b/a Whitehawk Worldwide*, 371 NLRB No. 122, slip op. at 3 (2022); *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 371 NLRB No. 118, slip op. at 3 (2022); *Amerinox Processing, Inc.*, 371 NLRB No. 105, slip op. at 3 (2022), enfd. 2023 U.S.App. LEXIS 8442, 2023 WL 2818503 (D.C. Cir. 2023). Although I agreed that a broad order was warranted in some of these cases, the trend is noteworthy. With today's decision, it seems likely that extraordinary remedies are about to become far less extraordinary. It bears watching whether my colleagues' deployment of such remedies becomes punitive and thus exceeds the powers granted them under Sec. 10(c). See, e.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (holding that the Board's "power to command affirmative action is remedial, not punitive").

determining which remedies to order." But, again, as my colleagues themselves recognize, the Board has complete authority—subject to judicial review and within the constraints of Section 10(c)—to consider and determine the appropriate remedies in each case that comes before it. Should a future Board decide to "stop short," in my colleagues' estimation, it will have the authority to do so, unconstrained by anything in the majority's remedial discourse, which serves no real purpose other than as a preview of coming attractions under the Board's current majority.[8]

I turn now to the non-dicta portion of the remedy section in the majority's decision, involving the extraordinary remedies my colleagues have decided to order in this case.[9] For the reasons explained below, I believe most of those remedies are unwarranted.

The Bargaining-Expenses Remedy. I agree with my colleagues, for the reasons they state, that the Respondent should be required to compensate the Union for its bargaining expenses.[10]

I disagree with my colleagues bargaining-expenses remedy in one respect, however. Contrary to my colleagues, and for reasons I have previously set forth, I would not require the Respondent to pay employees for earnings they lost while attending bargaining sessions to the extent those earnings were not reimbursed by the Union. See *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 371 NLRB No. 118, slip op. at 2–3 fn. 6 (Member Kaplan, dissenting in part). Neither would I include, in calculating the reimbursement of the Union's bargaining expenses, amounts spent by the Union to reimburse employee members of the Union's bargaining committee. Id.[11]

The Notice-Reading Remedy. I agree with the judge and the majority that the facts and circumstances warrant ordering the Respondent to read the remedial notice to its employees. I part ways with my colleagues, however, in two respects.

First, I would not order that the notice be read by the Respondent's CEO, Fischel Ziegelheim, or by a Board agent in his presence.[12] Consistent with the corresponding remedy the Board ordered in its first decision involving the Respondent, I would require that the notice be read by a high-ranking management official or, at the Respondent's option, by a Board agent in the official's presence.[13]

Second, contrary to my colleagues, I would not order the Respondent to distribute copies of the notice to employees at the meeting where the remedial notice is read. The majority cites no precedent for ordering this remedy,

[8] My colleagues fail to cite a single case where a court of appeals has faulted the Board for failing to order any particular extraordinary remedy, nor am I aware of any.

[9] I disagree with the majority that employees should be made whole for any direct or foreseeable pecuniary harms incurred as a result of the Respondent's unlawful implementation of its final offer. Consistent with my partial dissent in *Thryv, Inc.*, 372 NLRB No. 22 (2022), I would require the Respondent to compensate employees for other pecuniary harms only insofar as the losses were directly caused by the unlawful implementation of the final offer, or indirectly caused by that act where the causal link between the loss and the implementation of the final offer is sufficiently clear.

[10] The judge recommended that the Respondent be required to reimburse the Union for negotiating expenses incurred from the date it began to bargain in bad faith "until such time as [the Respondent] begins bargaining in good faith." My colleagues amend the judge's decision to terminate the period during which the Respondent must compensate the Union for its bargaining expenses on January 24, 2020, the date the Respondent declared impasse. The record indicates that no bargaining took place after January 13. But even if ending the bargaining-expenses-reimbursement period on January 24 is error, it is harmless error: if no bargaining took place between January 13 and January 24, there are no expenses to reimburse during that interval.

More generally, however, I agree with my colleagues' decision to cabin the judge's recommended bargaining-expenses remedy. This is not the first time this wording has been used. See, e.g., *Richfield Hospitality, Inc.*, 369 NLRB No. 111, slip op. at 5 (2020). And it is problematic. On its face, the judge's wording would have required the Respondent to compensate the Union for *additional* bargaining expenses incurred after January 24th (or 13th), should the Respondent once again engage in bad-faith bargaining, until such time as the Respondent begins to bargain in good faith. The determination of *whether* the Respondent bargained in bad faith once again apparently would be left to compliance. That is clearly improper; whether or not a party has engaged in bad-faith bargaining is a question of law, and the Board's compliance officers do not have the authority to decide issues of law. Unfair labor practice issues are litigated in merits hearings, not in compliance proceedings. See, e.g., *Neoprene Craftsmen Union Local 788 v. NLRB*, 187 Fed. Appx. 477, 480 (6th Cir. 2006) ("[A]ll specific unfair labor practices claims for which remedial relief is sought must be litigated on the merits during the initial Board proceeding.").

[11] Here, as in *Nexstar*, there is no evidence that the Union had decided to reimburse employee members of the bargaining committee prior to the commencement of bargaining. Therefore, I need not pass on whether this remedy would be appropriate under those circumstances.

[12] I acknowledge that the Court of Appeals for the District of Columbia Circuit—after reviewing the long, colorful, and not entirely coherent line of circuit precedent addressing the Board's extraordinary notice-reading remedy—upheld an order requiring that a notice be read by a named individual, where the Board provided the employer the option of "punting the task to a Board employee." *HTH Corp. v. NLRB*, 823 F.3d 668, 675–678 (D.C. Cir. 2016). More recently, however, the Courts of Appeals for the Fifth and Sixth Circuits have disagreed with their sister circuit and rejected such a remedy even where the Board-agent option is provided. *Denton County Electric Coop., Inc. v. NLRB*, 962 F.3d 161, 174–175 (5th Cir. 2020) ("The option to have the notice read by a board member [sic] does not assuage our concerns."); *Sysco Grand Rapids, LLC v. NLRB*, 825 Fed. Appx. 348, 350 (6th Cir. 2020) (reasoning that the option of having a Board agent read the notice while "named individuals . . . stand at attention as human demonstratives in the employer's confession of sins" does not save the order from unenforceability). Although I have not previously embraced the position adopted by the Fifth and Sixth Circuits, I may consider doing so in a future appropriate case.

[13] *Noah's Ark Processors, LLC d/b/a WR Reserve*, 370 NLRB No. 74 (2021) (*NAP I*), slip op. at 8–9, enfd. 31 F.4th 1097 (8th Cir. 2022).

and I am not aware of any.[14] Nor do I believe that my colleagues' novel remedy is justified in this case. The majority contends that it is warranted in order to "facilitate employee comprehension" during the reading and to allow review of the notice in a "safe and comprehensible manner" thereafter. This rationale is untethered from the realities of this case. The meat of the remedial notice is readily understood. Were it not for the multiple unwarranted extraordinary remedies the majority is ordering, it would also be relatively short. The notice will be read in both English and Spanish, and there is no good reason to believe that the Respondent's employees will be unable to comprehend it. Moreover, the notice, in both English and Spanish, will be posted in all places where notices to employees are customarily posted, and it will also be distributed to employees by electronic means if the Respondent customarily communicates with its employees by such means. These standard remedies provide ample opportunity for employees to absorb its content.[15]

The Notice-Signing Remedy. My colleagues order CEO Ziegelheim to sign the notice as well as read it. Here, I dissent in full. The majority cites no court precedent enforcing such a remedy, and I am not aware of any.[16] Although the Board has ordered this remedy in a handful of cases, see, e.g., *Three Sisters Sportswear Co.*, 312 NLRB 853, 880 (1993) and cases cited there, compelling a named individual to sign the notice may be even more objectionable than the just-discussed notice-reading remedy. As noted above, the District of Columbia Circuit has upheld notice reading by a named individual where the option is provided of having a Board agent read it instead. To state the obvious, there is and can be no saving option of having a Board agent sign the notice instead of Ziegelheim.[17] Neither does the majority's order leave the Respondent free to select the signer from among its managers, as the standard requirement of notice-signing by an "authorized representative" does. As a result, the majority's notice-signing remedy raises a compelled-speech issue. "[F]reedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 713 (1977)). The option of having a Board agent read the notice permits Ziegelheim to exercise his First Amendment right not to speak at all. The majority's notice-signing remedy does not.[18]

The Notice-Mailing Remedy. My colleagues order the Respondent to mail the remedial notice to its employees. Here as well, I dissent. Notice posting is the standard remedy for advising employees of their Section 7 rights and of a respondent's unlawful conduct. In its 1996 decision in *Indian Hills Care Center*, the Board modified its standard notice-posting remedy to provide for notice mailing in the event a respondent has gone out of business or closed the facility where the unfair labor practices were committed.[19] But the Board does not order notice mailing outright unless the respondent has *already* gone out of business or closed that facility,[20] or other circumstances would make notice posting futile.[21] So far as the record shows, the Respondent remains in business and has not closed its Hastings, Nebraska facility, and its employees regularly report to that facility.

[14] The first mention of a potential notice-distribution remedy appears to be Member Prouty's personal footnote—i.e., expressing his views, not the Board's—in *Johnston Fire Services, LLC*, 371 NLRB No. 56, slip op. at 7 fn. 24 (2022).

[15] Although I disagree, below, with the majority's requirement that the notice be mailed to the employees, the fact that my colleagues so require makes their notice-distribution remedy clearly superfluous.

[16] Although courts of appeals have enforced Board decisions in which notice-signing by a named individual was ordered, in none of them was the notice-signing issue placed before the court for review. See *Fieldcrest Cannon v. NLRB*, 97 F.3d 65 (4th Cir. 1996); *Three Sisters Sportswear Co. v. NLRB*, 1995 U.S. App. LEXIS 12208 (D.C. Cir. Apr. 28, 1995); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988); *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017 (8th Cir. 1978).

[17] My colleagues reply that Ziegelheim will not have to sign the notice in the presence of employees. This is beside the point. Ziegelheim will be virtually present in and through his signature.

[18] As discussed below, I disagree that an explanation-of-rights posting (let alone mailing) is warranted here. But even if I agreed that such a remedy is called for in this case, I would not order Ziegelheim to sign it (as the majority does), on First Amendment grounds. Even assuming that my colleagues have valid policy reasons for adopting this remedy, those policy reasons do not, and cannot, outweigh individuals' First Amendment rights. Furthermore, to the extent my colleagues' purpose in ordering Ziegelheim to sign the posting is to embarrass, burden, or otherwise punish him, their "signing" remedies are impermissible. See *Republic Steel Corp. v. NLRB*, 311 U.S. at 11–12.

[19] *Indian Hills Care Center*, 321 NLRB at 144 ("[W]e shall modify our standard notice-posting provision to state that if the respondent's facility has closed, the respondent shall mail the notice to employees.").

[20] Id. ("If the record indicates that the respondent's facility has closed, the Board routinely provides for mailing of the notice to employees.").

[21] See, e.g., *Bud Antle, Inc.*, 359 NLRB 1257, 1257 (2013) (ordering notice mailing where "the work force move[d] from place to place harvesting various crops throughout the year," and the respondent "[did] not maintain any facilities to which all unit employees report"), affirmed by and incorporated by reference in 361 NLRB 873 (2014); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 5 (2020) ("We have stressed that, like other extraordinary relief, notice mailing not conditioned on a plant closing is rarely granted.") (internal quotation marks and emphasis omitted), enfd. 5 F.4th 759 (7th Cir. 2021); *Consolidated Edison Company of New York, Inc.*, 323 NLRB 910, 912 (1997) (finding that notice mailing was unnecessary where there was no evidence that traditional notice posting was insufficient to inform employees of their rights and of the employer's unfair labor practices). *Newman Livestock-11, Inc.*, 361 NLRB 343 (2014), cited by my colleagues, does not support ordering notice mailing here. Although the Board did not expressly rely on this fact, the respondent in *Newman Livestock-11* had gone out of business. See id. at 347 ("The record shows that the [r]espondent was no longer in business after May 2012.").

My colleagues say that a notice-mailing remedy is warranted because some employees may be unable to attend the meeting at which the notice is read. But it is always the case that some employees may miss a notice reading, and the fact that those employees may read the posted notice takes care of this concern. The majority also says that notice-mailing is warranted to ensure the notice reaches former employees. Again, it is always the case that there may be former employees who cannot access the facility to see the posted notice, yet the standard remedy is to require only that the notice be posted.[22] In other words, the Board accepts that former employees may not—indeed, probably will not—see the notice. The Board *reasonably* accepts that outcome, since former employees of a wrongdoing employer are no longer at risk of being interfered with, coerced, or restrained by that employer in exercising their Section 7 rights in the future. This is equally true regardless of whether an employer's unfair labor practices warranted a narrow or broad cease-and-desist order. Accordingly, my colleagues have no valid basis for linking notice mailing to broad orders.[23]

Finally, my colleagues justify notice mailing on the basis that, in cases where broad orders are appropriate, employees may be fearful of "reading a posted notice in the workplace under their employer's scrutiny." This is a completely unsubstantiated concern. As highlighted above, it is a standard remedy in all unfair labor practice cases for the Board to order that the employer post a notice in its workplace, and employers have been posting such notices for nearly a century.[24] Never, to my knowledge, has any party ever complained to the Board that this remedy is either insufficient or ineffective because employees may be afraid to read the notice. Nor, to my knowledge, has any similar concern been raised with regard to the numerous other notices that are routinely posted in workplaces, such as Equal Employment Opportunity Commission notices or state wage and hour notices. Accordingly, my colleagues' hypothetical possibility is not a persuasive justification for their decision to order notice mailing here.

The Explanation-of-Rights Remedies. I also dissent from the majority's decision to order the Respondent to post, read, and mail an "explanation of rights." Until very recently,[25] the Board had ordered the posting of an explanation of rights in just three cases, in each of which the respondent had violated the Act in many and varied ways, and it had ordered the reading and mailing of an explanation of rights in only one of those cases, *Pacific Beach Hotel*, where the respondent's history of unfair labor practices and defiance of prior Board and court orders was such as to render that case virtually *sui generis*.[26] The Respondent is a recidivist, but the only Section 7 right implicated in *this* case is the right of employees to bargain collectively through representatives of their own choosing. The remedial notice will inform the Respondent's employees of that right. Accordingly, there is no valid basis to require even the posting of an explanation of rights in this case, let alone a reading and mailing as well.

The Extended-Posting Remedy. The majority orders the Respondent to post the remedial notice and the explanation of rights for one year, unless the parties reach a collective-bargaining agreement before the year is up. I dissent.

The standard notice-posting period is 60 days. I have found just three cases in which the Board has ordered the remedial notice to be posted for more than 60 days. One of those cases was *Pacific Beach Hotel*, where the scope of the employer's misconduct could reasonably be described as "off the charts." A second was *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018),[27] where the Board, in justifying the extended notice-posting period, explained that this was the *sixth* case involving this respondent, in each of which it had committed "serious and widespread violations of the Act." Id., slip op. at 13. The third was *UPMC,* 366 NLRB No. 185 (2018),[28] where the

[22] *Delta Sandblasting Co.*, 367 NLRB No. 17, slip op. at 1 fn. 3 (2018) ("[I]t is *always* the case that employees who worked for an employer at the time it committed an unfair labor practice may no longer be working for that employer when the remedial notice is posted, and the Board *rarely* orders notice mailing.") (emphasis in original), enfd. 969 F.3d 957 (9th Cir. 2020).

[23] Making matters even worse, the majority requires the Respondent to "maintain and make available for inspection proofs of mailings and receipts." In other words, they order the Respondent to send the notices by certified mail, return receipt requested. I take judicial notice of the fact that, in 2023, a letter sent by certified mail costs $4.15, and the green-card return receipt costs an additional $3.35. This is in addition to the regular cost of first-class mail, which is $.63 for the first ounce and $.24 for each additional ounce. At minimum, then, the majority's notice-mailing order will cost the Respondent $8.13 per bargaining-unit employee—and considering that it must mail the remedial notice *and* the explanation of rights *in both* English and Spanish, it will almost certainly cost more than that. As a rough back-of-envelope calculation, for between 250 and 300 employees at $8.50 a letter, compliance with the mailing remedy will cost the Respondent anywhere from $2,125 to $2,550.

[24] See, e.g., *In re Carbola Chem. Co.*, 3 NLRB 947, 949 (1937).

[25] See *Amerinox Processing, Inc.*, 371 NLRB No. 105, slip op. at 6.

[26] See *David Saxe Productions*, 370 NLRB No. 103, slip op. at 6 (2021) (finding employer committed egregious and pervasive violations of Sec. 8(a)(3) and 8(a)(1)); *Purple Communications, Inc. and Its Successor and Joint Employer CSDVRS, LLC*, 370 NLRB No. 26 (2020) (finding employer committed extensive violations of Sec. 8(a)(5), 8(a)(3), and 8(a)(1)); *HTH Corp. d/b/a Pacific Beach Hotel*, 361 NLRB at 713–714 (finding employer committed severe, pervasive, and repeated violations of Sec. 8(a)(5), 8(a)(3), and 8(a)(1) over the course of more than a decade, multiple injunctions under Sec. 10(j), and a district court order holding the employer in civil contempt).

[27] Enfd. mem. in relevant part 803 Fed. Appx. 876 (6th Cir. 2020).

[28] Petitions for review dismissed upon joint motion of the parties No. 18-1237, 2021 WL 1439791 (D.C. Cir. 2021).

employer committed "wide-ranging" violations of Section 8(a)(3), (2), and (1). In that case, the Board ordered a 120-day notice-posting period. Id., slip op. at 7–8. Even assuming the Respondent's conduct was as egregious as the respondent's in *UPMC*, the majority has not shown that it was more so, or so much more so as to justify a 1-year notice posting here. Absent such a showing, the discrepancy between the 120-day posting period in *UPMC* and the 1-year posting period my colleagues impose here appears to be arbitrary and capricious.[29]

The Visitation Remedy. My colleagues also impose a visitation remedy, under which the Respondent must permit a Board agent to enter its facility to determine "whether the Respondent is in compliance with our posting and mailing requirement." For reasons already stated, the majority should not impose those requirements in the first place. And for several reasons, they should not impose visitation, either.

To begin with, the Board already has a standard, well-established means to ensure compliance with its orders. Every order in an unfair labor practice case contains a paragraph requiring the respondent to file a sworn certification attesting to the steps it has taken to comply. Traditionally, the Board has considered the respondent's self-reporting, under oath, of compliance to be sufficient, including in cases where the Board has imposed a broad cease-and-desist order.[30] My colleagues, however, find this remedy insufficient here.[31] Indeed, they take the view that the Board's long-standing methods for ensuring parties' compliance may be insufficient in every broad-order case, and they indicate that they will consider a visitation remedy in all such cases.[32] Although they deny that they will find visitation and the other extraordinary remedies they canvass presumptively appropriate in every broad-order case, the majority deems it necessary to justify their decision *not* to issue certain extraordinary remedies in this case. In any event, the majority points to no evidence that the standard sworn attestation has proven inadequate to secure compliance in broad-order cases.

The standard for imposing visitation is "a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance." *Cherokee Marine Terminal*, 287 NLRB 1080, 1083 (1988). My colleagues do not base their visitation remedy on a likelihood of noncompliance. They base it on the 1-year duration of their posting remedies. They do, however, also conclude that the *Cherokee Marine Terminal* standard is met here, based, they say, on "the Respondent's conduct in this case, as well as in its earlier appearances before us." At best, this conclusion is underexplained; at worst, it suggests that recidivism will routinely entail visitation, despite the Board's insistence that it "remain an extraordinary remedy to be used only when warranted by the facts of a particular case." Id. at 1081.

In dissenting from this remedy, I note that not only does my colleagues' blanket endorsement of a visitation remedy in cases involving broad orders fail to satisfy the requirements set forth in Board law, it also constitutes an unnecessary intrusion on property owners' rights.[33] Even assuming that something more than self-reporting under oath is called for, a due regard for those rights favors a less intrusive means of policing compliance than ordering respondents to grant Board agents access to a workplace. There is an obvious alternative: requiring respondents to furnish photographic evidence of compliance.[34] This would be rather burdensome where, as here, mailing

[29] I further note that, more than 11 years ago, the Board promulgated a rule requiring employers to post an explanation-of-rights notice, but the courts rejected it. See Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013) (holding that the Board lacked authority under the Act to issue the rule); National Assn. of Manufacturers v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (vacating the rule on the basis that its means of enforcement were invalid). It could be argued that, to the extent that my colleagues aim to make posting an explanation-of-rights notice for a full year a standard remedy, the majority is improperly attempting to accomplish through remedial means what the Board tried and failed to accomplish through rulemaking.

[30] Of course, if a respondent does not comply with a Board order, the Board has methods for addressing such non-compliance, up to and including civil contempt proceedings.

[31] According to my colleagues, the Respondent's misconduct "has undermined any reasonable expectation that we can rely on it to accurately and sufficiently self-report its compliance." Yet in *Ozburn-Hessey Logistics*, the Board, including then-Member McFerran, ordered the standard sworn self-report of compliance, see 366 NLRB No. 177, slip op. at 15, and did not order visitation by a Board agent, even though the respondent had been found to have violated the Act in five previous decisions, each of which had been enforced by a court of appeals. See id., slip op. at 1 fn. 3.

Furthermore, it is puzzling that the majority orders the Respondent to file a sworn report of compliance, despite its declaration that the Respondent cannot be relied upon to accurately report its compliance with the Board's order.

[32] I note that my colleagues have sought public input on several cases, including another case that addressed a change in the scope of Board remedies. See, e.g., *Thryv, Inc.*, 372 NLRB No. 22, slip. op at 6 fn. 8 (2022) (listing the numerous briefs received in response to the Board's notice and invitation to file briefs addressing whether the Board should order compensatory damages as a remedy). It is not clear why my colleagues chose not to seek public comment in this case as well.

[33] Not only is the intrusion unnecessary, but the recent Supreme Court decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), suggests that the intrusion may violate the Takings Clause of the Constitution as well. Id. at 2077 (indicating that the Court's finding that the California Agricultural Labor Board's access regulations violate the Takings Clause is not inconsistent with the Court's holding in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), because takings issues were not litigated in the latter case).

[34] The majority rejects this alternative, speculating that the Respondent might post the notice, photograph it, and take it down again. Of course, this possibility would apply whenever the Board orders a notice-posting remedy, yet my colleagues fail to cite any relevant precedent in

remedies are imposed in addition to posting remedies, but at least it would avoid needless abridgment of property rights. Importantly, it would also avoid an equally unnecessary expenditure of Agency resources. In this particular case, the closest Board office to the Respondent's Hastings, Nebraska facility is Region 14's subregional office in Overland Park, Kansas, 311 miles away. I cannot condone spending agency funds, not to mention taxpayers' dollars, on the time and expense associated with that drive, especially considering that other methods for confirming compliance that do not require a 311-mile drive are available.[35]

For these reasons, as to the above issues, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. April 20, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED, READ, AND MAILED 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 with United Food and Commercial Workers Local Union No. 293 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT change your terms and conditions of employment by implementing a collective-bargaining proposal without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union in good faith and at reasonable times 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 it in a signed agreement:

All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL, on request by the Union, hold bargaining sessions for a minimum of 24 hours per month, at least 6

which the Board has failed to trust Respondents' compliance based on this concern. My colleagues' position is especially curious given that the Respondent must file a *sworn* attestation of the steps that it has taken to comply. Based on this remedy, the Region's compliance officer, a year from now, could require the Respondent to file a sworn statement that the notice was posted and *remained* posted throughout the 1-year posting period. Does the majority really believe that the Respondent would post the notice, photograph it, take it down, and then commit a felony under the False Statements Act, 18 U.S.C. § 1001, by lying to the federal government under oath, particularly when such a lie could be exposed by any and every employee willing to inform on the Respondent to the Region?

To be clear, I would not order a photographic-evidence remedy here, or in any case where the standard self-report under oath suffices. To go beyond the standard remedy, I would at the very least require the General Counsel to demonstrate a likelihood of noncompliance under *Cherokee Marine Terminal*.

[35] The majority's opinion may raise yet another, and graver, concern. Although my colleagues, in *this* case, order "narrowly tailored" visitation "for the limited purpose of determining whether the Respondent is in compliance with our posting and mailing requirement[s]," their general discussion suggests a potentially broader scope for this remedy. "Visitation," they say, "permits the Board to inspect the records of a respondent, and to take statements from its officers and employees (and others) for the purpose of determining or securing compliance with our orders . . . ." Statements taken by visiting Board agents for this purpose could include statements taken to determine whether a respondent is complying with an order to cease and desist from violating the Act. This would constitute investigation of potential violations absent an unfair labor practice charge, which would exceed the Board's statutory powers. See *Nash v. Florida Industrial Commission*, 389 U.S. 235, 235 (1967) ("Section 10 of the National Labor Relations Act authorizes the National Labor Relations Board to initiate unfair labor practice proceedings whenever some person charges that another person has committed such practices. The Board cannot start a proceeding without such a charge being filed with it."); *National Assn. of Manufacturers v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) (stating that the Board cannot enforce the Act unless "outside actors" file an unfair labor practice charge, and "'neither the Board nor its agents are authorized to institute charges *sua sponte*'") (quoting Robert A. Gorman & Matthew W. Finkin, BASIC TEXT ON LABOR LAW, at 10 (2d ed. 2004)).

hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees, and WE WILL submit written bargaining progress reports to the compliance officer for Region 14, with a copy served on the Union.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented under our January 13, 2020 final offer.

WE WILL make whole, with interest, eligible employees in the above-described unit for any loss of earnings and benefits resulting from our unilateral implementation of our January 13, 2020 final offer, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of our unilateral implementation of our January 13, 2020 final offer.

WE WILL make whole any affected employee bargaining committee members for any earnings lost while attending bargaining sessions, plus interest, to the extent those earnings were not reimbursed by the Union.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay awards, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL reimburse the Union for all bargaining expenses, that it incurred from November 11, 2019, through January 24, 2020, including but not limited to any lost wages the Union paid to employee bargaining committee members for bargaining conducted during working hours.

WE WILL post this notice and an Explanation of Rights at our facility in Hastings, Nebraska, for a period of 1 year. In addition, WE WILL post the notice and the Explanation of Rights on our intranet and any other electronic message area, including email, where we generally communicate with you.

WE WILL, within 14 days from the date of the Board's order, mail a copy of this notice and the Explanation of Rights to the homes of all current and former employees employed by use at any time since November 11, 2019. WE WILL maintain proofs of mailing as required by the Board.

WE WILL hold a meeting or meetings during working hours and have this notice and the Board's Explanation of Rights read to you and your fellow workers in English and Spanish, and any other languages deemed appropriate by the Regional Director by CEO Fischel Ziegelheim in the presence of a Board agent and, if the Union so desires, a union representative, or, at our option, by a Board agent in the presence of CEO Fischel Ziegelheim and, if the Union so desires, a union representative. A copy of the notice and the Explanation of Rights, in English and Spanish, and any other languages deemed appropriate by the Regional Director, will be distributed by a Board agent during this meeting or meetings to each unit employee in attendance before the notice is read by CEO Fischel Ziegelheim.

WE WILL, for a 1-year period, allow the Board or any of its duly-authorized representatives to obtain in oral and documentary forms, discovery and evidence from the Respondent, its officers, agents, successors or assigns, and its employees or former employees having knowledge concerning the posting and maintenance of the notice and Explanation of Rights as well as the mailing and dissemination of those documents in all the ways set forth in the Amended Remedy section of this Decision to all the individuals identified in the Amended Remedy section of this decision and WE WILL make available for inspection proofs of mailings and receipts as required.

NOAH'S ARK PROCESSORS, LLC D/B/A WR RESERVE

The Board's decision can be found at http://www.nlrb.gov/case/14-CA-255658 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.

APPENDIX B

EXPLANATION OF RIGHTS
POSTED, READ, AND MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also

the right to choose not to do so. This Explanation of Rights contains important information about your rights under this Federal law. The National Labor Relations Board has ordered Noah's Ark to provide you with the Explanation of Rights to describe your rights and provide examples of illegal behavior.

Under the National Labor Relations Act, you have the right to:

- Contact a union and, if they become your representative, have them negotiate with your employer concerning your wages, hours, and working conditions.
- Support your union in negotiations.
- Discuss your wages, benefits, other terms and conditions of employment, and negotiations between the union and your employer with your coworkers or your union.
- Take action with one or more coworkers to improve your working conditions.
- Strike and picket, depending on the purpose or means used.
- Choose not to do any of these activities.

It is illegal for your employer to:

- Make unilateral changes in your terms and conditions of employment by implementing a collective-bargaining proposal without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

There are rules that govern your employer's conduct during collective bargaining with your union:

- Your employer must meet with your union at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices, and other mandatory subjects.
- Your employer must participate actively in the negotiations with a sincere intent to reach an agreement.
- Your employer must not change existing working terms and conditions while bargaining is ongoing.
- Your employer must honor any collective-bargaining agreement that it reaches with your union.
- Your employer cannot retaliate against you if you participate or assist your union in collective bargaining.

Illegal conduct will not be permitted. The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity. You may ask about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges may be filed by any person and need not be filed by the employee directly affected by the violation.

You can contact the NLRB's regional office, located at: 8600 Farley St. – Suite 100, Overland Park, KS 66212.

The Board's decision can be found at http://www.nlrb.gov/case/14-CA-255658 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.

William F. LeMaster and *Julie Covel, Esqs.,* for the General Counsel.
Jerry L. Pigsley, Esq. (Woods Aiken LLP), for the Respondent.
Frederick Zarate, Esq. (Blake Uhlig Pennsylvania), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in December 2020 and January 2021. The complaint alleged that Noah's Ark Processors, LLC d/b/a WR Reserve (NAP or the Respondent) violated §§8(a)(1) and (5) of the National Labor Relations Act (the Act) by: bargaining in bad faith while negotiating a successor contract with the United Food and Commercial Workers Local Union No. 93 (the Union); and then implementing a final offer, absent a valid, good-faith impasse. On the record, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

NAP owns and runs meat processing plant in Hastings, Nebraska (the plant). It annually sells and ships products worth over $50,000 directly outside of Nebraska. It is, thus, engaged in commerce under §2(2), (6), and (7) of the Act. The Union is a §2(5) labor organization.

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

II. UNFAIR LABOR PRACTICES

A. Introduction

1. Purchase of the plant

In January 2015, the Nebraska Prime Group sold the plant to NAP, which seamlessly continued its meat processing operations and adopted the extant collective-bargaining agreement that ran from January 28, 2013, to January 28, 2018 (the CBA). (Jt. Exhs. 2, 33.) The CBA covered the following appropriate bargaining unit of plant employees (the Unit):

> All production, maintenance, shag drivers and distribution employees employed at the Hastings, Nebraska plant, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(Jt Exh. 2.)

2. Prior litigation

Following the January 28, 2018 expiration of the CBA, NAP and the Union met for negotiations. NAP sabotaged these negotiations by bargaining in bad faith and unlawfully implementing a final offer absent a valid impasse. These actions prompted a round of Board and Federal Court litigation, where NAP was repeatedly found to have violated the Act.

i. §10(j) Injunction, Contempt Order, and Sanctions

On May 10, 2019, the U.S. District Court of Nebraska issued a §10(j) injunction, which ordered NAP to, inter alia, cease: firing workers for their Union activities; refusing to provide information to the Union; making unilateral changes; bargaining in bad faith; and imposing a final offer absent a valid impasse. NAP was, accordingly, ordered to: make reinstatement offers; supply the requested information; bargain in good faith according to a set schedule; give the Union notice and an opportunity to bargain over contemplated changes to the Unit's terms and conditions of employment; and, upon request, rescind the unilateral changes implemented under its unlawful final offer dated January 2, 2019 (the first final offer). (Jt. Exhs. 4, 8.)

Somewhat surprisingly, the §10(j) injunction was insufficient to move NAP to bargain in good faith. Its recalcitrance prompted the General Counsel (the GC) to pursue a contempt finding and connected sanctions. On October 17, 2019, NAP was found in contempt of the §10(j) Order and, on November 1, 2019, sanctions were imposed. (Jt. Exhs. 9–10.)

ii. Board Order

On January 27, 2021, the Board issued a *Decision and Order* in *Noah's Ark Processors, LLC d/b/a WR Processors*, 370 NLRB No. 74 (2021) (*NAP I*), and held, inter alia, that NAP violated §§8(a)(1), (3), and (5) and 8(d) by: failing to provide information; failing to deduct and remit Union dues; making unilateral changes; firing workers for their Union activities; bargaining in bad faith; and declaring impasse and imposing a final offer absent a valid impasse.

B. Collective Bargaining

On November 5, 2019, following the U.S. District Court's issuance of sanctions, NAP solicited the Union to continue bargaining. (Jt. Exh. 15.) The parties held seven bargaining sessions, before NAP again prematurely declared impasse and implemented an invalid final offer.

1. November 11, 2019 meeting[2]

The Union was represented by these officers and business agents: Eric Reeder, April Guerrero, Rodney Brejcha, and Carmen Perez. NAP was represented by Chief Executive Officer Fischel Ziegelheim and attorney Jerry Pigsley. Their meeting is summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)[3]	NAP proposed deleting "maintenance employees and shag drivers" from the CBA's unit description. ***This article remained open.***
Art. 2, *Maintenance of Memb./Dues* (ER 2, U 1)	NAP proposed adding, "Union agrees that an employee may at any time contact the Company's HR Department to withdraw from the Union and cease having Union dues withheld from the employee's pay." The Union proposed adding that NAP would provide a weekly membership list and other related data. ***This article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	The Union proposed moving, "employees must pass probation to enjoy benefits," to Art. 17, and rephrasing it to, "employees must pass probation to be eligible for health benefits." ***This article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	NAP proposed deleting grievance steps 3 and 4, and binding arbitration; the Union countered with a streamlined grievance procedure retaining arbitration. ***This article remained open.***[4]
Art. 5, *Bulletin Bd.* (ER 4)	NAP proposed removing the Union's "glassed-in" bulletin board enclosure. ***This article remained open.***[5]
Art. 6, *Injury* (ER 5)	NAP proposed deleting the article, which gave notice to the Union about workplace injuries and deaths. ***This article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	NAP proposed deleting the entire article. The Union proposed adding that a worker, who identifies an unsafe condition, can

[2] The parties previously met for bargaining for less than an hour on August 6, 2019. (GC Exh. 4.) Very little, if any, progress was made at that time; NAP mostly reiterated its earlier bargaining stance. (Id.); see also (Jt. Exh. 4).

[3] ER 1 stands for NAP bargaining proposal 1, whereas U 1 stands for Union bargaining proposal 1.

[4] ER 3 was more regressive than the first final offer, which did seek to not eliminate arbitration. Although NAP cited some difficulty finding local arbitrators, this unavailability was not a new issue and it otherwise failed to explain the motivation behind this proposal.

[5] ER 4 was more regressive than the first final offer, which did not seek to remove the glass enclosure. NAP failed to explain its rationale.

	refuse their assignment until it is remedied. ***This article remained open.***
Art. 8, *Vacation* (E 7, U 6–8)	NAP proposed deleting leave days, while Union proposed adding days. ***This article remained open.*** [6]
Art. 9, *Holidays* (ER 8, U 9–14)	NAP proposed eliminating holiday overtime pay and other benefits, while the Union sought increases. ***This article remained open.*** [7]
Article	**Parties' Positions**
Art. 10, *Hours* (ER 9, U 15–17)	NAP proposed eliminating call-in and temporary job transfer benefits. The Union proposed, inter alia, increasing minimum call-in hours. ***This article remained open.***[8]
Art. 11, *Military Service*	~~No changes to this article were proposed at this session by either party.~~[9]
Art. 12, *Rates of Pay Provision* (ER 10)	NAP sought to eliminate all language setting pay rates, and replacing it with, "Union recognizes management's right to increase pay without the agreement of the Union." The Union stated that its wage proposal would be later provided. ***This article remained open.***
Art. 13, *Subcontracting* (ER 11)	NAP proposed deleting the Union's subcontracting protections, and replacing it with, "Union recognizes management's right to subcontract any existing operations." ***This article remained open.***[10]
Art. 14, *Extra Work* (ER 12)	NAP proposed eliminating the equitable distribution of extra work opportunities, and replacing it with, "Union recognizes management's right to assign extra work opportunities." The Union did not propose any changes. ***This article remained open.*** [11]
Art. 15, *Nondiscrimination* (U 18, 19)	The Union proposed an update to include sexual preference, sexual identity and genetic information. ***This article remained open.***
Art. 16, *Co. and Union Resp.*	~~No changes to the no-strike, no-lockout provision were proposed.~~
Art. 17, *Seniority* (ER 13, U 20–22)	NAP sought to eliminate bargaining unit seniority, which factored into job bids. The Union proposed to shorten probation and change the application of seniority. ***This article remained open.***[12]
Art. 18, *Rest Periods* (U 23–24)	The Union proposed creating a paid 15-minute break and timing breaks during set daily windows. ***This article remained open.***
Art 19, *Funeral Leave* (U 25)	The Union proposed changing funeral leave from 7.5 to 8 hours. ***This article remained open.***
Art. 20, *Leave of Absence* (ER 14)	NAP proposed eliminating leaves of absence for the Union convention. ***This article remained open.***[13]
Art. 21, *Plant Visitation* (ER 15)	NAP proposed eliminating the article, which gave the Union the right to visit the plant and replacing it with, "Union recognizes management's right to allow Union officers and representatives to visit locations designated by Company management." ***This article remained open.***
Art. 22, *Safety Equip. and Knives*	~~No changes to this article were proposed at this session by either party.~~
Art. 23, *Misc.* (ER 16)	NAP proposed deleting the 12-hour workday cap and replacing it with the "Union recognizes management's right to assign work in excess of twelve (12) hours a day." ***This article remained open.***[14]
Contract Duration (ER 17, U 26)	NAP proposed a 5-year term, while the Union stated that its proposal would be submitted at a later session. ***This article remained open***.
Job Listings and Pay Rates (U 27)	The Union stated that its job listings and rates of pay proposal would be submitted at a later session. ***This issue remained open.***
401K Plan (U 28)	The Union proposed creating a 401(K) plan, with an employer match. It reserved its right, however, to offer plan details at a later session. ***This issue remained open.***
Seniority Lists (U 29)	The Union proposed that NAP would provide a weekly new hire and termination list, and monthly seniority list. ***This issue remained open.***
Article	**Parties' Positions**

[6] ER 7 was more regressive than the first final offer, which did not cut vacation benefits. NAP failed to explain its new position.

[7] ER 8 was more regressive than the first final offer, which cut holiday overtime. NAP failed to explain its new position.

[8] ER 9 was more regressive than then first final offer, which never reduced these benefits. NAP failed to explain its new position.

[9] The strikethrough denotes resolved issues, agreements to leave the CBA unchanged, or tentative agreements.

[10] ER 11 was more regressive than the first final offer, which never ended subcontracting rights. NAP failed to explain its new position.

[11] ER 12 was more regressive than the first final offer, which never changed extra work procedures. NAP failed to explain its new position.

[12] ER 13 was more regressive than the first final offer, which never eliminated bargaining unit seniority. NAP failed to explain its new position.

[13] ER 14 was more regressive than the first final offer, which never ended such leaves. NAP failed to explain its new position.

[14] ER 16 was more regressive than the first final offer, which never remove this hourly limitation. NAP failed to explain its new position.

Temp. Vacancies (U 30)	The Union proposed a revised temporary vacancy procedure. ***This issue remained open.***
Hours of Work (U 31)	The Union proposed a guaranteed 36-hour workweek. ***This issue remained open.***
Plant Studies (U 32)	The Union sought to perform plant studies with advanced notice. ***This issue remained open.***

(Jt. 26.)

In sum, although the parties agreed to leave articles 11 and 22 unchanged, all other proposals (i.e., ER 1–17 and U 1–32) remained open at the end of the session. NAP's opening proposal was noteworthy because 10 of 17 its proposals were substantially more regressive than the proposals contained in its unlawful first final offer from less than a year before. Given that NAP never explained the changed circumstances that warranted it seeking greater cutbacks, it is difficult to see how it rationally believed that its opener might induce fruitful bargaining.

2. November 18, 2019 meeting

The Union was represented by Reeder, Guerrero, Brejcha and Perez. NAP was represented by Ziegelheim and Pigsley. Their discussions are summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)	No change in position; ***article remained open.***
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	No change in position; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	The Union countered NAP's proposal to delete grievance steps 3 to 4 and arbitration, with a streamlined grievance and arbitration procedure. Following NAP's rejection of this counter, the Union countered with retaining the status quo, which NAP rejected.[15] ***This article remained open.***
Art. 5, *Bulletin Bd.* (ER 4)	~~NAP withdrew its proposal.~~
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***[16]
Art. 7, *Safety* (ER 6, U 4, 5)	NAP countered with creating a safety committee; the Union further modified its position. ***This article remained open.***
Art. 8, *Vacation* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 15, *Non-discrimination* (U 18, 19)	No change in position; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Article	**Parties' Positions**
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be subsequently submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be subsequently submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***

(Jt. Exhs. 26–27.)

In sum, at the close of the session, with the exception of NAP's withdrawal of ER 4, the number of open proposals remained unchanged. Other proposals were mostly flatly rejected with little discussion. The parties solely exchanged ideas and modified their positions on Article 4, *Grievance Procedure*, Article 5, *Bulletin Board* and Article 7, *Safety*. They left with an

[15] The Union protested that, because the CBA had a no-strike, no-lockout provision, it needed arbitration because it would be otherwise powerless to strike during the CBA's term to redress unilateral changes. Although NAP replied that the Union could seek redress by filing a breach of contract action in state court (Jt. Exh. 27), its position was misleading, given that such a state suit would be preempted under established precedent. See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

[16] NAP responded to a question about this proposal, but, no obvious bargaining occurred.

agreement on a single easy item, i.e., leaving the union bulletin board locked.

3. November 26, 2019 meeting

The Union was represented by Reeder, Guerrero, and Perez. NAP was represented by Pigsley. Their discussions are summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)	No change in position; ***article remained open.***
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	Union proposed another change; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	NAP made a counter, which sought to grant it the right to assign Unit work to non-unit foremen and afford it more control to change work rules.[17] The Union's proposals were unchanged; ***article remained open***.
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 15, *Non-discrimination* (U 18, 19)	Some progress was made, with both NAP and the Union offering reasonable counters; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be subsequently submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be subsequently submitted; ***article remained open.***
Article	**Parties' Positions**
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	NAP proposed a new article, *Waiver, Entire Agreement and Severability*,[18] and the Union countered that the, "general waiver is null and void with respect to any mandatory subject of bargaining." ***This article remained open.***
Misc. – Respect for Workers (U 33)	Union proposed a new article, *Respect for Workers,* ***which remained open.***
Misc. – Health Insurance Coverage (U 35)	Union proposed a health insurance plan with details to be supplied at a later session; ***article remained open.***
Misc. – Walk-Around Steward (U 36)	Union proposed a full-time walk around steward; ***article remained open.***

(Jt. Exhs. 26–28.)

In sum, although the parties made some limited progress on Art. 15, *Non-discrimination*, they made little progress on anything else. It is unclear if they discussed their other proposals beyond reiterating earlier rejections. There is no evidence of the parties offering counterproposals, even on seemingly de minimis items. NAP even went in the opposite direction of progress, and added two newly regressive proposals (i.e., management rights and waiver proposals).

4. December 9, 2019 meeting

F.M.C.S. Commissioner Ron Morrison attended. The Union was led by Reeder, Perez, and Brejcha. NAP was led by Pigsley and Prager. Their discussions are summarized below:

[17] NAP never sought to reduce these benefits in its first final offer. It failed to explain the necessity or timing of this deeper cutback.

[18] NAP never sought to reduce these benefits in its first final offer. It failed to explain the necessity or timing of this deeper cutback.

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)	~~The parties reached a tentative agreement (TA) to exclude shag drivers from the Unit.~~
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	Union proposed an added change, while the parties' prior positions remained unchanged; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	~~Union withdrew U 9~~; ***article otherwise remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 15, *Non-discrimination* (U 18, 19)	~~The parties reached a TA on a revised article.~~
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	Union modified its position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Article	**Parties' Positions**
Job Listings and Pay Rates (U 27)	Union's wage proposal to be subsequently submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be subsequently submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	No change in position; ***article remained open.***
Misc. – Respect for Workers (U 33)	No change in position; ***article remained open.***
Misc. – Health Insurance Coverage (U 35)	No change in position; ***article remained open.***
Misc. – Walk-Around Steward (U 36)	No change in position; ***article remained open.***

(Jt. Exhs. 26–29.)

In sum, although the parties resolved Articles 1 and 15, they made little progress on anything else. Agreements on Articles 1 and 15 were expected, given that the parties only agreed to exclude shag drivers from a Unit where they no longer existed and agreed to incorporate nondiscrimination legislation that NAP was already required to follow. The parties left this session with a whopping 50 open proposals and an ongoing parade of flat rejections.

5. December 10, 2019 meeting

The Union was represented by Reeder, Perez, and Brejcha. NAP was represented by Pigsley and Junker. These negotiations are summarized below:

Article	Parties' Positions
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	No change in position; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	NAP proposed dividing Unit jobs into these categories: light ($12/hour); medium ($13/hour); medium/heavy ($14/hour); heavy ($15/hour); and super heavy ($16/hour). The Union rejected this proposal. There were no additional changes in the parties' positions; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***

Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	~~The parties reached a TA on a revised article.~~
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be later submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be later submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Article	**Parties' Positions**
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	No change in position; ***article remained open.***
Misc. – Respect for Workers (U 33)	No change in position; ***article remained open.***
Misc. – Health Insurance Coverage (U 35)	No change in position; ***article remained open.***[19]
Misc. – Walk-Around Steward (U 36)	No change in position; ***article remained open.***

(Jt. Exhs. 26–30.)

In sum, while the parties reached a TA on the Rest Periods article, a host of major labor relations issues (e.g., wages, health insurance, retirement benefits, contract duration, and grievance-arbitration) remained. Once again, there was little to no accompanying discussion on these bargaining subjects.

6. December 17, 2019 meeting

The Union was represented by Schwisow and Perez. NAP was represented by Pigsley. These negotiations are summarized below:

Article	**Parties' Positions**
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	No change in position; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	~~The parties reached a TA;~~ ~~***this article was resolved.***~~
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be later submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be later submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	No change in position; ***article remained open.***
Misc. – Respect for Workers (U 33)	No change in position; ***article remained open.***

[19] At this session, the Union reported that is International affiliate could provide health insurance coverage for the unit.

Misc. – Health Insurance Coverage (U 35)	No change in position; ***article remained open.***
Misc. – Walk-Around Steward (U 36)	No change in position; ***article remained open.***

(Jt. Exhs. 26–31.) In sum, this session solely yielded the resolution of Art. 20, *Leave of Absence*.

7. January 13, 2020 meeting

The Union was led by Brejcha, while NAP was led by Pigsley. After some limited discussion, NAP declared impasse and presented a final offer (the second final offer):[20]

[20] It is notable that NAP presented the Union with an unmarked copy of its final offer, which appeared as a draft contract. Its version made it extremely difficult to pinpoint and appreciate its exact CBA modifications.

Clause	Final Offer
Art. 1, *Recognition*	The TA was included; the rest of the article was left unchanged.
Art. 2, *Maintenance of Memb./Dues*	ER 2 (i.e., adding that the, "Union agrees that an employee may at any time contact the Company's HR Department to withdraw from the Union and cease having Union dues withheld from the employee's pay.") was added; U 1 and 34 were rejected; and the rest of the article was unchanged.
Art. 3, *Mgmt. Rights*	The status quo was retained; U 2 (i.e., "Employees must pass probation to be eligible for benefits.)" was incorporated in the *Seniority* article; and U 3, which was not withdrawn, was rejected.
Art. 4, *Grievance Procedure*	ER 3 (i.e., deleting grievance steps 3 and 4, and binding arbitration) was implemented, while the rest of the article was left unchanged.
Art. 5, *Bulletin Bd.*	ER 4 was withdrawn, and the article was left unchanged in accordance with the parties' prior agreement.
Art. 6, *Injury*	ER 5 (i.e., which deleted the article, including the Union's right to be notified of workplace injuries and deaths, and right to investigate) was implemented.
Art. 7, *Safety*	ER 6 (i.e., which deleted the entire article) was implemented, while U 4 and 5 were rejected.
Art. 8, *Vacation*	ER 7 (i.e., which deleted additional vacation for 4 and 5 years of service) was implemented, while U 6 through 8, which were not withdrawn, were rejected.
Art. 9, *Holidays*	ER 8 (i.e., which eliminated overtime for holiday hours worked and other holiday benefits) was implemented, while U 10 through 14, which were not withdrawn, were rejected.
Art. 10, *Hours of Work*	ER 9 (i.e., which deleted the entire article, including minimum call-in hours and premium pay for temporary transfers) was implemented, while U 15 through 17, which were not withdrawn, were rejected.
Art. 11, *Mil. Serv.*	The current article was retained, as per the parties' prior agreement.
Art. 12, *Rates of Pay Provision*	ER 10 (i.e., which provided, inter alia, that the "Union recognizes management's right to increase pay without the agreement of the Union" and set these rates/job categories: light ($12/hour), medium ($13/hour), medium/heavy ($14/hour), heavy ($15/hour) and super/heavy jobs ($16/hour)) was implemented. The Union was never given the opportunity to advance a wage proposal, although it had previously stated that it intended to at a later session, after lesser issues and non-economic matters were first addressed.
Art. 13, *Subcontracting*	ER 11 (i.e., which deleted the article and replaced it with the, "Union recognizes management's right to subcontract any existing operations") was implemented.
Art. 14, *Extra Work*	ER 12 (i.e., which deleted the article and replaced it with the, "Union recognizes management's right to assign extra work opportunities") was implemented.
Art. 15, *Non-discrimination*	The TA was implemented.
Art. 16, *Co. and Union Resp.*	The status quo article was retained in the final offer.
Art. 17, *Seniority*	Although ER 13 initially proposed deleting the entire article, the final offer only deleted the second paragraph of the article, which, inter alia, used department seniority for awarding vacancies. The final offer added this sentence, "employees must pass probation to be eligible for benefits," which the parties had agreed-upon. The final offer rejected U 20 to 22, which proposed, inter alia, changing the probationary period and bid procedures, and was not withdrawn.
Art. 18, *Rest Per.*	The TA was incorporated in the final offer.
Art 19, *Funeral Lv.*	The status quo article was retained in the final offer; U 25 (i.e., which proposed changing the funeral leave benefit from 7.5 to 8 hours, and was never withdrawn) was rejected.
Clause	**Final Offer**
Art. 20, *Lv. of Absence*	The TA was implemented.
Art. 21, *Plant Visit.*	ER 15 (i.e., which deleted the Union's right to visit the plant for, inter alia, grievances and safety, and replaced it with the, "Union recognizes management's right to allow Union officers and representatives to visit locations designated by Company management") was implemented.
Art. 22, *Safety Equip. and Knives*	The TA was implemented.
Art. 23, *Misc.*	ER 16 (i.e., which deleted the employees' rights to not work over 12 hours per day and replaced it with the "Union recognizes management's right to assign work in excess of twelve (12) hours a day") was implemented.

Art. 24, *Term of the Agreement*	ER 17 (i.e., which created a 5-year contract) was implemented. The Union never advanced a contract duration proposal; it stated that it intended to advance a duration proposal in tandem with its wage proposal at a later bargaining session, after various lesser issues and non-economic matters were addressed.
~~Misc. Job Listings and Pay Rates~~	~~U 27 (i.e., which sought to propose revised job listings and wages at a later session) was rejected.~~
~~Misc. 401K Plan~~	~~U 28 (i.e., which sought to propose the creation of a 401K plan for the unit at a later session) was rejected.~~
~~Misc. Seniority List~~	~~U 29 (i.e., which sought Noah's Ark's commitment to provide the Union with a weekly new hire and termination list, and monthly seniority list) was rejected.~~
~~Misc. Temporary Vacancies~~	~~U 30 (i.e., which sought to revise the process for filling temporary vacancies) was rejected.~~
~~Misc. 36 Hour Workweek~~	~~U 31 (i.e., where the Union proposed that full-time employees be guaranteed 36 hours of work per week) was rejected.~~
~~Misc. Plant Studies~~	~~U 32 (i.e., where the Union proposed conducting studies at the plant) was rejected.~~
~~Misc. Waiver~~	~~ER 18 (i.e., which added a *Waiver, Entire Agreement and Severability* article) was implemented, while the Union's counterproposal was rejected.~~
~~Misc. Respect for Workers~~	~~U 33 (i.e., which proposed creating a new article legislating respect for workers) was rejected.~~
~~Misc. Health Insurance Coverage~~	~~U 35 (i.e., which proposed granting health insurance coverage to the unit, but, was never discussed because it was tabled to a later point in bargaining) was rejected.~~
~~Misc. Walk-Around Steward~~	~~U 36 (i.e., which sought to create a full-time, walk-around steward) was rejected.~~

(Jt. Exhs. 26–32); see also (GC Exh. 5).

III. ANALYSIS

A. Bad-Faith Bargaining over the Successor CBA

NAP bargained in bad faith over the successor CBA. The Act requires an employer to meet with a union "at reasonable times," and confer in good faith over the bargaining unit's "wages, hours and other terms and conditions of employment." Good faith means negotiating with the "sincere purpose to find a basis of agreement," which includes reasonable efforts to compromise. *Regency Service Carts, Inc.*, 345 NLRB 671 (2005); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Although good faith does not require capitulation, it does require an obvious and ongoing effort "to settle differences and arrive at an agreement." *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965). The "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation" does not suffice (i.e., just going through the motions). Id. The Board employs a "totality of the circumstances" test to gauge a good faith, which weighs these factors: the reasonableness of bargaining demands; delays; efforts to bypass the union; refusals to provide information; unilateral changes; failing to designate an agent with bargaining authority; withdrawing prior agreements; arbitrary scheduling; and other unlawful conduct. *Atlanta Hilton & Tower*, supra. I find that several bad-faith factors are present herein.

1. Factor 1—Deeply regressive proposals

The consistently regressive nature of NAP's proposals strongly suggests bad faith. Or put another way, NAP's bargaining demands were unreasonable. *First*, it demonstrated bad faith when it sought to slash virtually every benefit and workplace protection contained in the CBA. Its second final offer deleted, inter alia, binding arbitration, workplace injury investigation rights, the whole *Safety* article, greater leave for senior workers, premium pay for call-ins, subcontracting protections, extra work procedures, plant visitation rights, a 12-hour workday cap and, perhaps most importantly, the Union's right to negotiate over, and consent to, mid-contract pay adjustments. It effectively offered the Union a deal that no self-respecting labor organization could take. *Second*, it further demonstrated bad faith because, when taken as a whole, it was really offering the Union a worse landscape with a contract than it would have possessed without a contract.[21] *Third*, the egregiousness of its position was magnified by its consistent failure to even offer a rationale for its

[21] For example, the combined effect of ER 12's granting to NAP of the right "to increase pay without the agreement of the Union," ER 3's deletion of arbitration, the continuation of the no-strike clause, and ER 18's comprehensive *Waiver, Entire Agreement and Severability* article, meant that the Union would be powerless to challenge NAP's decision to adjust wages during the contract's term. This scenario is vastly worse than having no CBA at all because, absent a contract, the Union would still be entitled to pre-implementation notice and bargaining over wages. By way of further example, without a contract, the Union would retain the right to pre-implementation notice and bargaining over most instances of subcontracting. See generally *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964); *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). The combined effect, however, of ER 11's express grant "to subcontract any existing operations, ER 3's elimination of arbitration, and ER 18's comprehensive *Waiver, Entire Agreement and Severability* article meant that the Union would now be powerless to stop NAP from subcontracting and eviscerating the entire Unit at will. Without exercising a great deal of creativity, many additional examples of this principle could be listed, with each eviscerating the Union in a unique way.

deeply regressive slate of proposals.[22] See, e.g., *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (where a proponent of a regressive proposal fails to provide a legitimate explanation for such a proposal, it is indicative of a failure to bargain in good faith); *John Asquaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part sub nom. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992). *Fourth*, its second final offer was even more regressive than its first final offer, which was held to have been made in bad faith; once again no explanation was offered for this anomaly.[23] *Atlanta Hilton & Tower*, supra; *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) (tactics "designed to frustrate bargaining" are "an indicium of bad-faith bargaining").[24]

2. Factor 2—Unwillingness to consider even minor changes

NAP's ongoing refusal to consider even the Union's most innocuous proposals, without explanation, reveals bad faith. The Board considers an employer's refusal to consider a union's proposals, without explanation, to be a factor demonstrating bad faith. *Mid-Continent Concrete*, supra, 336 NLRB at 260. In this case, NAP flatly rejected U 1, even though it only sought a membership list and related data, which was readily available at little expense and an abundantly reasonable demand, and U 33, even though the Union only wanted a pro forma pledge about workplace respect. Agreeing to U 1 and U 33 would have been cost-free gestures of good will, without any actual labor relations impact; NAP's rejection of easy giveaways suggested bad faith.

3. Factor 3—General unwillingness to consider most other union proposals

NAP's refusal to consider the Union's other proposals, without discussion, supports a bad-faith finding. Although the Union made proposals on a range of key Unit issues (e.g., safety (U 4–5), vacation (U 6–8), holiday (U 9–14), hours of work (U 15–17) and seniority (U 20–22)), NAP flatly dismissed these issues, without a single counter. Although NAP was never obligated to capitulate to any specific demands, its decision to cursorily dismiss these proposals, without even a reasonable exploration of the Union's goals, its priorities and the potential common ground, demonstrated bad faith.

4. Factor 4—Adoption of most of its own initial proposals without modification

NAP's implementation of so many of its own highly regressive proposals, without any discourse or retreat from its original position, demonstrated bad faith. NAP repeatedly advanced its highly regressive slate without alteration, compromise or rationale, while summarily rejecting the Union's ideas on the same topics. *Atlas Guard Service*, 237 NLRB 1067, 1079 (1978) (violation where employer would only reach agreement on its own terms). This "my way or the highway" approach suggested bad faith.

5. Factor 5—Unwillingness to wait for the union to make all of its proposals

NAP's bad faith was also exhibited by its unwillingness to even wait for the Union to advance its full slate of proposals. Throughout bargaining, the Union told NAP that it intended to advance its wage (U 27), 401K plan (U 28) and health insurance (U 35) proposals at a later session, after the parties culled through several more resolvable proposals with lesser economic impact.[25] NAP's unwillingness to hold off on declaring an impasse before it actually heard everything that the Union had to say was bad faith. *Atlanta Hilton & Tower*, supra. There was simply no valid reason why NAP could not wait to at least hear the Union's position on these key issues, and gauge if there was any commonality in their stances.

6. Factor 6—NAP's wage proposal

NAP's pursuit of an unlawful wage proposal further demonstrated bad faith. Wage proposals (e.g., merit pay proposals) that do not contain definable objective procedures and criteria for their application are unlawful. *Royal Motor Sales*, 329 NLRB 760, 779–781 (1999), enfd., 2 Fed. Appx. 1 (D.C. Cir. 2001) (promotions and raises based on "ability and performance" without defining objective criteria for assessing those factors and without established maximum amounts for raises too discretionary); *McClatchy Newspapers*, 321 NLRB 1386, 1390–91 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997) (merit raises based on performance without defined criteria for evaluations and parameters for amounts was unlawful); *Colorado-Ute Elec. Assn.*, 295 NLRB 607, 609–610 (1989), enf. denied, 939 F.2d 1392 (10th Cir. 1991) (merit raises based on performance without defined criteria for assessment and parameters for amounts are too discretionary). In the instant case, the wage proposal that NAP implemented lacked any objective criteria for assessing the factors that warranted a raise and lacked parameters for such raises (e.g., it broadly stated, "Union recognizes management's right to increase pay without the agreement of the Union" without providing any connected criteria). It was, as a result,

[22] As a threshold matter, beyond NAP saying that it was unable to procure a local Nebraska arbitrator, it wholly failed to justify why it needed to completely end arbitration in a workplace that rarely had any arbitrations. It's also flatly unreasonable that the short supply of Nebraska arbitrators meant that NAP needed to reject the arbitral institution in its entirety. In addition, it never explained why it needed to eliminate the Union's subcontracting, health and safety rights, as well as host of other important procedures, benefits and protections for its employees. Explanation and discussion is a key element to bargaining, and NAP's derogation of these duties smacked of bad faith.

[23] As noted, even though only a year passed between NAP's first and second final offers, it newly sought even deeper cutbacks in Arts. 3, 7, 8, 9, 10, 13, 14, 17, 20, and 23, even though its first final offer never previously sought to amend the same portions of these articles.

[24] "Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp*., 331 NLRB 223, 225 (2000), enfd. 26 Fed.Appx. 435 (6th Cir. 2001), citing *McAllister Bros*., 312 NLRB 1121 (1993).

[25] Collective bargainers often categorize proposals into economic and non-economic categories, in an effort to try to first resolve non-economic matters before tackling more difficult economic ones that might be bargained over in the context of an overall labor relations budget. The Union's efforts to try to work through bargaining in this manner was rational.

too discretionary and unlawful. NAP's prosecution of this unlawful wage proposal further demonstrated bad faith.[26]

7. Synthesis

I find, accordingly, that NAP bargained in bad faith. *Public Service Co. of Oklahoma*, 334 NLRB 487, 488–490 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Mid-Continent Concrete*, supra at 261 (relying upon the several bad-faith factors present herein). Although NAP argues that its willingness to reach a few tentative agreements demonstrated good faith, this argument is misplaced. Its tentative agreements involved "low-hanging fruit" (e.g., agreeing to leave a bulletin board locked, incorporating anti-discrimination laws into the contract, moving previously agreed-upon language around, etc.), which hardly exculpated NAP's other instances of bad faith.

B. Unlawful Impasse

NAP's bad-faith bargaining during contract negotiations precluded it from reaching a valid impasse with the Union. The absence of a valid, good-faith impasse estopped NAP from lawfully implementing its second final offer. In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board held that a valid bargaining impasse occurs when, "good-faith negotiations have exhausted the prospects of concluding an agreement." In *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974), the Board added that:

> [A] genuine impasse in negotiations is synonymous with a deadlock [where] the parties have discussed the … subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

The question of whether a valid impasse exists is a "matter of judgment," where these factors are relevant: "bargaining history, good faith of the parties in negotiations, the length of 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.*, supra at 478. It is insufficient that the party asserting impasse believes that it has been reached; there must be a "contemporaneous understanding" by both that further bargaining would be futile. *Newcor Bay City Div.*, 345 NLRB 1229, 1238 (2005), enfd. mem. 219 Fed. Appx. 390 (6th Cir. 2007). The burden of demonstrating a good-faith impasse rests with the party, who claims its existence. *Serramonte Oldsmobile Inc*., 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). An employer, consequently, violates §8(a)(5), when it implements its final bargaining offer in the absence of a valid good-faith impasse. *Cotter & Co.*, 331 NLRB 787 (2000).

In the instant case, NAP failed to meet its burden of demonstrating the existence of a valid, good-faith impasse. *First*, as noted in detail in the bad-faith bargaining analysis above, its declaration of impasse was preceded by a pattern of bad-faith negotiations, which precluded the parties from reaching a valid, good-faith, impasse. *Second*, the parties' bargaining history undercuts NAP's assertion of a good-faith impasse. This is a case, where NAP previously bargained in bad faith, unlawfully implemented its first final offer, and then had to be forced to return to the bargaining table via an injunction and contempt action (i.e., it really only went back to the table kicking and screaming). *Finally*, NAP failed to show that there was a "contemporaneous understanding" of impasse by both parties. The Union never believed that the parties were at impasse. And, really, how could there have been an impasse, when NAP failed to even wait for the Union to submit its most important proposals on wages, health insurance and retirement benefits? In sum, NAP failed to meet its burden of proof on this subject; its contention regarding the reaching of a valid impasse is a sham.[27] The absence of a valid impasse, consequently, rendered NAP's imposition of the second final offer unlawful.

CONCLUSIONS OF LAW

1. NAP is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. The Union is a §2(5) labor organization.

3. At all times material herein, the Union has been the designated bargaining representative of NAP's employees in the following appropriate unit:

> All production, maintenance, shag drivers and distribution employees employed at its Hastings, Nebraska facility, but, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

4. At all material times, NAP has recognized the Union as the exclusive bargaining representative of the employees in the unit described above.

5. NAP violated §8(a)(5) by:

(a) By failing and refusing to bargain in good faith with the Union while negotiating a successor agreement.

(b) Implementing a last, best and final offer in negotiations without reaching a valid, good-faith, bargaining impasse with the Union.

6. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

REMEDY

Having found that NAP committed unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that NAP violated §8(a)(5) by refusing to bargain in good faith, it shall meet, on request, with the Union and bargain in good faith over the terms and conditions of

[26] This factor supplements the already strong conclusion that NAP bargained in bad faith, but, is not outcome determinative. Thus, even if this wage issue were not considered, a bad faith finding would be persuasively supported by the several other bad faith factors cited herein.

[27] NAP's contention that a valid impasse was reached in the face of its ongoing pattern of bad faith and recent quadfecta of losses on the very same issues before the Board and the U.S. District Court exhibits an almost comical level of chutzpah. Chutzpah is eloquently defined as "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." LEO ROSTEN, THE JOYS OF YIDDISH (1968).

employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract. In addition, having found that NAP unlawfully implemented its final offer on January 13, 2020, in the absence of a valid impasse, NAP is directed to reinstitute the terms and conditions of employment that existed before its unlawful changes. It shall also make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral changes as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus 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). In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), NAP shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, 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 employee.

In light of NAP's bad-faith bargaining recidivism, it shall hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which time the attached notice, Appendix, is to be read to the employees in both English and Spanish by CEO Fischel Ziegelheim or, at NAP's option, by a Board agent in his presence. Given that Ziegelheim took an active role in bargaining, his presence will promote the message that NAP will now comply with the Act and bargain in good faith, which will help assure workers that their §7 activities are not an act of futility.

NAP shall reimburse the Union for its negotiating expenses that were incurred from November 11, 2019, until such time as NAP begins bargaining in good faith, upon submission by the Union of a verified statement of costs and expenses. *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 NLRB 1125 (1998) (an order requiring a respondent to reimburse a charging party for negotiation expenses is warranted in cases of unusually aggravated misconduct, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies).

Finally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), an affirmative bargaining order is warranted herein, as the "traditional, appropriate" remedy for NAP's unlawful failure and refusal to bargain in good faith. Id. at 68. An affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000).

Regarding factor 1, an affirmative bargaining order would vindicate the §7 rights of the Unit employees who have been repeatedly denied the benefits of collective bargaining by NAP's unlawful conduct. NAP's surface bargaining, repeated efforts to frustrate the negotiating process and unlawful implementation of the second final offer has unlawfully deprived the Unit of the chance to secure the stability of a collective-bargaining agreement. An affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, will advance the §7 rights of employees who have been deprived of the benefits of the collective-bargaining process, without undue prejudice to the §7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Factor 1, accordingly, weighs heavily in favor of an affirmative bargaining order.

Regarding factor 2, an affirmative bargaining order would advance the Act's policies by fostering meaningful collective bargaining and industrial peace. It would remove NAP's incentive to delay bargaining and foster greater Union disenfranchisement. It would ensure that the Union will not be pressured by NAP's failure to bargain in good faith to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

Regarding factor 3, a cease-and-desist order, in isolation, would be inadequate to remedy NAP's unlawful surface bargaining because it would permit a challenge to the Union's majority status before the taint of the unlawful conduct has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unjust in the instant case because the unlawful surface bargaining has caused an undue and prolonged delay in the parties' progress toward achieving a successor agreement. Given that Unit employees may errantly blame the Union, at least in part, for the present situation, an affirmative bargaining order would insulate the Union from a consequence that NAP has singlehandedly caused, and, ideally, prevent disaffection on this basis for a sufficient period. Or put another way, an affirmative bargaining order is necessary to prevent NAP from benefiting from the fruits of its unlawful actions. The imposition of a bargaining order would signal to employees that their rights guaranteed under the Act will be protected. This circumstance outweighs the temporary impact the affirmative bargaining order will have on the rights of employees, who may oppose continued union representation.

For all the foregoing reasons, an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy NAP's bad-faith surface bargaining in this case.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

Noah's Ark Processors, LLC d/b/a WR Reserve its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with the Union while negotiating a successor agreement.

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

(b) Implementing a last, best and final offer in negotiations without reaching a valid, good-faith bargaining impasse with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

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

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

> All production, maintenance, shag drivers and distribution employees employed at the Hastings, Nebraska facility, but, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(b) Rescind the changes in the terms and conditions of employment for its unit employees, which were unilaterally implemented under the January 13, 2020 final offer.

(c) Make whole eligible employees in the above-described unit for any loss of earnings and benefits resulting from implementing the January 13, 2020 final offer in the absence of a valid impasse, as described in the remedy section.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving a lumpsum awards and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay liability is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Compensate the Union for all bargaining expenses incurred, or to be incurred, from November 11, 2019, through the date that good-faith negotiations ultimately begin. Upon receipt of a verified statement of costs and expenses from the Union, NAP shall promptly submit reimbursement to the compliance officer for Region 14 of the National Labor Relations Board, who will document its receipt and forward payment to the Union.

(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 the Board's order.

(g) Within 14 days after service by the Region, post at its Hastings, Nebraska facility copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 14, 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, it 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 November 11, 2019.

(h) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice, Appendix, is to be read to the employees in both English and Spanish by CEO Fischel Ziegelheim or, at NAP's option, by a Board agent in his presence.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated Washington, D.C. May 27, 2021

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 bargain in bad faith with the Union while negotiating a successor agreement.

WE WILL NOT implement a last, best and final offer in negotiations without reaching a valid, good-faith, bargaining impasse with the Union.

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 as the exclusive collective-bargaining representative of the employees in this appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement:

> All production, maintenance, shag drivers and distribution employees employed at the Hastings, Nebraska facility, but,

[29] 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."

excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees, which were unilaterally implemented under our January 13, 2020 final offer.

WE WILL make whole, with interest, eligible employees in the above-described unit for any loss of earnings and benefits caused by the unlawful imposition of our January 13, 2020 final offer.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving a lumpsum award associated with our unlawful implementation of our January 13, 2020 final offer, and file with the Regional Director for Region 14, 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 employee.

WE WILL reimburse the Union for their negotiating expenses from November 11, 2019, until such time as we begin bargaining in good faith, upon submission by the Union of a verified statement of costs and expenses.

NOAH'S ARK PROCESSORS, LLC D/B/A WR RESERVE

The Administrative Law Judge's decision can be found at http://www.nlrb.gov/case/14-CA-255658 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.