NLRA impasse cases: What's right, what's not right and what can be done about it

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By David P. Twomey

I. Introduction

Section 1 of the National Labor Relations Act (NLRA) sets forth the policy of the law to protect "the right of employees to organize and bargain collectively" and restore "equality of bargaining power between employers and employees."[1] Section 7 of the Act sets forth the rights of employees to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, (including the right to strike) for the purposes of collective bargaining, or other mutual aid or protection.[2] Section 7 also includes the right of employees to refrain from all such activities.[3] Section 13 of the NLRA states that nothing in the Act, except as specifically provided in the law, "shall be construed to interfere with or impede or diminish in any way the right to strike."[4] Nevertheless, a judicial doctrine allowing employers to permanently replace economic strikes has taken hold.[5] Moreover, a second judicial doctrine allows employers to make unilateral changes in terms and conditions of employment once the parties have bargained to a bona fide impasse.[6] This so called "implement upon impasse" doctrine may be initiated as a result of a genuine disagreement leading to a valid bargaining impasse between the parties over economic and/or work rules. And a union in theory is not defenseless when faced with the unilateral implementation of an employer's "final offer," for it has the strike weapon in its arsenal. However, weakened by an employer's ability to hire permanent replacements, a union and employees may be reluctant to strike, especially if competent replacement workers are available to the employer.

Seizing on the implement upon impasse doctrine coupled with the power to hire permanent replacements should a strike occur, some employers may undertake a collective bargaining strategy of manufacturing an impasse solely to implement its "final offer," even though the union is seeking mediation and/or further bargaining. Other employers may implement a strategy to create an impasse to relieve their bargaining obligations by seeking terms that they know a union is very unlikely to agree to, thus leading to a bargaining impasse. No union security clause; no grievance arbitration clause, and/or no dues check off could be such employer proposals. In the context of bargaining for a first contract, a responsive strike by a union to an employer's asserted impasse could lead to the hiring of permanent replacements and deunionization. Failure to strike could

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expose the union's lack of bargaining leverage and bring about erosion of employee support for the union. Either outcome would be a win for the employer.

This paper discusses two recent "impasse" cases. In *Carey Salt Co. v. NLRB*,[7] an employer, frustrated by a lack of acceptance of its core demands by a union, with the guidance of legal counsel, executed its "end game" strategy, and imposed its "final offer" on the union.[8] The extensive fact pattern will give insights into the employer's strategy, the impact of permanent replacements, and the important role of the NLRB in resolving "impasse" cases. In *Erie Brush & Manufacturing Corp. v. NLRB*, [9] a case involving bargaining for a first contract, the employer claimed that a bargaining impasse on the subject of union security relieved it of its obligation to bargain over economic issues.[10] The Board majority disagreed, but the U.S. Court of Appeals for the District of Columbia Circuit, refused to enforce the Board's bargaining order.[11] Part II of the paper presents the *Carey Salt* case and comments. Part III of the paper presents the *Erie Brush* case and comments. Part IV of the paper considers some remedial measures proposed to restore the equality of bargaining power between employers and employees regarding "impasse cases." The paper concludes with a modest policy proposal to facilitate the adjudication of first contract impasse disputes.

II. The *Carey Salt* Case

A. Background and Bargaining Process

Carey Salt Company, a subsidiary of Compass Minerals International, Inc., operates a rock salt mine in Cote Blanche, Louisiana.[12] Carey Salt entered into negotiations with the United Steelworkers Union (Union) over terms of a new collective-bargaining agreement in February of 2010.[13] Between February 8 and March 19 the parties met some fourteen times to replace their current agreement which would expire on March 24.[14] Union negotiators largely refused to yield on three "core" Employer issues regarding overtime distribution, alternative shifts, and cross-assignment of employees. [15] On March 18, after an initial confrontational discussion of wages, the Union requested a "final" offer from Carey Salt.[16] The Union representative explained that his purpose was to obtain membership feedback on the offer's terms ahead of the current contract's expiration; and he expressed his interest to return to negotiations if the offer was rejected by the membership.[17] On March 19, Cary Salt presented its final offer.[18] On March 24, the Union membership rejected the offer, and the union representative immediately contacted Carey Salt and requested to meet;[19] the employer agreed to meet, and extended the existing contract to March 31.[20]

During a conference call on March 30, Victoria Heider, the Vice President for Human Resources for Compass Minerals, stationed in Overland Park, Kansas, informed the company's CEO Angelo Brisimitzakis of the status of the bargaining at the Carey Salt subsidiary, and thereafter booked her flight to Louisiana with a return flight for 2:20 pm on the afternoon of the March 31, 2010 negotiating session.[21] CEO Brisimitzakis sent her a follow up e-mail. The reference to "Gord" is to Gord Bull the mine manager and "Victoria" is Victoria Heider, the Vice President of Human Resources and lead negotiator.

> "CB Game Plan/End Game," Confirming our call this morning . . . please find below the specific steps that will play out on Wednesday and beyond:
>
> Wed 9–11 am–Victoria and Gord attempt to get union to agree to our "last and final" Offer . . . if unsuccessful, they declare "impasse" based on guidance from Bob/legal team.
>
> Wed 11:01 am Victoria presents union with letter (prepared by Bob/legal team) confirming impasse and that there will be no further negotiations.
>
> Wed 11:02 am: Gord communicates in writing with all Supervisors/Management what just happened, what is impasse, terms of our last & final offer and that NO ONE is to negotiate anything etc. (letter prepared by legal team) . . . okay to copy exempt/non-union work force.
>
> Wed 11:03 am- General/kind letter from Gord to entire CB work force (union & non Union is available and can be handed out with a brief summary as to where we stand, confirming that they are all welcome to work at new/higher wages on their current shift but subject to the terms of our "last & final" offer (letter to be prepared by Bob/legal team).
>
> Wed 11:04 am: a hard copy of revised CBA (incorporating all the "last & final" terms) is distributed to CB management/supervisors.
>
> Obviously, the times of 11:01–11:04 am are approx and only indicate the sequence of events. We are entering an "100% legal phase" right now and we all need to work thru Bob/legal team. I will set

up a call for tomorrow afternoon for all of us to discuss/review our status.

Hang tough and stay safe . . . good luck![22]

At the March 31, 2010 meeting Carey Salt negotiators, having confirmed the Union's rejection of the final offer, then declared a bargaining impasse over Union protest.[23] Company negotiators explained that the Union had asked for a "final offer" and they were given such, and then departed from the meeting site by approximately 11:30 A.M., thereby executing the "end game" outlined by Carey Salt's CEO the previous day.[24] In the afternoon, the Union representative tried unsuccessfully by phone and email to bring Carey Salt negotiators back to the table by explaining that he had new proposals that would "move in a meaningful way" toward Carey Salt's positions on shift scheduling and other issues, and that a federal mediator was available.[25] The Union membership, at a special meeting later in the day, reconsidered but again voted to reject the final offer. That night, a Carey Salt negotiator confirmed that the company was unilaterally implementing its March 19 final offer.[26] On April 1, the company confirmed that, having reached impasse it would not meet again unless the Union accepted its offer in full.[27]

On April 7, the Union, believing the March 31 implementation to be an unfair labor practice, voted to and commenced a strike.[28] On April 30, the parties returned to the negotiating table.[29] On May 25, Carey Salt presented a revised offer increasing the number of core issues from three to seven.[30] On June 15, the employees ended the strike, unconditionally offering to return to work.[31] The company recalled certain strikers by merit, rather than by seniority, with the Union objecting to the failure to take back what it termed the "unfair labor practice strikers."[32]

After more meetings, a failure to agree on a June 23 second "final offer" containing four additional "core" issues and the original "core" issues, Carey Salt, claiming impasse again, unilaterally implemented additional changes in terms and conditions of employment.[33]

B. Employer Utilizes the Leverage of Permanent Replacements

At the close of the day on April 30, Ms. Heider told the Union's negotiating committee that if the Union rejected its modified final offer, two things were going to happen. The first thing was that Carey Salt would step up the hiring of permanent replacement workers and the second thing was that it would re-evaluate the Union's proposals in their entirety.[34]

In its May 25, 2010 session the Carey Salt lead negotiator stated:

> The management team hopes that over the course of these reopened negotiations, all on the union side will keep an open mind and that we can get a new agreement that recognizes the realities of the current job marketplace, especially the fact that management has learned that it easily can hire an excellent workforce on the terms it is offering.[35]

During a meeting on June 3, 2010, Plant Manager Bull stated that Carey Salt had already hired as many as fifty five replacement workers and it anticipated having as many as one hundred by the end of the month.[36]

In emails between the parties on June 9, 2010 Ms. Heider informed the Union's lead negotiator, Gary Fuselier that the replacement workers hired during the strike were permanent replacements.[37] She explained that if, and when, the strike ended, it was unlikely that all of the striking employees would be able to return at once to their jobs.[38] She suggested basing the preferential recall on Carey Salt's last contract proposal. The proposal based recall on relative merit.[39] Union Representative Mike Tourne sent Mr. Bull an email. In it Tourne stated that several times during the negotiations, Bull had referenced the replacement workers hired during the strike.[40] Tourne asked for clarification as to whether these replacement workers were temporary or permanent.[41] At 9:25 p.m. that same evening, Ms. Heider responded to Tourne's inquiry. She explained in her email that while she could not give a precise breakdown in numbers, Carey Salt had hired a substantial number of replacement workers in both categories.[42] She identified, however, that the only temporary employees were contractor employees.[43]

C. Proceedings Before the Board and the Court of Appeals

The Union brought charges alleging unfair labor practices.[44] The Administrative Law Judge found *inter alia* that the company had violated Section 8(a)(5) and (1) of the Act by making unilateral changes in employment conditions in the absence of a valid impasse, and had violated Section 8(a)(3) and (1) of the Act by failing to reinstate employees engaged in an unfair labor practice strike.[45] The Board adopted the ALJ's findings with certain modifications, and its order required Carey Salt to restore terms and conditions of employment to its pre-March 31 status until an agreement or valid impasse was reached, make whole employees who suffered losses as a result of the March 31

implementation or the failure to reinstate strikers; and post notices explaining the company's obligations.[46]

On appeal to the U.S. Court of Appeals for the Fifth Circuit, Carey Salt contended that because the parties had bargained to impasse, its implementation of its final offers were lawful.[47] The court determined that Carey Salt deployed impasse not to "further" but to destroy the negotiation, at a critical point when the parties had explicitly agreed to return to the bargaining table.[48] Despite the company's claims that it satisfied the formal requirements of good-faith bargaining by providing an offer, agreeing to meet, and listening to Union concerns, the court concluded that substantial evidence supports the Board's conclusion that the company's true intent was to forgo agreement and rush to unilateral implementation.[49]

The court stated that the Board permissibly concluded that although Carey Salt representatives met with the Union negotiators on March 31, they had already paved the way for impasse by planning directly for an impasse declaration and then failing to return earnestly to talks as the Union had expressly requested.[50]

The court determined that the strike commencing on April 7 was an unfair labor practice strike caused by the unlawful March 31 implementation; that Carey Salt threatened to replace strikers; failed to reinstate strikers; and failed to use seniority in recalling strikers.[51] It enforced the Board's order in all important respects other than to vacate a provision prohibiting Carey Salt from making regressive proposals during negotiations.[52]

D. Investigative Tools Available to the Board

When a charge is filed with the Board's regional office, the agency undertakes an investigation "to seek out all material evidence in the spirit of providing the Regional Director with a complete picture of the events so as to permit an informed decision [as to whether or not to issue a complaint] on the case.[53] Upon request, at trial, certain statements and materials must be made available by the General Counsel after a witness has testified at a hearing for the purposes of cross-examination.[54] Moreover, subpoenas are available to all parties in an unfair labor practice proceeding to require the attendance and testimony of witnesses, and the production of any information in their possession or under their control including books, records, correspondence (emails) or documents.[55] While NLRB rules unambiguously state that any attempt to use the Federal Rules of Civil Procedure, providing for compulsory pretrial discovery, should be resisted,[56] the Board's relatively uncomplicated procedures set forth in its Casehandling Manual provide the Board with the necessary tools to maintain the fairness and integrity of the investigative and legal process.

Critical to the outcome of the *Carey Salt* case and the findings of Section 8(a)(5) and (1) violations is CEO Brisimitzakis' March 30 email entitled "CB [Collective Bargaining] Game Plan/End Game" in which the CEO detailed the "end game" -- its plan for swift impasse declaration and unilateral implementation, following the anticipated rejection.[57] Moreover, emails between the parties on June 9, 2010 on the status of replacement workers laid a foundation along with testimony from union negotiators for the finding of Section 8(a)(1) and (3) violations for threatening to replace strikers.[58] The emails obtained during the "investigation" phase of this case by the Board agent were submitted into evidence at the hearing before the ALJ on behalf of the Acting General Council.[59]

E. The Board Fulfills Its Role Reviewing "Impasse Cases" in Successor Contract Bargaining

Carey Salt had legitimate efficiency and labor cost issues to resolve with the Union in bargaining for the successor collective bargaining agreement.[60] Bargaining to a bona fide impasse, it would have had a right to impose a final offer, and if a strike occurred it would have had the legal right and leverage to hire permanent replacements.[61] The strikers would be considered "economic strikers" with limited reinstatement rights.[62] Knowing of the permanent replacement possibility the Union and employees would be measured in exercising their right to strike. By manufacturing the impasse in this case and committing a Section 8(a)(5) refusal to bargain unfair labor practice the employer empowered its employees to go out on an "unfair labor practice strike," and in this special status the employees were provided with the right to immediate reinstatement after an unconditional offer to return to work, with a right to backpay if not returned to work.[63] During the strike the employer committed Section 8(a)(1) and (3) unfair labor practices by threatening employees with the prospect of stepping up the hiring of permanent replacements.[64] Ultimately, Carey Salt was sanctioned for multiple unfair labor practices and ordered to make whole employees who suffered losses as a result of the March 31 implementation and its failure to reinstate strikers. Carey Salt was ordered to restore terms and conditions of employment to their pre-March 31, 2010 status until agreement or a valid impasse is reached.[65]

While the Board is well situated to investigate and remedy failures by employers to negotiate to a valid impasse

before imposing final offers in the renegotiation of expiring contracts, it has recognized that bargaining for an initial contract presents special problems. The Board's initiatives in first contract impasses cases have yet to be specifically addressed and approved by court precedent. As developed in the following segment, a troubling court precedent exists that would allow employers to avoid their bargaining obligations in first contract impasse cases.

III. A Precedent And Blueprint For Employers To Follow To Avoid Bargaining Obligations In First Contract Cases

A. The Journey to The Seventh Circuit, Back to the Board, and Then to the D.C. Circuit

The Employees of Erie Brush and Manufacturing Corporation (Erie Brush), a manufacturer of washing and polishing brushes located in Chicago, Illinois voted to accept the Service Employees International Union (SEIU) as their bargaining representative by a vote of 18-5 in a secret ballot election conducted by the NLRB on January 14, 2003.[66] Erie Brush filed objections to the election by this bargaining unit comprised mostly of Spanish speaking employees from the Chicago area, and the Hearing Officer recommended that the objections be overruled.[67] Subsequently, on July 18, 2003, a three-member panel of the NLRB certified the union as the exclusive bargaining representative for the bargaining unit employees.[68] Erie Brush refused to bargain with the Union, claiming the certification of the union was improper.[69] The Union filed an unfair labor practices charge with the Board, and a three-member panel granted judgment in favor of the Union on December 31, 2003.[70] On May 2, 2005 the United States Court of Appeals for the Seventh Circuit enforced the Board's order requiring the employer to:

> (1) cease and desist from refusing to bargain with the Union and from interfering with employees in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act; and (2) to bargain on request with the labor unit at Erie Brush and to post a notice to employees informing them of their rights.[71]

On June 28, 2005, some two years and four months after winning the representation election by a wide margin, the Employer and Union finally began negotiations.[72] Thereafter the parties met on eight occasions through March 31, 2006 and reached agreement on the noneconomic issues except for two, union security and arbitration of grievances.[73] At the March 31 negotiation session, the Union's negotiator repeated an offer to modify his position on arbitration of grievances if the Employer would change its position on a no-strike provision.[74] He also told the Employer's negotiator that he felt the parties were at an impasse on union security and arbitration; and the Employer's negotiator agreed. [75] The Union's negotiator suggested mediation; and the Employer rejected this proposal by email dated April 15.[76] On May 10, the Union offered to negotiate the economic issues and come back to the noneconomic ones;[77] by a subsequent email the Employer rejected the offer as pointless to meet unless union security was on the table.[78] On June 16, the Union threatened to file an unfair labor practice charge if the Employer continued its refusal to bargain; and the Employer scheduled another bargaining session for some five weeks later on July 24.[79] On July 5, the Employer received an employee petition stating in Spanish that 18 of the 21 bargaining unit employees did not want to be represented by the Union.[80] Erie Brush cancelled the July 24 meeting and withdrew recognition of the Union.[81]

The Union brought unfair labor practice charges and the General Counsel issued a complaint. A Board majority adopted the findings of the administrative law judge who determined that the employer violated the Act by refusing to bargain with the Union between May 10 and June 16; and that the refusal tainted the employees' petition renouncing the Union.[82] The Board majority stated that the Board has long recognized that bargaining for an initial contract presents "special problems." And in a new relationship "union security" is one that takes the longest to resolve.[83] It pointed to the Union representative's suggestion for a mediator's assistance on March 31.[84] As to the use of the phrase "at impasse" as stated by the Union representative on that date, it stated that the Board is "careful not to turn back in a party's face remarks made in the give-and-take atmosphere of collective bargaining."[85] The Board majority found that the Employer had not established that it was privileged to suspend negotiations with the Union from May 10 through June 21, and that by doing so it violated Section 8(a)(5) and (1) of the NLRA.[86] Member, Brian E. Hayes, dissented.[87]

The Court of Appeals for the District of Columbia unanimously disagreed with the Board majority, finding that an impasse on a single critical issue can create an impasse on the entire agreement.[88]It determined that an impasse on union security existed as of March 31, relying

on the Union representative's statement that the parties were "at impasse."[89]

The Court of Appeals determined that the critical issue of union security was a "make or break" issue on the entire contract which led to an overall breakdown in negotiations.[90] Because the court believed the parties were at a lawful impasse on at least the critical issue of union security from March 31 through to the end of the parties' relevant communications, the Court of Appeals for the District of Columbia determined that Erie Brush was relieved of the duty to bargain during this time period.[91] The court vacated the Board's decision and denied enforcement.[92]

B. The *Erie Brush* Precedent as a Blueprint For Deunionization of Newly Certified Unions

The D.C Circuit's *Erie Brush* decision, if credited, will serve as a blueprint for employers to follow to achieve deunionization of newly certified unions, even when the union wins a representation election by a wide margin.[93] In phase I, hire an attorney-negotiator to challenge the election and certification process at every turn over a twenty eight month period until a U.S. Court of Appeals orders the employer to cease and desist from refusing to bargain with the union. After twenty eight months of no bargaining, the employer can expect a significant erosion of employee support for the union.[94] In phase II, start bargaining over noneconomic issues, making sure that the employer's position is very clear that it will not agree to a union security clause, nor will it agree to arbitration of grievances. Make sure that the employer has at least eight bargaining sessions over a nine month period and be clear that the employer eventually agrees to all the noneconomic proposals, except the two that the employer knows the union "must have," which the employer will adamantly oppose. This bargaining activity, agreeing to all noneconomic proposals except the two union "must haves," will demonstrate the employer's good faith bargaining, under the D.C. Circuit's standards. (The first 28 month period of no bargaining "...has no bearing on its [the employer's] good faith at the bargaining table..." according to Board Member Hayes in his *Erie Brush* dissent).[95] In the tenth month of bargaining when frustration sets in with the union negotiator (who is not trained in the law) and he utters the word "impasse" regarding the union security and arbitration proposals, the employer's attorney-negotiator will state his agreement that the parties are at an impasse.[96] When the union negotiator simultaneously asks for mediation or later seeks to bargain about the **economic** issues, none of which ever have been addressed in the bargaining process, under the *Erie Brush* decision the single issue of union security suspends the employer's bargaining obligation with the union at the date the word "impasse" is uttered! On or about the day the union's certification year expires "someone outside the bargaining unit" may initiate the idea of a decertification petition to bargaining unit employees.[97] The Employer pays its fees to its attorney-negotiator and does not pay union wages or benefits to any bargaining unit employees from the date of certification and for years to come. In case of adverse Board decisions on the above set forth scenario following this *Erie Brush* blueprint, employers will, of course, flock to the D.C. Circuit with petitions for review of the Board's orders.

C. The *Erie Brush* Decision is Not "Right"

The *Erie Brush* decision is a first contract bargaining case. The Board majority adopted the ALJ's finding that Erie Brush violated Section 8(a)(5) and (1) of the NLRA by refusing to bargain with the Union over economic items from May 10 through June 21 and that this unlawful conduct by the employer presumptively tainted the July 5 employee decertification petition, making the Employer's withdrawal of recognition based on the petition unlawful as well.[98] The Court of Appeals was in error when it concluded that "... the record evidence clearly demonstrates that Erie met its burden of showing the parties were at an impasse on the critical issue of union security on March 31, 2006."[99] The Employer maintains that it was privileged to suspend negotiations on the economic items from May 10 through June 21, because of the impasse on this single issue of union security on March 31.[100] On March 31, 2006 when the Union representative stated that there was an "impasse" on union security and arbitration, he simultaneously suggested that the parties seek a mediator's assistance.[101] The use of the word "impasse" coupled with a request for mediation in negotiating a first contract, with the economic items yet to even be discussed, does not indicate that all further bargaining with the Union would be futile and provide the employer a license to refuse to bargain until the Union concedes on the subject of union security. Such a determination is clearly contrary to Section 8(d) of the NLRA which requires the parties to bargain about "wages," something that was not done in this case.[102] The Employer's refusal to bargain on the economic items was a clear violation of Section(8)(a)(5) and (1) of the NLRA.

The Board's decision provided guidance which could have been used by the reviewing court, explaining that it has long recognized that bargaining for an initial contract

presents "special problems, ... which are not present if a bargaining relationship has been established over a period of years and one or more contracts have been previously executed. "[103] It pointed out that in a new relationship union security can present one of those "special problems" that takes longer to resolve.[104] The Board advised in part:

> Impasse and deadlock are not the natural and inevitable end of every significant disagreement in negotiations, and an attempt to work around such a disagreement is not a ruse or a resort to magical thinking. Adding to the subjects on the bargaining table, instead of focusing on a single issue, can permit the trade-offs and compromises that produce an overall agreement. This is particularly true here.[105]

In situations where employees are successful in their organizing drive and win a secret ballot election conducted by the Board, approximately one-third of these newly certified unions never obtain a first collective bargaining contract.[106] As stated by the Board in its decision in *Erie Brush,* union security is one of the "special problems" that takes longer to resolve in first contract negotiations. Initiated by Board General Counsel Meisburg in 2006 during the Bush II administration, a remedial initiative was established to ensure that employees' decisions regarding representation were protected in first contract bargaining cases.[107] The subsequent acting General Counsel Lafe Solomon[108] and the current General Counsel Robert Griffin continue this initiative to protect employee decisions regarding representation in first contract cases.[109] The D.C. Circuit did not grasp or refused to see the legitimacy of the General Counsels' and the Board's concern that "union security" is a special subject that can be used by an employer to assert an invalid impasse resulting in the obstruction of the core policy of the NLRA of encouraging the practice and procedure of collective bargaining,[110] and depriving employees of their rights under the Act.[111] On the basis of the finding of Section 8(a)(5) and (1) violations of the Act, the ALJ recommended and the Board agreed that the Employer must bargain with the Union for "not less than six months."[112]

The Board was not forcing the Employer to agree to a union security clause. It was demanding that the Employer fulfill its bargaining obligations.

Ultimately, two-thirds of newly certified unions do obtain a first contract.[113] As pointed out in the Board's decision, and as widely accepted by experienced negotiators, adding subjects on the bargaining table can permit trade-offs and compromises that produce an overall agreement. The Board was fulfilling its statutory obligations to require the Employer along with the Union to fully bargain proposals on wages, hours and other terms and conditions of employment in compliance with Section 8(d) of the Act, with the expectation that good faith negotiations, with or without the aid of a mediator, would lead to an agreement rather than allow the employer to evade its bargaining obligation by manufacturing an impasse on the topic of union security.

As stated by the Court of Appeals for the Fifth Circuit in *Huck Manufacturing Co. v. NLRB,* a decision about whether negotiations have reached an impasse is particularly suited to the Board's expertise as fact finder. The DC Circuit's substitution of its judgment for that of the Board in this particular case is in error.[114]

IV. What Can Be Done About It?

A. Successor Contract Impasse Cases

As seen in the *Carey Salt* case, the Board has the investigative and remedial powers to identify and correct failures by employers to negotiate to a valid impasse before imposing final offers in the renegotiation of existing contracts. The Board is well suited and properly functioning to continue its mission in successor contract impasse cases.

B. First Contract Impasse Cases

The incentive for questionable bargaining tactics by employers negotiating first contracts is great because failure of unions to obtain first agreements almost invariably leads to the disappearance of the union.[115] With one-third of newly certified unions never obtaining a first contract a proposed Employee Free Choice Act (EFCA) in 2009 had addressed this matter and prescribed that if the parties were unable to agree on a first contract within a 90-day bargaining period, the services of the Federal Mediation and Conciliation Service (FMCS) would be requested and, if unsuccessful after 30 days, the FMCS would be required to refer the dispute to an arbitration board, whose award would be binding on the parties for a two-year period.[116] An arbitration board would look to factors such as wage patterns and contract patterns for the geographic area and industry in question, along with the employer's ability to pay.[117]

What can be done about facilitating the obtainment of first contracts today from a legislative point of view? While there was some political momentum for the EFCA in 2009 in the beginning of the Obama administration, it is highly unlikely that any legislative action would have viability in today's political and economic climate.

1. Board Action

It is up to the Board then to utilize its investigative and remedial tools to continue to protect employee bargaining rights in first contract cases. The *CalMat* precedent in play in the *Erie Brush* case involved a single critical issue creating a valid impasse, but it was not a first contract bargaining case, and the parties had negotiated on all of their bargaining proposals before reaching an impasse on the amount of the employer's pension contributions.[118] Rather than rely on *CalMat*, the present five member Board should address an *Erie Brush* category case identified in its pipeline, and set clear guidance for employers who would contemplate following the *Erie Brush* blueprint to decertify unions seeking first contracts. With General Counsel initiatives under both Republican and Democratic administrations in full support of protecting employee rights in first contract cases and all five Board members highly qualified labor lawyers, clear guidance on bargaining obligations by the Board would be beneficial to employers and the reviewing courts.

2. Proper Deference for Board Decisions

In its *Dallas General Drivers, Warehousemen, and Helpers v. NLRB* decision, the D.C. Circuit stated that courts have long recognized that, "in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems."[119] Nevertheless, a three member panel of the D.C. Circuit in *Erie Brush* ignored this guidance and substituted its evaluation for that of the Board, using its view of the *CalMat* factors to determine that a union security disagreement in a first contract case provided a privilege for the employer to legally refuse to bargain about economic issues which had not yet even been addressed by the parties.[120] The *Dallas General Drivers* case is a sensible policy, and remains still viable to this day.[121]

3. Labor Unions

Where a valid impasse is reached in a first contract bargaining case, and a strike may not be a viable option because of the availability of a replacement workforce, a labor union or its surrogates have the option of utilizing social media to communicate with the employer's customers and suppliers about the nature of the impasse. Also, the aid of affiliated unions and "worker center" groups may be enlisted for publicity support. The US Chamber of Commerce sees the "worker center" model of advocacy continuing to grow in the near term."[122] In the Erie Brush company dispute, the SEIU was in a position to muster large community support for the primarily Spanish speaking workforce at the Chicago manufacturing facility. Did it do all it could have done?

The design of the NLRA is based on the fundamental premise that agreements will be the result of private bargaining under governmental supervision of the procedures alone, without any official compulsion over the actual terms of the contract.[123] Our system under the NLRA recognizes the crucial economic weapons of the strike and primary picketing, and other publicity, as well as the lockout, to ultimately bring about the goal of a first contract and subsequent contracts. While the utilization of permanent replacements by employers has substantially weakened the strike weapon, no legislative modification of the rule is viable.

Ultimately, it is the National Labor Relations Board, its agents, ALJs and board members, all labor law professionals, who must resolve the problems related to first contract impasse cases.

ENDNOTES

1 29 U.S.C. §151 (2012).

2 29 U.S.C. § 157 (2012).

3 *Id.*

4 29 U.S.C. § 163 (2012).

5 NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938). In *dicta* in Justice Owen Robert's majority decision he stated that it was not "an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Id. at 345. Additionally, he stated that it was not an unfair labor practice "to reinstate only so many of the strikers as there were vacant places to be filled. Id. at 346. While this *dicta* provided a basis for employers to hire permanent replacements subsequent to the 1938 *Mackay Radio* decision it, was not until President Reagan discharged some 11,000 striking air traffic controllers in 1981 that momentum for employers to hire permanent replacements for striking workers began. See Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*. 1990 U.Ill. L. Rev. 547. 548-49 n. 12. Today an employer may lawfully refuse to reinstate economic strikers at the conclusion of a strike so long as the positions in question are occupied by permanent replacements. During organizing campaigns employers have the right to point out (and nearly always do so) that if the union should take employees out on strike, the employer has the right to replace strikers with permanent replacements, and when employees want to come back to work, they will no longer have a job.

6 In NLRB v. Katz, 369 U.S. 736, (1962), the Supreme Court held that an employer violates Sections 8(a)(1) and (a)(5) of the NLRA when the employer makes a unilateral change in a term or condition of employment without first bargaining to an impasse on that term. *Id.* at 743. An impasse occurs when "good faith negotiations have exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope". TruServ Corp. v. NLRB, 254 F.3d 1105, 1114 (D.C. Cir. 2001). "Whether the parties have reached this point is a case-specific inquiry; there is no fixed definition of impasse or deadlock which can be applied mechanically to all factual situations." *Id.* In *Taft Broadcasting Co.* 163 NLRB 475, 478 (1967), the Board enumerated some

considerations for evaluating the existence of an impasse. Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is a disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Id.*

7 736 F.3d 405 (5th Cir. 2013).
8 Id. at 408.
9 700 F.3d 17 (D.C. Cir. 2012).
10 Id. at 20.
11 Id. at 21.
12 Carey Salt Co., 736 F.3d at 407.
13 Id.
14 Id.
15 Id. at 408.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Carey Salt Co., 358 N.L.R.B. No. 124 at 8 (Sept 12, 2012).
22 *Id.*
23 *Carey Salt Co.*, 736 F.3d at 408.
24 *Id.*
25 *Id.*
26 *Id.* at 408, 409.
27 *Id.* at 409.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Carey Salt Co.* 358 N.L.R.B. No. 124 at 17.
35 *Id.* at 18.
36 *Id.* at 22.
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Carey Salt Co.*, 736 F.3d at 409.
45 *Id.*
46 *Id.*
47 *Id.* at 410.
48 *Id.* at 415, 416.
49 *Id.* at 416.
50 *Id.*
51 *Id.* at 429.
52 *See Carey Salt Co.*, at 417and 422.
53 N.L.R.B. Casehandling Manual ¶ 10050 ("Investigation").
54 79 C.F. R.§ 102.118 (b) (2012), following the rule in Jencks v. United States, 353 U.S. 657, 668-69 (1957).
55 N.L.R.B. Casehandling Manual ¶ 102.31
56 N.L.R.B. Casehandling Manual ¶ 10292.4. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).
57 *See Carey Salt Co.*, 736 F.3d at 415.
58 *See* supra notes 36-42.
59 *See Carey Salt Co.*, 358 N.L.R.B. No. 124 at 8 n. 4.
60 *See Carey Salt Co.*, 736 F.3d at 416.
61 *See supra* note 6 and accompanying text discussing rights of employer to impose a final offer after reaching a valid impasse. *See supra* note 5 and accompanying text discussing right of employers to hire permanent replacements in responses to a strike.
62 *See* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW, 250-255 (15TH ed. 2013). Based on the Supreme Court's NLRB v. Fleetwood Trailer Co. decision, 389 U.S. 375 (1967), the Board issued a comprehensive rule on the reinstatement rights of economic strikers in its *Laidlaw Corp.* decision, 171 NLRB 1336 (1968) which states: Economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.... Id. at 1369-70.
63 *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).
64 *See supra* note 5 and accompanying text referring to the Mackay Radio dicta allowing emphasis "to replace the striking employees with others in an effort to carry on the business," and "to reinstate only so many strikers as there were vacant places to fill." However it is a violation of Section 8(a)(1) and (3) of the NLRA to interfere with, restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.
65 *Carey Salt Co.*, 736 F.3d at 429, 430.
66 NLRB v. Erie Brush and Mfg. Corp., 406 F.3d 795, 797 (7th Cir. 2005).
67 *Id.*
68 *Id.* at 800.
69 *Id.*
70 *Id.*
71 *Id.* 806, 800.
72 Erie Brush & Mfg. Corp. v. NLRB, 700 F.3d 17, 19 (D.C. Cir. 2012).
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.* at 19, 20.
79 *Id.* at 20.
80 *Id.*
81 *Id.*
82 *Erie Brush*, 357 N.L.R.B. No. 46 at 2 (Aug. 9, 2011).
83 *Id.*, citing N. J. MacDonald & Sons, 155 NLRB 67, 71-72 (1965).
84 *Id.*
85 *Id.* at 3, citing Industrial Electric Reels, 310 NLRB 1069, 1072 (1993).
86 *Id.* at 4.
87 *Id.* at 5.
88 *Erie Brush*, 700 F.3d at 21, citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000). A party asserting impasse based on a single issue must show that: first, a good-faith bargaining impasse actually existed; second, the single issue involved was critical; and third, "the impasse on this critical issue led to a breakdown in the overall negotiations.
89 *Id.* at 22.
90 *Id.* at 23.
91 *Id.* at 24.
92 *Id.*
93 This blueprint is based on facts and findings of the Board and the D.C. Circuit Court of Appeals as set forth above in Part III.A. A recent Human Resources publication also sees the *Erie* case as an "easily followed road map for any employer whose goal is to decertify a union." Julie Beck, *NLRB Cannot Force Companies to Bargain in Face of Clear Impasse*, (Jan. 28, 2013), http://insider-counsel.com at *3. Of course it is a Section 8(a)(1) and (3) employer unfair labor practice for an employer to have a role in the decertification of a union. *See* Caterair International v. NLRB, 22 F.3d 114 (D.C. Cir. 1994).

The author of the HR publication references Attorney Stephen Key in part as follows:

- Key ... points out that *Erie* creates an easily followed road map for any employer whose goal is to decertify a union. As it was in this case, union security is often an issue on which unions are unwilling to budge, according to Key. If employers make themselves similarly intractable, an impasse cannot be far behind.
- "It is exceptionally rare for a union to agree to a contract that eliminates the union security clause," Key says. "At the end of the day, the union is a business. So any other term in the contract, the union would be willing to compromise on, if it means the difference between keeping their dues and losing their dues."
- For employers that want to work with the union, not try to get rid of it, **the union security trick** can still be a valuable bargaining chip that in-house counsel can offer up in order to get something else they want in the contract.
- However, Key says he would have done one thing differently than Erie did in this case. "I will never stop negotiating with the union," he says. "It just gives the union too much ammunition in the litigation." Even if the parties have reached an impasse, Key says he would continue negotiations. "I'll just sit in the room and play Sudoku on my computer while they talk. Just show up." Id. at 3,4 (emphasis added).

94 In the Board's landmark *Ex Cell-O Corporation* decision, 185 N.L.R.B. No. 20 (Aug. 25, 1970) at 2, where the Board discussed the inadequacy of remedies available to it, the Board identified the harm to employees of unlawful delay of two years or more in fulfilling of a statutory bargaining obligation as follows:

- "It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from the loss of employee support attributable to such delay..."

[95] *Erie Brush*, 357 N.L.R.B. No. 46 at S n.1 (Member Hayes dissenting).

[96] *See Erie Brush*, 700 F.3d at 22, the court of appeals stated in part:

- NLRB's position is undermined by the inconvenient fact that the Union here not only did not say that the parties "weren't at impasse" on March 31, its representative said – out-loud and in-person – that they were "at impasse" [on union security and arbitration].

[97] *Erie Brush*, 357 N.L.R.B. No. 46 at 11.

[98] *Erie Brush*, 357 N.L.R.B. No. 46 at 2.

[99] *Erie Brush*, 200 F.3d at 24.

[100] *See Id.* at 21.

[101] *Erie Brush*, 357 N.L.R.B No. 46 at 3.

[102] 29 U.S.C. § 158(d) stating in part: For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[103] *Erie Brush*, 357 N.L.R.B. No. 46 at 2.

[104] *Id.*

[105] *Id.* at 3.

[106] See U.S. DEP'T OF LABOR. COMM. ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 73-74 (1994).

[107] See *First Contract Bargaining Cases*, Memorandum GC 11-06 (Feb. 18, 2011) at 1 n. 1.

[108] *Id.* at 1 addressing remedies: Regions to consider remedies beyond the standard bargaining order to effectively address the consequences of bad-faith bargaining and other violations during first contract negotiations so as to more adequately restore the pre-violation conditions and relative positions of the parties. These additional remedies include: notice reading; requiring bargaining on a prescribed or compressed schedule; periodic reports on bargaining status; a minimum six-month extension of the certification year; reimbursement of bargaining expenses; and reimbursement of litigation expenses.

[109] *Mandatory Submissions to Advice*, Memorandum GC 14-01 (Feb. 25, 2014), cases that involve the General Counsel's initiatives or policy concerns: cases covered by GC 11-06 (First Contract Bargaining cases).

[110] 29 U.S.C. §151 (2012), stating in part: It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred **by encouraging the practice and procedure of collective bargaining**, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protecting (emphasis added).

[111] 29 U.S.C. § 157 (2012).

[112] *Erie Brush*, 357 N.L.R.B. No. 46 at 4 and 11.

[113] *See supra* note 102.

[114] 693 F.2d 1176, 1186 (5th Cir. 1982).

[115] WILLIAM B. GOULD IV, AGENDA FOR REFORM 169 (1993).

[116] See S. 560, 111th Cong. §1 (2009); H.R. 1409, 111th Cong. sec. 2 (2009) (proposing to amend the National Labor Relations Act, 29 U.S.C. §§ 15101-69 (2006).

[117] While the EFCA did not contain standards for arbitration boards to utilize in making their determinations, the standards are generally speaking the same as the standards the parties use in their negotiations. In a short period of time, published awards by arbitration boards would establish precedents to be used by the parties in the arbitration process. *See* Frank Elkouri & Edna Asper Elkouri, How Arbitration Works (4th ed. 1985).

[118] CalMat Co., 331 NLRB 1084 (2000).

[119] *See* 355 F.2d 842, 844-45 (D.C. Cir. 1966).

[120] The D.C. Circuit substituted its judgment for the Board's determinations applying the words of the *CalMat* formula, as it saw fit, without the experience the Board's professionals bring to impasse cases and uprooted from the clearly expressed purposes and policies of the NLRA, the rights of employees under the Act, and the obligation of the Employer under the Act to bargain with representatives of its employees about wages and more.

[121] *See* NLRB v. Whitesell Corp., 638 F.3d 883 (8th Cir. 2011).

[122] U.S. Chamber of Commerce, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS, p. 25 (2014).

[123] H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).