In the

United States Court of Appeals

For the Seventh Circuit

No. 18-1774

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NEISES CONSTRUCTION CORPORATION,

Respondent.

Petition of the National Labor Relations Board for an Adjudication in Civil Contempt, Assessment of Noncompliance Fines and Other Requested Civil Relief.
No. 13-CA-210180.

DECIDED MARCH 10, 2023

Before RIPPLE, ROVNER, and WOOD, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Neises Construction Corporation refuses to bargain in good faith with the Indiana/Kentucky/Ohio Regional Council of Carpenters ("the Union"), which represents its employees. We have ordered Neises to

bargain with the Union three times.[1] Despite these orders, Neises's contumacious conduct persists. After reaching numerous tentative agreements on the articles to be included in a collective bargaining agreement with the Union, Neises retracted those tentative agreements without good cause. The National Labor Relations Board then sought to hold Neises in contempt for refusing to bargain with the Union in good faith. We appointed a Special Master to resolve the parties' factual disputes. After more than a year of discovery, motions practice, and deliberation, the Special Master found, by clear and convincing evidence, that Neises should be held in contempt. The Special Master's Report and Recommendation is sound, and Neises's objections are unpersuasive. We hold Neises in contempt.[2] As explained in detail below, we impose most of the Board's proposed sanctions, including a $192,400 fine.

I.

A.

This case began in 2018 when the Board sought, and obtained, from this court enforcement of its order requiring Neises to recognize and to bargain with the Union. In May 2019, the Board sought to hold Neises in contempt for failing to bargain with the Union. We entered a consent order that required Neises to bargain with the Union not less than once

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[1] We refer to appellate docket entries as "App. Dkt. ___." We refer to the Special Master's Docket as "SM Dkt. __."

[2] On January 6, 2023, we issued an order that overruled Neises's objections to the Special Master's Report and Recommendation and adjudicated Neises in contempt. *See* App. Dkt. 65. In that order, we explained that we would issue a full opinion after we considered and decided the matter of an appropriate remedy. We now issue this opinion.

every thirty days. In February 2020, the Board again sought to hold Neises in contempt for failing to bargain with the Union as required; we again entered a consent order that required Neises to bargain with the Union at least once every thirty days.

In April 2021, the Board sought to hold Neises in contempt for a third time. The Board alleged that while the previous consent order was under submission, Neises and the Union engaged in productive discussions and came to tentative agreements on many aspects of a collective bargaining agreement.[3] But Neises effectively retracted those tentative agreements when it hired a new attorney who refused to adhere to them. Specifically, after the Board filed its February 2020 contempt petition, Neises retained attorney Francis Jaskowiak to defend it against the contempt petition and to represent it during collective bargaining. While the contempt petition was pending, the parties resumed bargaining with Attorney Jaskowiak as Neises's lead negotiator. The parties met five times between March 2 and May 28, 2020. These meetings resulted in tentative agreements on most of the articles to be included in a final collective bargaining agreement.

Two agreements produced in discovery by Neises reflect these tentative agreements. Most relevant is a document labeled "Exhibit QQ." It reflects, as Mr. Jaskowiak confirmed, the "current status of [the tentative agreements] after

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[3] The petition says that this bargaining happened "[i]mmediately following entry of the 2020 consent order." App. Dkt. 24 at 6. In fact, the bargaining happened during several sessions before the 2020 consent order was entered. The Board corrected this statement in its amended petition. SM Dkt. 26 ¶ 16.

completion of [the] May 28, 2020 negotiations."[4] This document includes (1) tentative agreements (written in normal text), (2) Union proposals for open articles or sections (highlighted in green), and (3) company proposals for open articles or sections (highlighted in yellow). An earlier version of the tentative agreements, dated May 14, 2020, is highlighted in various colors with initials next to some tentatively agreed-upon provisions.

The tentative agreements also are reflected in a draft of the collective bargaining agreement produced by the Board during discovery. This document, created by the Union for a bargaining session scheduled for June 26, 2020, contains the parties' tentative agreements (reflected in normal text) and the Union's proposals (highlighted in green). We refer to this document as the Union version of the tentative agreements.

The Union version and Exhibit QQ have two relevant differences.[5] First, the Union version suggests that the parties reached a tentative agreement on Article XV, "Duration, Amendment and Termination"; Exhibit QQ does not. But the Union repeatedly said this was a mistake and informed Neises that it did not believe that Article XV was part of the

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4 App. Dkt. 55 at 82; SM Dkt. 67-6 at 90–93.

5 We say "relevant differences" because Neises also complains that the documents differ concerning the parties' proposals on open articles and sections. But this is a red herring. What matters is whether there are differences in terms to which the parties had tentatively agreed, not differences over terms that had not yet produced any agreement.

tentative agreements.[6] Second, the Union's version includes a sentence in Article II that does not appear in Exhibit QQ.[7]

Negotiations broke down at the June 26 bargaining session (held just days after we entered a consent order in June 2020).[8] Attorney Robert Hanlon replaced Mr. Jaskowiak as Neises's lead negotiator, and he informed the Union's representatives that he had significant problems with the parties' tentative agreements. He insisted on reading his proposed revisions aloud.[9] After some back and forth, the Union asked to resume bargaining about two weeks later, on July 8, and asked Mr. Hanlon to present his proposals in writing. The Union also sent Mr. Hanlon a copy of the tentative agreements, its proposals, and its standard contract language.[10]

Two days before the scheduled follow-up meeting, the Union again asked Mr. Hanlon to send his proposals in writing. He refused, saying he would only provide the proposals at the meeting. The Union responded that it would not meet without having a copy of Hanlon's proposals and an

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6 *See, e.g.*, SM Dkt. 69-3 at 33 (noting the Union told Neises that "duration" was an open consideration); SM Dkt. 67-6 at 742 (same); SM Dkt. 72-2 at 6 n.1 (stating that the Union informed Neises several times that Article XV was an open article).

7 *Compare* App. Dkt. 52-4 at 5 (final sentence of Article II, Section 3), *with* App. Dkt. 52-3 at 4–5 (no such sentence).

8 SM Dkt. 70-1 at 14–17; SM Dkt. 67-6 at 2–3.

9 SM Dkt. 67-6 at 3–5, 189.

10 SM Dkt. 70-1 at 18.

assurance that Neises would honor the parties' tentative agreements.[11] When Mr. Hanlon again refused, the Union canceled the meeting. Mr. Hanlon nevertheless showed up and demanded the Union pay for expenses incurred in attending the canceled meeting.

On August 4, the parties met, and, although Mr. Hanlon again had refused to provide the proposals in advance, he provided his proposals in writing at the meeting. That document included all the tentative agreements found in Exhibit QQ but proposed many changes.[12] For instance, Mr. Hanlon proposed charging the Union $50 per employee, per pay period, to collect and remit Union dues, even though the parties already had agreed that Neises would do so without charge.[13] The Union rejected the proposals as "regressive," "outlandish," and not made in good faith.[14] Mr. Hanlon maintained that his proposals were reasonable and asked to continue bargaining; the Union refused to continue bargaining until Mr. Hanlon committed to the tentative agreements and withdrew his new proposals.[15]

Over the next twelve months, Neises continued to propose dates to bargain. The Union refused to bargain until Neises

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11 SM Dkt. 65-4 at 8, 17.

12 SM Dkt. 67-5 at 26–58.

13 *Compare* App. Dkt. 52-3 at 4–5, *with* App. Dkt. 57 at 43.

14 SM Dkt. 70-1 at 26.

15 SM Dkt. 92 at 5.

committed to bargain in good faith and honor the tentative agreements as they existed on June 26, 2020.[16]

After the Board's Office of General Counsel investigated this matter, then-General Counsel Peter Robb directed his staff to file the contempt petition.[17] Before it was filed, however, President Biden, upon assuming office, discharged Mr. Robb and appointed Peter Ohr as Acting General Counsel. While Mr. Ohr was in office, the petition was filed on April 12, 2021. We referred the petition to a Special Master.

Before the Special Master, Neises argued that Mr. Robb was fired unlawfully and that filing the contempt petition while Mr. Ohr was acting as general counsel constituted an ultra vires act. In response, General Counsel Jennifer Abruzzo and the full Board ratified the contempt petition.[18]

After reviewing the evidence, the Special Master concluded that the Board had proven by clear and convincing evidence that Neises should be held in contempt. He rejected Neises's argument that filing the petition was an ultra vires act because General Counsel Abruzzo had ratified the filing and Neises had offered no evidence to overcome the presumption of regularity.[19] The Special Master then found that all four elements of civil contempt were met. Those elements are: 1) an unambiguous command, 2) a violation of the

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16 SM Dkt. 65-2 at 11; SM Dkt. 65-4 at 54.

17 SM Dkt. 67-6 at 766.

18 *See* SM Dkt. 15-1; SM Dkt. 22-1.

19 He also noted that the Board itself ratified the petition too. *See* SM Dkt. 22-1.

command, 3) a significant violation, and 4) a lack of reasonable and diligent efforts to comply. *See Prima Tek II, LLC v. Klerk's Plastic Indus.*, 525 F.3d 533, 542 (7th Cir. 2008). Specifically, he determined that our 2020 judgment and consent order unambiguously command Neises to bargain in good faith. He next determined that Neises violated that command by, among other things, retracting without good cause numerous tentative agreements that were to be included in a final collective bargaining agreement. Last, he found that Neises did not comply substantially with its obligation to bargain in good faith or make reasonable, diligent efforts to do so.

B.

The basic issue before us is whether Neises significantly violated an unambiguous command to bargain in good faith with the Union by retracting, without good cause, the aspects of the collective bargaining agreement to which it tentatively had agreed. The record clearly and convincingly establishes that Neises disobeyed our order.

Neises offers three broad objections, but none are persuasive. First, it says that the Board did not have authority to file the contempt petition and that the petition was not properly ratified. Second, it asserts that the Report improperly decided that the parties reached tentative agreements. Finally, Neises argues that it did not violate an unambiguous command because this court's February 2020 judgment and consent order do not use the phrase "in good faith" and such a phrase is too vague anyway.

We review de novo the Special Master's legal conclusions and all facts found without an evidentiary hearing. *See Polish*

Nat'l All. v. NLRB, 159 F.2d 38, 39 (7th Cir. 1946) (applying Federal Rule of Civil Procedure 53 by analogy); *cf. Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (noting that the Supreme Court independently reviews a Special Master's legal and factual conclusions). Here, the parties filed cross-motions for summary judgment based on the papers before the Special Master but did not seek an evidentiary hearing. We therefore have reviewed independently the record to determine whether, based on the undisputed evidence, there is clear and convincing evidence that Neises committed a significant violation of an unambiguous command without taking reasonable and diligent steps to comply with our order. *Prima Tek II*, 525 F.3d at 542.

Neises's first argument need not detain us long. It maintains that there is no valid contempt petition here because the President unlawfully removed General Counsel Robb. We need not reach the merits of this argument because the five-member Board, on whose behalf the petition is filed in the first place, *see* 29 C.F.R. § 101.15, formally endorsed seeking contempt here. Even so, we are mindful that other courts have recently rejected the same argument that Neises raises here. *See Exela Enters. Sols. v. NLRB*, 32 F.4th 436, 441 (5th Cir. 2022); *NLRB v. Aakash, Inc.*, 58 F.4th 1099, 1103 (9th Cir. 2023).

Neises's second argument is that the Special Master erred by deciding that Exhibit QQ contained the parties' tentative agreements because there are material differences between Exhibit QQ and the Union's version of the tentative agreements. We cannot accept this submission. The documents are essentially the same; the two differences are immaterial. First, Article II, Section 3 has an extra sentence in the Union's version: "The Employer agrees to accept the current Union

authorization cards to demonstrate employee's authorization of payroll deductions to include but not limited to: dues, assessments, C.O.P.E., market recovery, and vacation savings." Second, the Union's version of Article XV indicates the parties' tentative agreement; Exhibit QQ does not.

The extra sentence in Article II, Section 3 does not create a material dispute over the essential agreement expressed by that provision. Nor does it place in doubt that Neises retracted that essential agreement. Article II, Section 3 provides that Neises would, upon an employee's authorization, deduct Union dues and remit them to the Union. The contested sentence describes how an employee could demonstrate that the employee authorized the deduction. To the extent that Neises complains that there is no evidence it tentatively agreed to this sentence, the Special Master found, and we agree, that the sentence was not part of the parties' tentative agreements. But a one-sentence discrepancy in a thirteen-page document does not cast serious doubt on the remainder of the parties' tentative agreements. In any event, Neises's August 4 proposal effectively retracted the parties' agreement on this point; it specifically proposed charging $50 per Union employee, per pay period, for deducting Union dues. That proposal eviscerated the parties' prior agreement that Neises would deduct Union dues without charge, irrespective of how an employee authorized the deduction.

Nor is there a material factual dispute over Article XV. There is no serious doubt whether the parties tentatively agreed to these provisions; they did not. The Union's representatives repeatedly told Neises that the agreement's duration was open to negotiation. And, as the Special Master

correctly found, Neises's own Exhibit QQ accurately reflects that Article XV was open for negotiation.

Neises's final argument is that the version of the tentative agreements from May is the best reflection of the parties' tentative agreements. This is so, in Neises's view, because the draft from May contains tentative agreements with handwritten initials next to various provisions. But this argument simply ignores Mr. Jaskowiak's testimony that Neises's Exhibit QQ reflected the terms to which the parties had tentatively agreed. And as the Board points out, the parties did not establish any ground rules about initialing agreed-upon proposals or require that the parties would initial tentative agreements. Thus, the presence or absence of initials does not control.

The Special Master decided correctly that the parties reached tentative agreements on many articles to be included in the collective bargaining agreement. He rightly determined that Exhibit QQ accurately reflects the parties' tentative agreements.

C.

Neises next makes three arguments why it should not be held in contempt for refusing to bargain in good faith with the Union. First, it submits that it could not have bargained in bad faith because of the differences between the two versions of the tentative agreements. Second, it contends that the Board failed to demonstrate that Neises was required to bargain in good faith. Third, an order to bargain in good faith is an impermissibly overbroad, obey-the-law command.

1.

Neises submits that it did not bargain in bad faith when it rejected the Union's version of the tentative agreements because the Union's version was substantially different from Neises's version. But, as we already have noted, this argument must fail because the two versions are materially identical. If Neises's refusal to bargain were limited to Article II, Section 3, or Article XV, it may have had good cause to propose altering those tentative agreements. But that did not happen here. Neises reversed its position on matters unrelated to these two minor discrepancies. Its argument that it did not bargain in bad faith because of these two differences is simply a post-hoc excuse that it never presented to the Union as a reason to renegotiate.

Neises next argues that it did not bargain in bad faith because its proposals were necessitated by an economic downturn caused by the COVID-19 pandemic. It relies on *Chicago Local No. 458-3M, Graphic Communications International Union v. NLRB*, 206 F.3d 22, 29–31 (D.C. Cir. 2000), for the proposition that changed economic conditions present good cause for renegotiation of tentative agreements. But, as the Board notes, this argument also appears to be a post-hoc excuse because Neises never told the Board or the Union that it needed to renegotiate terms for this reason. Neises makes no effort to explain why changed economic conditions would support retracting tentative agreements over noneconomic terms.

Neises's final argument that it did not bargain in bad faith is that the Special Master erred when he decided that Neises effectively eviscerated the parties' tentative agreements. Neises says it merely "made proposals in response to the

Union's June 26 proposals"[20] on mandatory bargaining subjects. But Neises did not simply propose terms for open articles or sections, it reneged on the parties' tentative agreements, which is evidence of bad faith. *See Polycon Indus., Inc. v. NLRB*, 821 F.3d 905, 907 (7th Cir. 2016); *Am. Seating Co. of Miss. v. NLRB*, 424 F.2d 106, 108 (5th Cir. 1970). For instance, after the parties agreed that Neises would deduct Union dues without fee, Neises proposed charging $50 per employee, per pay period. After the parties agreed that the workday would not begin before 6:00 am and would include two, paid ten-minute breaks and an unpaid thirty-minute lunch break, Neises proposed a new start time and eliminating the paid breaks. After the parties agreed that a workweek would be forty hours, Monday through Friday with Saturday as a makeup day, Neises proposed that the workweek would run Monday through Saturday and that it could institute shift work or ten-hour days at its discretion.[21]

The Special Master highlighted two additional indicia of bad faith; Neises ignores both. First, the Special Master noted that Neises proposed a management's-rights provision that evidenced bad faith because it would bar the Union from taking part in decision making about Union members' working hours and conditions. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1359 (9th Cir. 2011) (noting that a virtually unlimited management's-rights clause indicates bad faith). Second, Neises proposed a grievance procedure that would make the arbitrator liable to the dissatisfied party, which, noted the Special

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[20] App. Dkt. 55 at 29.

[21] *See* App. Dkt. 38-2 at 10–12 (listing these and other retractions).

Master, "is essentially no procedure at all."[22] Moreover, Neises offered these proposals even though the parties already had reached tentative agreements on both subjects.

2.

Neises's second argument why it should not be held in contempt is that the Board failed to prove that our 2020 judgment and consent order required Neises to bargain in good faith. Contempt requires the court to find that the party violated an unambiguous, specific command. *Prima Tek II*, 525 F.3d at 542; *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986). Neises argues that our orders do not give it "'explicit notice' of 'what conduct is outlawed,'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam)), because the 2020 judgment and consent order do not use the phrase "in good faith."

Taggart holds that civil contempt is appropriate "if there is *no fair ground of doubt* as to whether the order barred" the conduct at issue. *Id.* at 1799. Our 2020 consent order requires Neises to comply fully with the order and judgment we had entered in May 2018. There are two relevant provisions in that judgment: (1) Neises must "bargain with the Union," and (2) Neises must "cease and desist from failing and refusing to recognize and bargain" with the Union or "in any like or related manner interfering with, restraining, or coercing employees."[23]

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[22] App. Dkt. 38-2 at 13.

[23] App. Dkt. 2-2 at 2 (cleaned up); *see also* App. Dkt. 21-2 at 7 (requiring the same).

There is no fair ground of doubt that our orders required good-faith bargaining. A command to bargain necessarily encompasses an order to engage in genuine efforts to reach an accord. *See*, *e.g.*, *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 485 (1960); *NLRB v. Overnite Transp. Co.*, 938 F.2d 815, 821 (7th Cir. 1991). Otherwise, as the Special Master pointed out, Neises could attend bargaining sessions and propose illegal terms without violating this court's orders. Parties must make reasonable efforts to comply with our orders, not engage in crafty feints designed to avoid court-imposed obligations. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192–93 (1949); *Am. Fletcher Mortg. Co. v. Bass*, 688 F.2d 513, 517 (7th Cir. 1982). Neises's prior submissions demonstrate that it understood its obligation. Indeed, in response to an earlier contempt petition in this case, Neises responded that "it should not be held in contempt … because it met and bargained with the Union in good faith … . *The Judgment required good faith bargaining* 'upon request' by the Union."[24]

Neises nevertheless maintains that good-faith bargaining is too opaque a concept to form the basis of a contempt order. It points out that the Board's website lists more than fifty examples of what good-faith bargaining might include. But this observation misses the point. The Special Master did not determine that Neises failed to engage in specific acts that might qualify as good-faith bargaining. Rather, he concluded that Neises engaged in a course of conduct designed to subvert the possibility of reaching an agreement. It did so by offering regressive modification of tentative agreements, proposing obviously preposterous terms, suggesting a management's-

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[24] App. Dkt. 15 at 2 (emphasis added).

rights clause that would exclude the Union from decision making, and proposing a worthless grievance procedure. Neises cannot avoid contempt simply because the order did not specifically enumerate every possible violative act. *McComb*, 336 U.S. at 192–93.

3.

Neises's final argument is that commanding it to bargain in good faith amounts to an impermissible "obey-the-law" command. It relies on the Supreme Court's directive that the Board cannot seek to enforce every aspect of the National Labor Relations Act in contempt proceedings just because a party violated one aspect of the Act. *NLRB v. Express Pub. Co.*, 312 U.S. 426, 433 (1941). The Board may seek to hold a party in contempt only for violations that are similar or fairly related to the unfair labor practice that gave rise to the original order enforcing the Board's decision. *See id.* at 435. Neises argues that the Board cannot use these contempt proceedings to charge it with bad faith bargaining because that is not similar or fairly related to the unfair labor practice that gave rise to this case.

This argument depends on the proposition that failing to bargain in good faith is unrelated to Neises's failure to recognize or bargain with the Union at all. *See McComb*, 336 U.S. at 192–93. We reject this argument; Neises's failure to bargain in good faith is related to its initial failure to recognize and to bargain with the Union. As the Supreme Court has noted, "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." *Ins. Agents Int'l Union*, 361 U.S. at 484–85.

Neises significantly violated our unambiguous command to bargain in good faith with the Union and failed to make reasonable and diligent efforts to comply with that command. Therefore, in an order issued on January 6, 2023, we adjudicated Neises in civil contempt.

II.

Following our contempt order, we afforded the parties the opportunity to present their views on the appropriate remedy. Each side has responded. The Board also has submitted a proposed order.[25] The parties have employed that proposed order as an outline for their discussion of an appropriate remedy. We also refer to that document and indicate, in the course of our discussion, those areas where alteration is required. Neises does not oppose all the measures proposed by the Board.[26] We therefore limit our discussion to those matters contested by Neises or where we think some elaboration will assist the parties.

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25 The Board's proposed order is contained in its motion for an order imposing contempt remedies. *See* App. Dkt. 41 at 3–12. The proposed remedies are contained in numbered paragraphs, beginning at paragraph 5. *See id.*

26 The following proposed remedies are uncontested aside from Neises's ongoing contention that it cannot be ordered to bargain in good faith: Proposed remedies 5(b), (c)(i), (c)(ii), (d), (e). Briefly, proposed remedy 5(b) requires good-faith bargaining, 5(c)(i) requires Neises to withdraw its proposals that retracted previous tentative agreements, 5(c)(ii) requires Neises to commit to its previous tentative agreements, 5(d) requires Neises to meet and bargain in good faith at least once every thirty days, and 5(e) requires Neises to continue to meet and bargain until the parties reach an agreement or a bona fide impasse. *See* App. Dkt. 41 at 4–5.

The Board asks us to impose substantial contempt remedies. It submits that these remedies are warranted because of Neises's history of contumacious conduct. In crafting a remedy, we must keep in mind the dual purposes of civil contempt: (1) to coerce the party in contempt into compliance, and (2) to compensate the complainant for losses caused by the defendant's noncompliance. *Taggart*, 139 S. Ct. at 1801. Therefore, the remedy we impose must be sufficient to bring Neises into compliance, *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947), and also must accord "full remedial relief," *McComb*, 336 U.S. at 193. In short, the nature and extent of the contumacious conduct determines the nature and extent of the remedy.

A.

1.

Neises first objects to any proposed remedy that includes the phrase "good faith."[27] It continues to assert that "good faith bargaining" is too subjective and ambiguous a term to give explicit notice of what is required. Neises also objects to several related terms in the proposed remedies, such as "good cause" and "predictably unacceptable bargaining proposals."[28]

This objection has no merit. In adjudicating Neises in contempt, we already have concluded that an order to bargain in good faith is not impermissibly ambiguous. There is no "fair ground of doubt" about what is required. *Taggart*, 139 S. Ct.

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[27] That phrase can be found in the Board's proposed remedies 5(a), (b), (c), (d), (e) and 6.

[28] *See* App. Dkt. 66 at 3–4.

at 1799 (emphasis omitted). "[T]he duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." *Ins. Agents Int'l Union*, 361 U.S. at 484–85; *see also Overnite Transp. Co.*, 938 F.2d at 821 (noting that the duty to bargain "requires the employer to approach collective bargaining with a good faith intention … to come into agreement"). Nor are the other terms to which Neises objects fatally ambiguous. Withdrawing tentative agreements without good cause is a sign of bad-faith bargaining. *Polycon Indus.*, 821 F.3d at 907. Requiring Neises to adhere to tentative agreements if it lacks good cause to change its position is therefore unremarkable.

2.

The Board proposes ordering Neises to "[c]ommit to its prior tentative agreements made with the Union during bargaining as they existed on May 28, 2020."[29] Neises does not contest this remedy. In the Board's reply, however, it goes further, asking us to rule that the extra sentence in the Union's version of Article II, Section 3 is part of the parties' tentative agreements.

We deny the Board's request to rule that the extra sentence in Article II, Section 3 as part of the parties' tentative agreements. But our denial does not prevent the parties from continuing to bargain over how employees can authorize the deduction of their Union dues. We therefore clarify the proposed remedy as follows:

> Commit to <u>the</u> tentative agreements made with the Union during bargaining <u>as</u> <u>contained in the</u>

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[29] App. Dkt. 41 at 5.

> document labeled Exhibit QQ, which the Special Master determined are the agreements as they existed on May 28, 2020.

3.

Neises next objects to the proposed requirement that it be required to present written proposals on all issues over which the parties have not yet reached a tentative agreement. It asks the court to clarify that oral proposals during bargaining are acceptable.

An order to present written proposals in advance of bargaining sessions is certainly warranted here in light of Neises's prior bargaining conduct. To address Neises's concern, however, we amend the proposed order as follows:

> Before each bargaining session, present written proposals for further bargaining on all issues that remain unresolved by tentative agreements. This requirement does not limit good-faith oral responses and counterproposals during bargaining sessions. Any resulting tentative agreements shall be promptly memorialized in writing.

4.

Neises next objects to the proposed requirement that it inform each of its agents or representatives of the judgment, 2020 consent order, and contempt adjudication. It maintains that the Board has not identified a basis for this remedy and that the language is unclear about what documents it must pass along.

This objection is without merit. Neises can only bargain through its representatives, who must be apprised of our orders to ensure compliance with them. *See Connolly v. J.T. Ventures*, 851 F.2d 930, 935 (7th Cir. 1988). We therefore impose this requirement.

5.

Neises next objects to the requirement that it post notices to employees of the court's orders and contempt adjudication and to file a sworn statement attesting to the steps it has taken to comply. Neises also objects to permitting the Board access to its facilities to ensure compliance. It argues that giving the Board access is only appropriate if there is a demonstrated likelihood that it will fail to cooperate.

These objections have no merit. Notice-posting is a common purgation remedy. *See*, *e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002). The Board describes it as "sacrosanct."[30] Here, Neises has shown itself likely to flout our orders, so allowing the Board access to ensure compliance is appropriate. Notably, Neises has already agreed to these remedies in the previous consent orders.

B.

1.

In its motion for contempt remedies, the Board requested a monetary penalty "as contemplated in the 2020 Consent Order."[31] Neises objects on the basis that the Board did not

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[30] App. Dkt. 69 at 5.

[31] App. Dkt. 41 at 7.

specify the amount of the penalty. It further submits that it should not be penalized for defending against the contempt petition.

The Board, in its reply, clarifies that it seeks $192,400 in penalties. It arrives at this number as follows: an initial $10,000 fine per violation (the Board stipulates that there is just one violation here – failing to bargain in good faith), plus $200 per day that violation continued, running from August 4, 2020, through February 2, 2023 (totaling 912 days). Neises's protest that it will be fined for defending the contempt petition relies on a false premise. It agreed to this fine schedule in the 2020 consent order and judgment. The penalty we impose here is designed to address Neises's failure to comply with our prior orders and to coerce Neises into compliance.

Neises also moves to file a sur-response to contest the penalty amount. We grant the motion only insofar as it relates to the amount of the penalty; Neises's other arguments are improper. Neises argues that it cannot be penalized for failing to bargain after the Board decided to initiate contempt proceedings because, at that point, the Union refused to resume bargaining. But this argument misrepresents the record. The Union said it would resume bargaining if Neises retracted its regressive proposals; only if Neises did not would the Union "let things play out" in the contempt proceedings.[32] Thus, this conditional refusal did not affect how long Neises's violation has continued. We impose the full financial penalty the Board requests.

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32 *See* SM. Dkt. 71-3 at 3–4.

2.

The Board further seeks an award of the Union's "reasonable costs and expenses attributable" to Neises's violation of the 2020 consent order. Neises objects that this remedy violates the "American Rule" that prevailing parties are not awarded attorneys' fees without statutory authorization. *See Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015). Neises acknowledges an exception for civil contempt cases. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

We will award compensatory damages to the Union. Because civil contempt proceedings are partly about compensating the prevailing party, *McComb*, 336 U.S. at 191, compensatory damages are typically required, *see Thompson v. Cleland*, 782 F.2d 719, 722 (7th Cir. 1986). As the party that charged Neises with an unfair labor practice, the Union is a prevailing party here. *See Ahearn v. Int'l Longshore & Warehouse Union*, 721 F.3d 1122, 1128 (9th Cir. 2013) ("the charging party … is entitled to compensation for its actual damages"); 29 C.F.R. § 102.1(h) (defining "party"). The Union will submit its costs within thirty days of the court's opinion. Neises may object to those costs within twenty-one days; if it does, the Union may reply within fourteen days of Neises's objections.

3.

The Board seeks its own attorneys' fees, calculated at the prevailing rate in Washington D.C. It argues that Neises has unreasonably and vexatiously multiplied the proceedings by making frivolous arguments.

Neises objects, saying it simply responded to all filings in this contempt case and that it has not unreasonably and

vexatiously multiplied the proceedings. It insists that its arguments were based on its reasonable beliefs and had a plausible legal or factual basis. *See Jolly Grp., Ltd. v. Medline Indus., Inc.*, 435 F.3d 717, 720 (7th Cir. 2006). Finally, Neises argues that the Board's attorneys' fees should be calculated at their actual salary rates, not the prevailing market rate in Washington D.C. *See Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366–67 (7th Cir. 2000).

We will award the Board's attorneys' fees. We have discretion to award attorneys' fees. *See Tranzact Techs., Inc. v. 1Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005); *CFTC v. Premex, Inc.*, 655 F.2d 779, 785 (7th Cir. 1981); *In re Establishment Inspection of Microcosm*, 951 F.2d 121, 126 (7th Cir. 1991). These fees are regularly awarded in contempt cases. *See NLRB v. Haven Salon + Spa*, No. 21-2413, 2023 WL 2230865, at *2 (7th Cir. Feb. 27, 2023) (awarding attorneys' fees for contempt); *NLRB v. Loc. 825, Int'l Union of Operating Eng'rs*, 430 F.2d 1225, 1230 (3d Cir. 1970); *NLRB v. Goren Printing Co.*, 1990 WL 300325, at *12 (1st Cir. Sept. 28, 1990) (unpublished). Here, Neises has pursued arguments "without a plausible legal or factual basis and lacking in justification." *Jolly Grp., Ltd.*, 435 F.3d at 720 (quoting *Pac. Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 119 (7th Cir. 1994)). Attorneys' fees, moreover, are not duplicative of the contempt penalty. *See Premex, Inc.*, 655 F.2d at 785.

And the Board's fees will be computed at the prevailing market rate in Washington D.C., where the Board's attorneys are based. Neises's reliance on *Hotline Industries, Inc.*, 236 F.3d at 366–67, is misplaced. There, the court was confronted with an unusual statutory scheme that limited attorneys' fees to "actual expenses." *Id.* at 367. But "reasonable fees" are

generally calculated at the prevailing market rate. *Id.*; *see also Blum v. Stenson*, 465 U.S. 886, 895 (1984); *NLRB v. Loc. 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d 399, 406–07 (2d Cir. 2006). The Board will submit its attorneys' fees within thirty days of the court's final opinion. Neises may object to the Board's calculation within twenty-one days; if it does, the Union may reply within fourteen days.

C.

The Board also seeks an order extending by six months the certification of the Union as the exclusive representative of the bargaining unit. It submits that such an order is necessary for three reasons: (1) to vindicate the employees' rights under section 7 of the National Labor Relations Act, which have been trampled by Neises; (2) to remove Neises's incentive to delay bargaining; and (3) to demonstrate that the court will not permit Neises to flout its orders.

Neises objects, submitting that the decertification bar protects the Union, not employee rights. It notes that most of the employees filed a petition to decertify the Union, although the Board dismissed that petition. It argues that the remedy "impacts employee Section 7 rights, which have already been suppressed for several years."[33]

Neises's objection has no merit under the circumstances of this case. There is no doubt that a decertification bar is an extraordinary remedy. *See Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 439 (7th Cir. 1993). But this remedy is appropriate when an employer engages in "outrageous and pervasive" unfair labor practices. *Id.* at 440 (citing *NLRB v. Gissel Packing*

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[33] App. Dkt. 66 at 14.

Co., 395 U.S. 575, 611–13 (1969)). The remedy is also appropriate when less outrageous conduct nevertheless "erode[s] majority strength or adversely affect[s] the election process." *Id.* And a decertification bar that lasts six months is appropriate when the employer's failure to bargain in good faith is part of its effort to "poison[] the bargaining process." *Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 810 (7th Cir. 1995); *see also NLRB v. Goya Foods of Fl.*, 525 F.3d 1117, 1128–29 (11th Cir. 2008) (approving a decertification bar lasting up to one year).

A six-month decertification bar is appropriate here. Neises has engaged in outrageous and pervasive conduct. It has flouted this court's orders for years and refused to bargain in good faith. *Ron Tirapelli Ford*, 987 F.2d at 441 (noting that "if the employer's violation is deliberate and egregious enough" a decertification bar is appropriate). The Board says that Neises's conduct has eroded the Union's majority strength.[34] *See id.* at 440. Given Neises's pattern of inhibiting bargaining, it is no surprise that the employees' faith in the Union may have weakened. Without extending the certification period, Neises may well obtain the object of its obstructive behavior: the Union's destruction. The employees may still choose to decertify—that is their prerogative—but a six-month extension will give them a fair opportunity to assess their interests on a level playing field. *See Gissel*, 395 U.S. at 613 (noting that a temporary decertification bar does not prevent employees from later disavowing the Union).

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34 *See* App Dkt. 69 at 10.

D.

Next, the Board requests an enhanced prospective fine schedule against Neises: $20,000 per violation and $300 per day for each day the violation persists. It also seeks a prospective fine schedule against Neises's bargaining representatives[35] who help Neises violate our orders: $5,000 per violation and $100 per day for each day the violation continues. It says that this remedy is necessary to assure purgation and deter future violations.

Neises objects. It says that the Board provides no evidence that the fines will accomplish their purpose. It also notes that prospective fines are not supposed to be punitive. Neises further objects to fines against its bargaining representatives, saying this would restrict its constitutional right to counseled representation and advice. It also says that it would be challenging to determine whether counsel has violated this order without delving into privileged communications.

We will impose the prospective fine schedule against Neises, but not its bargaining representatives. The point of a prospective fine is to coerce future compliance. *See United Mine Workers of Am.*, 330 U.S. at 304. Here, earlier prospective fines proved insufficiently onerous to prevent Neises's behavior. Increasing the prospective penalties Neises faces will aid

[35] We employ "bargaining representatives" as a stand-in for the lengthier formulation the Board provides: "each of Neises's officers, agents, attorneys, successors, and assigns, and persons who, having knowledge of the Judgement, Consent Order, and Contempt Adjudication, act in active concert or participation with Respondent" regardless of whether they are named as a respondent in the contempt adjudication. App. Dkt. 41 at 9–10.

in deterring Neises from persisting in its contumacious conduct.

We decline, however, to impose this prospective fine schedule against Neises's bargaining representatives. True, a corporation can only act through its officers, agents, etc., *Connolly*, 851 F.2d at 935, and it is well established that such persons can be punished for the corporation's misconduct, *Tranzact Techs., Inc.*, 406 F.3d at 856. When "those who are officially responsible for the conduct of [the business's] affairs" knowingly violate court orders aimed at the business, "they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt." *Wilson v. United States*, 221 U.S. 361, 376 (1911). Even so, the unusual remedy of imposing prospective personal liability against Neises's bargaining representatives does not currently seem necessary given the other remedies we are imposing, including a significant prospective fine schedule against Neises itself.

E.

1.

The Board also asks for various remedies that would require ongoing court involvement. It proposes that we require prior approval from this court before Neises can implement any proposal after reaching a "lawful and legitimate bargaining impasse."[36] Neises submits that this determination is for the Board, not for the court.

Neises has the better argument here. It is generally the Board's role to determine whether any impasse is lawful. *See Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 325 (D.C. Cir.

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36 App. Dkt. 41 at 10.

2015). We therefore will alter the proposed remedy accordingly:

> Respondent Neises may not, without prior approval from the National Labor Relations Board, implement any bargaining proposal without the agreement of the Union based on an assertion of a lawful and legitimate bargaining impasse.

2.

The Board also proposes requiring Neises to provide advance notice to the Board, the Union, and this court, before it seeks outside help to resolve bargaining disputes with the Union. Neises submits that the Board identifies no basis for this remedy.

We agree with Neises. The Board provides inadequate justification for this broad remedy. We see no reason to restrict the parties' ability to resolve any future disputes without resorting to the courts.

3.

The Board also asks that our order provide that, upon the Board's motion, further bargaining disputes be subjected to supervised mediation or if the parties agree, to interest arbitration. It also asks that it be permitted to move for future negotiations to be transcribed at Neises's expense. Neises maintains that the Board provides no basis for such remedies.

The Board's request that, should it become necessary, it can ask us to require Neises to pay for the transcription of future negotiations is reasonable here. The court has authority to grant such relief as is necessary to ensure compliance with

its orders. *McComb*, 336 U.S. at 193–94. Here, Neises was able to obscure what the parties agreed to, in part, because the negotiation process was not always clear. To head-off future disputes of a similar nature, transcription may become appropriate. If it does, the Board may request that we order that future negotiations be transcribed at Neises's expense. Ordering court-supervision of the bargaining process at the Board's motion, however, is not appropriate at this time. There are alternate and less intrusive remedies available should the need arise.

4.

The Board proposes requiring Neises to provide advance notice to the Board, the Union, and the court if Neises closes or files for bankruptcy. Neises objects that this restricts its ability to dissolve or enter bankruptcy, in violation of its "absolute right to terminate its business for any reason [it] pleases." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (quoting *Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965)).

The Board maintains, however, that this remedy does not interfere with Neises's ability to close; it just requires advance notice. It justifies this incursion on Neises's prerogatives as necessary so that the Board can determine that Neises is not trying to dissolve simply to avoid its court-imposed obligations.

We think that this remedy will be sufficiently effective if we limit advance notice to the Board and the Union, not the court. *Cf. Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 597 (D.C. Cir. 1976) (prohibiting the employer from "threatening to go out of business or close the plant on

account of the union"). If any of Neises's future closure or bankruptcy decisions require additional involvement from this court, the Board will notify the court.

5.

The Board also proposes requiring Neises to inform the Board, the Union, and this court at least fourteen days in advance of any expenditure that will exceed $5,000. Neises points out that this would cripple its ability to operate. The Board's reply does not address this concern.

The Board has not justified this proposal adequately. Neises's concern that this remedy would cripple the business is realistic. Requiring two-weeks' notice of any and every transaction that exceeds $5,000 would put Neises in an unrealistic bind. We therefore decline to impose this remedy.

Conclusion

Except as otherwise specified in this opinion, the Board's requested remedies will be imposed as requested. The Board may submit for approval an order and judgment that conforms with this opinion.

The Board may recover its costs.

It is so ordered.