UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

October 2, 2015

BRUCE FICKMAN
ASSOCIATE GENERAL COUNSEL
UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC, AND ITS LOCAL 235A
FIVE GATEWAY CENTER STE 807
60 BLVD OF THE ALLIES
PITTSBURGH, PA 15222-1209

Re: Sherwin Alumina Company, LLC
Case 16-CA-143944

Dear Mr. Fickman:

This office has carefully considered the appeal from the Regional Director's partial refusal to issue complaint. We agree with the Regional Director's decision and deny the appeal substantially for the reasons in her letter of May 20, 2015. We concluded that the Employer did not violate the Act by locking out bargaining unit employees. We further deny your request for oral argument as we concluded it would not materially advance our disposition of the matter.

Specifically with respect to allegations 1 through 3, we determined that the Employer did not insist on a permissive subject of bargaining (i.e. retiree healthcare) in order to end the lockout. Rather, the Employer told the Union that it would end the lockout when the parties reached a new agreement. The last, best and final offers proposed to the Union were not "take it or leave it" proposals. The parties did not bargain to impasse. While the only difference between the two last, best and final offers included the permissive subject, the parties have bargained since the Employer's "last" offers and the Employer has changed its proposal as to the alleged permissive subject.

We find the Union's reliance on *Movers and Warehousemen*, 224 NLRB 356 (1976), enf'd, 550 F.2d 962 (4th Cir. 1977), cert. denied, 434 U.S. 826 (1977), distinguishable from the instant case because there, the parties bargained to impasse, the lockout was implemented to compel acceptance of unlawful bargaining conduct and it became a means of evading a duty to bargain in good faith, which did not occur in this case. While here, the Employer may have

bargained hard about current retiree benefits, it continually indicated that it was looking for an overall agreement, and the Employer never expressly predicated reaching such an agreement on its retiree demands. Further, the parties did not reach agreement regarding additional subjects, such as contracting out and overtime.

We also determined that the Employer did not fail to inform the Union why it was locking out the employees, thereby rendering the lockout unlawful. The Board has stated that an employer's assertion that a lockout will end when a new agreement is reached is "sufficient to inform. . . employees that the employer was locking them out in support of its bargaining position." See *In re Midwest Generation, EME, LLC*, 343 NLRB 69, 71 (2004) rev'd on other grounds 429 F.3d 651 (7th Cir. 2005); see also *Ancor Concepts, Inc*., 323 NLRB 742, 744 (1997) enf'd. denied on other grounds 166 F.3d 55 (2d Cir. 1999). In *Ancor*, the Board held that a timely announcement of a lockout does not depend on an employer's use of formal words describing its bargaining tactics. But the employer's assertion that it would not offer the strikers' reinstatement until the parties reached a new agreement was sufficient to inform the striking employees that the employer was locking them out in support of its bargaining position. 323 NLRB at 744, fn. 13 Here, the Employer advised both the Union and its employees that it initiated the lockout due to a "lack of progress in negotiations and in achieving a new collective bargaining agreement." The Employer lawfully and sufficiently advised the Union that to end the lockout, the parties would have to reach agreement on a new collective bargaining agreement, which could or could not have included permissive subjects depending on continued contract negotiations.

The Union's reliance on *Smurfit Stone Container Enterprise*, 357 NLRB No. 144, enf'd, 594 Fed. Appx. 897 (9th Cir. 2014), is also distinguishable. The employer in *Smurfit Stone* explicitly conditioned effects bargaining upon the union's willingness to concede to non-mandatory bargaining subjects. In this case, the Employer did not condition agreement on any proposal in order to end the lockout. Rather, it made clear that the lockout would end when the Employer and Union reach a new agreement.

Based on a review of all of the evidence, we concluded that the Employer acted lawfully

when it locked out bargaining unit employees. The remaining meritorious allegations are still pending before the Region for further processing.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

By: _____
Deborah M.P. Yaffe, Director
Office of Appeals

cc: MARTHA KINARD
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