

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

D.R. HORTON, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	No. 12-60031
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**UNOPPOSED MOTION  
OF THE NATIONAL LABOR RELATIONS BOARD  
TO RECALL MANDATE**

To the Honorable, the Judges of the United States Court of Appeals  
for the Fifth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court to recall mandate issued in the above-captioned case to allow for the 45-day period for petitioning for rehearing or rehearing en banc required under Federal Rules of Appellate Procedure 35(c), 40(a)(1), and 41, and shows as follows:

1. On December 3, 2013, the Court issued a decision in the above-captioned case, granting in part and denying in part Horton's petition for review and the Board's cross-application for enforcement.

2. The Court's letter accompanying the decision specified that "[a]fter judgment is entered," Rules 40 and 41, and Fifth Circuit Local Rule 41 "governing

petitions for rehearing and issuance of mandates will then apply.” *See* Rule 40(a)(1)(B) (“[A] petition for panel rehearing may be filed . . . within 45 days after entry of judgment if one of the parties is . . . a United States agency.”); Rule 41(b) (“The court’s mandate must issue 7 days after the time to file a petition for rehearing expires. . . .”); *see also* Rule 35(c) (“A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.”). The Office of the Clerk subsequently confirmed to Board counsel by phone that the rehearing period would begin to run when the Court entered judgment.

3. Pursuant to Federal Rule of Appellate Procedure 19, the Board submitted a proposed judgment conforming to the opinion. Thereafter, Horton responded with a counter-proposed judgment, and the Board replied with a second proposed judgment. Each of those proposed judgments ended with standard language that “Mandate shall issue forthwith.”

4. On January 27, 2014, the Court entered the judgment, adopting the Board’s second proposed judgment. That same day, the Court issued mandate.

5. Pursuant to Local Rule 41.2, this Court will recall mandate only to prevent injustice. Mandate here issued with extraordinary and unexpected haste, without notice to the Board, and without providing for the 45-day rehearing period referenced in the Court’s letter of December 3, 2013, and specified in Rule

40(a)(1). Failure to recall mandate will thus foreclose the Board's opportunity to petition for rehearing or rehearing en banc of a decision resolving novel issues at the intersection of federal labor and arbitration law. Similarly, it will eliminate Petitioner's ability to petition for rehearing of the portion of its petition for review that it lost. A denial of the opportunity to petition for rehearing in this case will work an injustice.

6. Consistent with Rules 40 and 41 discussed above, mandate in this case should not have issued until 7 days after the time for a rehearing petition has run, or 52 days after January 27, 2014, the day the Court entered the judgment. But, instead, mandate issued simultaneously with the judgment. The clerk's office explained that this occurred because the final sentence of the judgment reads: "Mandate shall issue forthwith." The Board often includes that sentence in its proposed judgments, according to its standard practice. The Board did not anticipate, nor intend, that the Court would interpret the sentence as overriding the 52-day waiting period specified by Rule 41(b). Indeed, on December 6, 2013, the Court entered the Board's proposed judgment in *Carey Salt Co. v. NLRB*, 5th Cir. No. 12-60757, which contained the same "Mandate shall issue forthwith" language (see Exh. A), and ordered that "mandate will issue 52 days from this date, unless you file a timely petition for rehearing." (Exh. B.) The Board submits that here

the Court should have allowed the same 52-day period prior to issuing the mandate.

7. Therefore, the Board respectfully requests that the Court recall mandate to allow the full 52-day period to run, thereby providing the Board the standard 45 days to consider whether to petition for rehearing or rehearing en banc.

8. Counsel for Horton has represented to Board counsel that it will not oppose this motion.

WHEREFORE, the Board requests that the Court recall mandate in the above-captioned case which was issued contrary to the Federal Rules of Appellate Procedure and the local rules of this Court.

Respectfully submitted,

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1099 14th St., NW  
Washington, D.C. 20570

Dated at Washington, D.C.  
this 28th day of January 2014

# EXHIBIT A

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

December 06, 2013

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 12-60757     Carey Salt Company v. NLRB  
Agency No. 15-CA-19704  
Agency No. 15-CA-19738

Judgment Entered Proposed by: NLRB

A judgment has been entered under FED R. APP. P. 19.

The mandate will issue 52 days from this date, unless you file a timely petition for rehearing under FED R. APP. P. 40 or application for stay under FED R. APP. P. 41.

Sincerely,

LYLE W. CAYCE, Clerk

*Shea E. Pertuit*

By: \_\_\_\_\_  
Shea E. Pertuit, Deputy Clerk  
504-310-7666

Mr. Stanley E. Craven  
Ms. Linda Dreeben  
Mr. Robert James Englehart  
Ms. Elizabeth Ann Heaney  
Mr. David M. Kight  
Mr. Daniel M. Kovalik  
Ms. Nancy A. Parker  
Ms. Milakshmi Varuni Rajapakse  
Ms. Emma Rebecca Rebhorn

# EXHIBIT B



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, D.C. 20570

November 26, 2013

Lyle W. Cayce  
Clerk United States Court of  
Appeals for the Fifth Circuit  
F. Edward Hebert Bldg.  
600 S. Maestri Place  
New Orleans, LA 70130-3408

Re: Carey Salt Company v. *NLRB*, 5th Cir.  
No. 12-60757

Dear Mr. Cayce:

On November 21, 2013, the Court handed down its opinion granting Carey Salt Company's petition in part and granting in part the Board's cross-petition for enforcement. Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, I hereby submit the Board's Proposed Judgment in the above entitled manner. A certificate of service is enclosed.

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960



**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

CAREY SALT COMPANY, a Subsidiary of  
Compass Minerals International, Incorporated

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION AND  
LOCAL UNION 14425

Intervenor

Case No. 12-60757

Board Case Nos.  
15-CA-19704  
15-CA-19738

**JUDGMENT**

Before: Smith, Garza and Southwick, Circuit Judges

THIS CAUSE came to be heard upon a petition filed by the Carey Salt Company to review an order of the National Labor Relations Board dated September 12, 2012, in Case Nos. 15-CA-19704 and 15-CA-19738, reported at 358 NLRB No. 124, and upon a cross-petition for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of the parties and has considered the briefs and agency record filed in this cause. On November 21, 2013, the Court being fully advised in the premises, handed down its opinion granting Carey Salt Company's petition in part and granting in part the Board's cross-petition for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the Petitioner/Cross-Respondent Carey Salt Company, a Subsidiary of Compass Minerals International, Inc., Cote Blanche, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Threatening employees with discharge because they engaged in an unfair labor practice strike.
- (b) Failing and refusing to reinstate employees because they engaged in an unfair labor practice strike.
- (c) Failing and refusing to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425 (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, including storeroom clerks, truck drivers, and dock employees employed at the Cote Blanche Mine.

- (d) Unilaterally changing the terms and conditions of employees in the absence of a valid impasse.
  - (e) Conditioning bargaining over mandatory subjects of bargaining on the Union's concessions to Respondent's bargaining demands.
  - (f) Refusing to use seniority as the basis for recalling unit employees who engaged in an unfair labor practice strike.
  - (g) Continuing to honor job offers made to replacement workers after the end of an unfair labor practice strike.
  - (h) Unilaterally changing the seniority-based recall procedure for unit employees.
  - (i) Unilaterally changing the time period for unit employees to accept offers of reinstatement.
  - (j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees in the above unit concerning terms and conditions of

employment and, if an understanding is reached, embody the understanding in a signed agreement.

- (b) Upon request by the Union, restore the terms and conditions of employment of unit employees as they existed prior to March 31, 2010, and continue those terms in effect until the parties have bargained to a new agreement or a valid impasse, or the Union has agreed to changes, as provided in the remedy section of the judge's decision.
- (c) Within 14 days from the date of this Order, offer to reinstate to their former jobs any bargaining unit employees who may have lost their employment because of the Respondent's unlawful unilateral changes or their effects, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired in the interim.
- (d) Make the unit employees whole for all losses, including loss of employment, they may have suffered as a result of the unlawful unilateral changes to terms and conditions of employment that were implemented beginning on or about March 31, 2010, as provided in the remedy section of the judge's decision.
- (e) Within 14 days from the date of this Order, offer to reinstate all former unfair labor practice strikers to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired during the strike.
- (f) Make all former unfair labor practice strikers whole for any loss of earnings or other benefits that they may have suffered by reason of Respondent's failure to promptly offer them reinstatement after they unconditionally offered to return to work.
- (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (h) Within 14 days after service by the Region, post at its Cote Blanche, Louisiana facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60

consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 31, 2010.

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

Mandate shall issue forthwith

ENTERED:

## APPENDIX

### NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES  
COURT OF APPEALS ENFORCING AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

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

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

WE WILL NOT threaten our employees with termination because they engage in an unfair labor practice strike.

WE WILL NOT refuse to reinstate employees who have engaged in an unfair labor practice strike.

WE WILL NOT refuse to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees, including storeroom clerks, truck drivers, and dock employees employed at the Cote Blanche Mine.

WE WILL NOT unilaterally implement bargaining proposals and change terms and conditions of employment in the absence of a valid impasse in bargaining.

WE WILL NOT condition bargaining over mandatory subjects of bargaining on the Union's concessions to our bargaining demands.

WE WILL NOT unlawfully refuse to use seniority to recall our employees who have engaged in an unfair labor practice strike.

WE WILL NOT continue to honor job offers we made to replacement workers after the end of an unfair labor practice strike.

WE WILL NOT unilaterally change the seniority-based recall procedure for our employees.

WE WILL NOT unilaterally change the time period for our employees to accept an offer of reemployment.

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

WE WILL, upon request by the Union, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above bargaining unit.

WE WILL, upon request by the Union, retroactively rescind any and/or all terms that we unilaterally imposed beginning on March 31, 2010, and restore, honor, and continue the wages, hours, terms, and conditions of employment that were set forth in the collective-bargaining agreement that expired on March 24, 2010, and WE WILL maintain the restored terms and conditions of employment until such time as the parties complete a new collective-bargaining agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to such changes.

WE WILL, within 14 days from the date of this Order, offer to reinstate to their former jobs any bargaining unit employees who may have lost their employment because of our unlawful unilateral changes or their effects, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired in the interim.

WE WILL make bargaining unit employees whole for all losses, including loss of employment, suffered as a result of our unlawful unilateral changes.

WE WILL, within 14 days from the date of the Board's Order, offer to reinstate all former unfair labor practice strikers to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired during the strike.

WE WILL make the former strikers whole for losses resulting from the failure to reinstate them after their unconditional offer to return to work.

CAREY SALT COMPANY, A SUBSIDIARY OF COMPASS  
MINERALS INTERNATIONAL, INC.

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

CAREY SALT COMPANY, a Subsidiary of  
Compass Minerals International, Incorporated

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION AND  
LOCAL UNION 14425

Intervenor

---

Case No. 12-60757

Board Case Nos.  
15-CA-19704  
15-CA-19738

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

Dated at Washington, D.C.

this 26th day of November, 2013

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

D.R. HORTON, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	No. 12-60031
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on January 28, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570

Dated at Washington, D.C.  
this 28th day of January 2014