UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CVS/PHARMACY

and Case 13-UC-266228

TEAMSTERS LOCAL 727

NOTICE TO SHOW CAUSE

On February 5, 2021, the National Labor Relations Board issued an order granting review of the Employer's November 5, 2020 Request for Review, and it remanded this proceeding to the Regional Director. Chairman McFerran and Members Kaplan and Emanuel participated. The case returned to the Board on May 11, 2021 when the Employer filed a Request for Review of Regional Director's Dismissal of UC Petition. On May 25, 2021, the Office of the Executive Secretary issued an order granting the Acting Regional Director's request that the Board transfer the Request for Review to the Regional Director for reconsideration.

Subsequently, the Board's Designated Agency Ethics Official (DAEO) determined that Member Emanuel (whose term on the Board has since ended) should have been disqualified from participating in this case, based on an investigation conducted by the Board's Inspector General.[1] The Inspector General concluded that Member Emanuel's participation violated a criminal statute, 18 U.S.C. § 208(a), and its implementing regulations, 5 C.F.R. §2640.201(b)(2)(i), because of his ownership of a conflicting financial interest in a

[1] The results of the Inspector General's investigation are reflected in an August 26, 2021 memorandum to the DAEO. As appropriately redacted, the memorandum with relevant attachment is appended to this notice to show cause.

sector mutual fund.[2]

The Board has accepted the DAEO's determination that Member Emanuel should have been disqualified. The presumptively appropriate remedy for Member Emanuel's unlawful participation in this case is to vacate the February 5, 2021 and May 25, 2021 orders and to re-adjudicate the November 5, 2020 Request for Review *de novo*. See e.g., *Berkshire Employees Assn. of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970).[3]

NOTICE IS GIVEN that any party seeking to show cause why the Board's orders should not be vacated, and why the Board should not re-adjudicate this case, must do so in writing, filed with the Board in Washington, D.C., on or before **January 28, 2022** (with affidavit of service on the parties to this proceeding).[4] If a response to this Notice to Show Cause is filed, a party may file a reply to the response within 14 days of receipt of the response

[2] At relevant times, Member Emanuel owned more than $50,000 in shares of the Health Care Select Sector SPDR Fund ETF, which in turn owned CVS Health Corporation common stock. Member Emanuel did not timely disclose his ownership of this sector mutual fund, which prevented a disqualification determination from being made before Member Emanuel participated in this case and before the Board order and the Executive Secretary order issued.

[3] We reject our colleague's assertion that in describing vacatur of the earlier orders as presumptively appropriate we have somehow prejudged matters or "slanted the playing field." We have not. As we stated in the notice to show cause that we issued for the same reasons in *ExxonMobil Research & Engineering*, Case 22-CA-218903, at 2, fn. 3 (Jan. 7, 2022) (not reported in Board volumes), the conduct compelling this notice involves the Board's interests and reflects on the Board and its integrity as an institution. For this reason, we believe the federal appellate decisions involving possible bias by federal administrative-agency adjudicators (including a prior Board member) that we cite above provide more relevant guidance than any cases construing the disqualification requirement for an individual judge that our colleague cites. Because the Board's institutional interests are at stake—and at risk—it is entirely appropriate that we convey our belief to the parties that, presumptively, vacatur is the right response to the events uncovered by the Inspector General.

[4] Member Kaplan concurs in providing the parties an opportunity to brief the issue of an appropriate remedy for Member Emanuel's disqualification from participation. Pending review of arguments made in response to this notice, he reserves judgment as to whether vacatur is appropriate, presumptively or otherwise, in the particular circumstances of this case.

(with affidavit of service on the parties to this proceeding), but further responses will not be permitted except where there are special circumstances warranting leave to file such a response.

Dated, Washington, D.C., January 7, 2022

Lauren McFerran,	Chairman
Marvin E. Kaplan,	Member
Gwynne A. Wilcox,	Member
David M. Prouty,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Member Ring, dissenting in part.

My colleagues and I agree that Member Emanuel should not have participated in this case, based on a conflicting financial interest. We also agree that the parties are entitled to an opportunity to be heard before the Board decides whether to vacate its prior order in this case. However, for the reasons stated in my partial dissent in *ExxonMobil Research & Engineering*, Case 22-CA-218903 (Jan. 7, 2022) (not reported in Board volumes), I strongly disagree with the majority's decision to hold that the "presumptively appropriate" remedy for Member Emanuel's participation is to vacate the Board's order and re-adjudicate the case *de novo*. The remedial question posed by Member Emanuel's participation in this case is one of first impression for the Board, and there is no statute or controlling legal precedent directly on point. In my view, the Board should give the parties an opportunity to be heard, not only on whether the order should be

vacated, but also on the standard to apply in determining whether vacatur is warranted. I cannot agree with my colleagues' decision to prejudge the latter issue, slanting the playing field in advance by making vacatur the presumptively appropriate remedy.

Furthermore, and also as explained in my opinion in *ExxonMobil Research & Engineering*, the cases cited by the majority—*Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970), and *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235 (3d Cir. 1941)—do not support their premature conclusion that vacatur is presumptively appropriate here. Those cases dealt with instances of actual bias or prejudgment, not with conflicting financial interests. Nor is it at all clear how actual bias or prejudgment can be found in this instance, absent any basis for concluding that Member Emanuel was aware, at the time he participated in the decision in this case, that the Health Care Select Sector SPDR Fund ETF held shares of common stock in CVS Health Corporation. The Supreme Court has held that there is room for consideration of "harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance."[1] If a presumption in favor of vacatur is not required in order to protect the integrity of the judicial process, it is not clear why such a presumption is required in order to protect the integrity of the Board's processes. In any event, the Board should hear from the parties *before* it announces the applicable standard. From the majority's refusal to do so, I respectfully dissent.

Dated, Washington, D.C., January 7, 2022

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

[1] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988).

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

August 26, 2021

To: Lori Ketcham
Designated Agency Ethics Official

From: David Berry
Inspector General

Subject: Board Member Financial Conflict of Interest

The purpose of this memorandum is to report back to the Designated Agency Ethics Official (DAEO) that the Office of Inspector General (OIG), National Labor Relations Board (NLRB), substantiated an allegation that Member William Emanuel participated in matters in which he had a conflicting financial interest and that he failed to fulfill the commitments he made when he signed his *Ethics Agreement*.

The investigation involving Member Emanuel was initiated on May 27, 2021, after your staff reviewed Member Emanuel's annual public financial disclosure report. That review disclosed that, in the first part of calendar year 2020, Member Emanuel began investing in sector funds, and one or more funds had equity holdings in entities that were a party to an NLRB case. Your office then reported the matter to the OIG. See, 5 CFR 2638.104(c)(9)(i).

To conduct the OIG investigation, we issued subpoenas to the investment companies that managed the sector funds and to the broker that Member Emanuel used to invest in the sector funds. Based on the information in the subpoena returns from the investment companies, we were able to compile a list of all entities in which the funds held an equity interest and the dates of transactions involving the sale and purchases of the equity interest. The subpoena return from Member Emanuel's broker provided information that documented when Member Emanuel first had an interest in each sector fund and when that interest exceeded or fell below $50,000, the regulatory threshold set by the Office of Government Ethics (OGE) to trigger an 18 U.S.C. § 208 financial conflict of interest. See, 5 CFR 2640.201(b)(2)(i).

The documentation provided by the broker also showed that Member Emanuel received monthly statements and that those statements listed his investments, transactions involving the investments, and the beginning and ending value of the investments. The sector funds are identified as a "sector fund" in the fund's name. We also reviewed the annual DAEO's notice to Member Emanuel regarding the approval of his Public Financial Disclosure Report. That notice included a paragraph warning Member Emanuel of the $50,000 threshold for sector

funds and that he may not participate in any particular matter involving the underlying holdings of the funds.

We compared our compiled list of entities in which the sector funds held an equity interest, to a list of cases pending before the Board during the period January 1, 2020 to June 17, 2021. For each case that matched with a sector fund equity interest, we then reviewed documentation to determine if Member Emanuel participated in the matter as a Member, if his participation in the matter was both personal and substantial, and whether Member Emanuel held an interest in the sector fund in excess of $50,000 at the time of his participation. Through that process, we determined that Member Emanuel participated both personally and substantially in five matters involving an entity held by a sector fund and, at the time of that participation, Member Emanuel had a financial interest in the sector fund that exceeded $50,000. Documentation is provided as attachment (1).

On August 19, 2021, Member Emanuel participated in an interview after being provided assurances that the statements he made could not be used against him in a criminal proceeding. Prior to providing those assurances, the OIG presented the matter to the U.S. Attorney's Office for the District of Columbia. On August 9, 2021, the U.S. Attorney's Office declined prosecution. During the interview, Member Emanuel generally denied knowledge of his sector fund investments and responsibility for his investment decisions. Member Emanuel also denied understanding the ethics agreement that he signed. A copy of the transcript is provided as attachment (2).

Member Emanuel's position that he lacked knowledge of the conflicting financial interest is without merit. As discussed above, Member Emanuel was provided with monthly statements that detailed his financial investments. When questioned about the statements, Member Emanuel acknowledged that he received the monthly statements and that he reviewed them to determine the overall performance of investments. Member Emanuel, however, denied that he reviewed the statements in detail and denied any knowledge of the sector fund investments. Transcript starting at page 23.

An Executive Branch employee cannot avoid knowledge of his financial interests by failing to review information that is provided to the employee by his financial representative. On October 18, 2017, Member Emanuel signed a document titled *Certification of Ethics Agreement Compliance* that was marked "yes" to a box containing the following statement:

> If I have a managed account or use the services of an investment professional, I have notified the manager or professional of the limitations indicated in my ethics agreement. **In addition, I am continuing to monitor purchases**. (Emphasis added)

Member Emanuel was provided the necessary information by his financial advisor to monitor his purchases. Given the duty to monitor his financial investments purchases and the information that was provided to him monthly, Member Emanuel meets the knowledge requirement for 18 U.S.C. § 208. Having certified that he is monitoring his investment purchases, and he cannot now disavow knowledge when it becomes apparent that he acted in matters that he had a financial interest. Also, even though individual shareholders do not

control a sector fund's portfolio, they are charged with having knowledge of the holdings. See, OGE Informal Advisory Letter 93X37 (O.G.E), 1993 WL 721257.

Member Emanuel also stated that he relied upon the DAEO staff to ensure that his investments complied with OGE requirements. Transcript starting at page 70. That position is without merit. It is clearly established that the DAEO staff did not have knowledge of Member Emanuel's sector fund investments until Member Emanuel filed his annual financial disclosure form. The assistance that the DAEO staff provided to Member Emanuel, through his financial advisor, was with disclosure requirements.

In addition to the 18 U.S.C. 208 issues, it is our understanding [redacted] had concerns regarding Member Emanuel's compliance with the *Ethics Agreement*. Those specific concerns were whether Member Emanuel had a plan in place that required his approval of purchases. We determined that Member Emanuel had no plan in place. Additionally, based on Member Emanuel's responses during the interview, he took no steps to comply with that requirement of the agreement. Transcript pages 40 to 42. In addition to not complying with the agreement, Member Emanuel took the position that the *Ethics Agreement* was superseded by other DAEO memorandums. Transcript starting at page 45. We were not persuaded by these statements, and we determined that Member Emanuel did not comply with the *Ethics Agreement*.

Our investigative efforts did not disclose gaps or failures in the NLRB's ethics program or that the DAEO program did not meet the requirements as set out in 5 C.F.R. 2638.104. We observed that the DAEO staff acted promptly to address Member Emanuel's recusal obligations and notified the OIG. We also documented that the NLRB's financial disclosure filers are reminded annually of the sector fund threshold for a financial conflict of interest.

Given the nature of the extensive jurisdiction of the NLRB, you may want to consider consulting with OGE to determine if other agencies have taken steps to limiting employee investments in sector funds or if there is a standard notice that can be provided to an employee to then provide to their financial advisor. We note, however, that because sector fund investments are not subject to the periodic reports required by the Stop Trading on Congressional Knowledge (STOCK) Act of 2012, enforcement of any restrictions would remain an annual process and would not address the risk between annual disclosure reports.

[redacted] Because the DAEO has the regulatory responsibility to assist the Board in its enforcement of ethics law and regulations, including corrective action, the OIG is reporting this information to you so that you can advise the Board regarding what, if any, corrective action is necessary to remedy the financial conflict of interest violations regarding the five matters identified above. See, 5 CFR 2638.104(c)(9)(ii).

Attachments

cc: Chairman

Holding for CVS

UBS Portfolio Management Program
May 2020

Account name: WILLIAM J EMANUEL

[redacted]

Your assets › **Equities** › **Closed end funds & Exchange traded products** (continued)

Holding	Number of shares	Purchase price/ Average price per share ($)	Client investment ($)	Cost basis ($)	Price per share on May 29 ($)	Value on May 29 ($)	Unrealized (tax) gain or loss ($)	Investment return ($)	Holding period
HEALTH CARE SELECT SECTOR SPDR FUND ETF Symbol: XLV									
[redacted]									
Security total						206,020.00			
[redacted]									
[redacted]									
[redacted]									
[redacted]									
[redacted]									
[redacted]									

Holding for Exxon

UBS Portfolio Management Program
September 2020

Account name: WILLIAM J EMANUEL

[redacted]

Your assets › Equities › Closed end funds & Exchange traded products (continued)

Holding	Number of shares	Purchase price/ Average price per share ($)	Client investment ($)	Cost basis ($)	Price per share on Sep 30 ($)	Value on Sep 30 ($)	Unrealized (tax) gain or loss ($)	Investment return ($)	Holding period
ENERGY SELECT SECTOR SPDR FUND									
ETF									
Symbol: XLE									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]									
Security total	[redacted]	[redacted]	[redacted]	[redacted]		62,895.00	[redacted]	[redacted]	
[redacted]									
[redacted]									
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]									
[redacted]									
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[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]	
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[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]	
[redacted]								[redacted]	

[redacted] [redacted]

Holding for Marathon

UBS

Portfolio Management Program
June 2020

Account name: WILLIAM J EMANUEL

[redacted]

Holding	Number of shares	Purchase price/ Average price per share ($)	Client investment ($)	Cost basis ($)	Price per share on Jun 30 ($)	Value on Jun 30 ($)	Unrealized (tax) gain or loss ($)	Investment return ($)	Holding period
ENERGY SELECT SECTOR SPDR FUND									
ETF									
Symbol: XLE									
[redacted]									
Security total						79,485.00			

Holding for Universal Health

UBS Portfolio Management Program
April 2021

Account name: WILLIAM J EMANUEL

[redacted]

Your assets › **Equities** › **Closed end funds & Exchange traded products** (continued)

Holding	Number of shares	Purchase price/ Average price per share ($)	Client investment ($)	Cost basis ($)	Price per share on Apr 30 ($)	Value on Apr 30 ($)	Unrealized (tax) gain or loss ($)	Investment return ($)	Holding period
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]	
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
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[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
HEALTH CARE SELECT SECTOR SPDR FUND ETF Symbol: XLV									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		LT
[redacted]									
Security total	[redacted]	[redacted]	[redacted]	[redacted]		242,660.00	[redacted]	[redacted]	
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
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[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]
[redacted]									
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	[redacted]	[redacted]	
[redacted]								[redacted]	

[redacted]

UBS [redacted] gram

November 2020

Account name: WILLIAM J EMANUEL

[redacted]

Fund Name	Transaction	Shares	Price	Trade Date	Settlement Date
CVS Health Corp Common Stock USD 0.01	Purchase	5000	70.97	1/27/2020	1/29/2020
CVS Health Corp Common Stock USD 0.01	Purchase	21700	61.47	3/11/2020	3/13/2020
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-26500	54.70	3/20/2020	3/24/2020
CVS Health Corp Common Stock USD 0.01	Purchase	25200	64.41	5/18/2020	5/20/2020
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-33900	63.34	5/21/2020	5/26/2020
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-13800	63.33	5/22/2020	5/27/2020
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-27700	66.56	5/28/2020	6/1/2020
CVS Health Corp Common Stock USD 0.01	Purchase	32000	64.49	6/19/2020	6/23/2020
CVS Health Corp Common Stock USD 0.01	Purchase	12100	63.63	8/3/2020	8/5/2020
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-24700	59.57	9/18/2020	9/22/2020
CVS Health Corp Common Stock USD 0.01	Purchase	11300	61.78	11/5/2020	11/9/2020
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-39000	69.55	12/18/2020	12/22/2020
CVS Health Corp Common Stock USD 0.01	Purchase	15100	72.20	2/17/2021	2/19/2021
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-7600	73.18	3/19/2021	3/23/2021
CVS Health Corp Common Stock USD 0.01	Purchase	34600	75.75	4/19/2021	4/21/2021
CVS Health Corp Common Stock USD 0.01	Sale or Pair-off Sale	-27000	84.27	5/13/2021	5/17/2021

Health Care Select Sector SPDR traded in CVS equity during the time of the Board action - 2/5/2021 and 5/25/2021.

Fund Name	Transaction	Shares	Price	Trade Date	Settlement Date
Exxon Mobil Corp Common Stock USD	Purchase	32,400	69.28	1/13/2020	1/15/2020
Exxon Mobil Corp Common Stock USD	Purchase	43,500	60.81	2/11/2020	2/13/2020
Exxon Mobil Corp Common Stock USD	Purchase	26,900	60.24	2/18/2020	2/20/2020
Exxon Mobil Corp Common Stock USD	Purchase	192,200	53.22	3/2/2020	3/4/2020
Exxon Mobil Corp Common Stock USD	Purchase	376,500	44.23	3/10/2020	3/12/2020
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	980,000	32.74	3/20/2020	3/24/2020
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	3,536,700	37.50	3/30/2020	4/1/2020
Exxon Mobil Corp Common Stock USD	Purchase	42,500	37.53	4/1/2020	4/3/2020
Exxon Mobil Corp Common Stock USD	Purchase	36,200	45.54	4/9/2020	4/14/2020
Exxon Mobil Corp Common Stock USD	Purchase	38,100	44.43	5/6/2020	5/8/2020
Exxon Mobil Corp Common Stock USD	Purchase	23,700	42.67	5/13/2020	5/15/2020
Exxon Mobil Corp Common Stock USD	Purchase	37,000	42.70	5/15/2020	5/19/2020
Exxon Mobil Corp Common Stock USD	Purchase	182,200	44.56	5/21/2020	5/26/2020
Exxon Mobil Corp Common Stock USD	Purchase	36,900	44.68	5/29/2020	6/2/2020
Exxon Mobil Corp Common Stock USD	Purchase	27,700	45.18	6/1/2020	6/3/2020
Exxon Mobil Corp Common Stock USD	Purchase	24,300	48.73	6/3/2020	6/5/2020
Exxon Mobil Corp Common Stock USD	Purchase	313,600	51.49	6/10/2020	6/12/2020
Exxon Mobil Corp Common Stock USD	Purchase	3,499,000	45.98	6/19/2020	6/23/2020
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	68,700	43.62	6/26/2020	6/30/2020
Exxon Mobil Corp Common Stock USD	Purchase	86,400	43.53	7/14/2020	7/16/2020
Exxon Mobil Corp Common Stock USD	Purchase	101,600	42.69	8/17/2020	8/19/2020
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	36,700	41.32	8/20/2020	8/21/2020
Exxon Mobil Corp Common Stock USD	Purchase	86,900	37.95	9/9/2020	9/11/2020
Exxon Mobil Corp Common Stock USD	Purchase	2,101,900	37.19	9/18/2020	9/22/2020
Exxon Mobil Corp Common Stock USD	Purchase	47,400	34.74	10/9/2020	10/14/2020
Exxon Mobil Corp Common Stock USD	Purchase	92,900	36.08	11/13/2020	11/17/2020
Exxon Mobil Corp Common Stock USD	Purchase	4,122,500	42.73	12/18/2020	12/22/2020
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	370,000	44.61	1/6/2021	1/8/2021
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	517,300	47.89	1/12/2021	1/14/2021
Exxon Mobil Corp Common Stock USD	Purchase	403,800	49.53	1/20/2021	1/22/2021
Exxon Mobil Corp Common Stock USD	Purchase	335,400	49.84	2/11/2021	2/16/2021
Exxon Mobil Corp Common Stock USD	Purchase	187,700	53.08	2/17/2021	2/19/2021
Exxon Mobil Corp Common Stock USD	Purchase	95,700	56.07	3/2/2021	3/4/2021
Exxon Mobil Corp Common Stock USD	Sale or Pair-off Sale	7,827,400	56.49	3/19/2021	3/23/2021
Exxon Mobil Corp Common Stock USD	Purchase	93,100	58.98	5/19/2021	5/21/2021
Exxon Mobil Corp Common Stock USD	Purchase	77,800	60.94	6/2/2021	6/4/2021
Exxon Mobil Corp Common Stock USD	Purchase	532,900	61.18	6/3/2021	6/7/2021

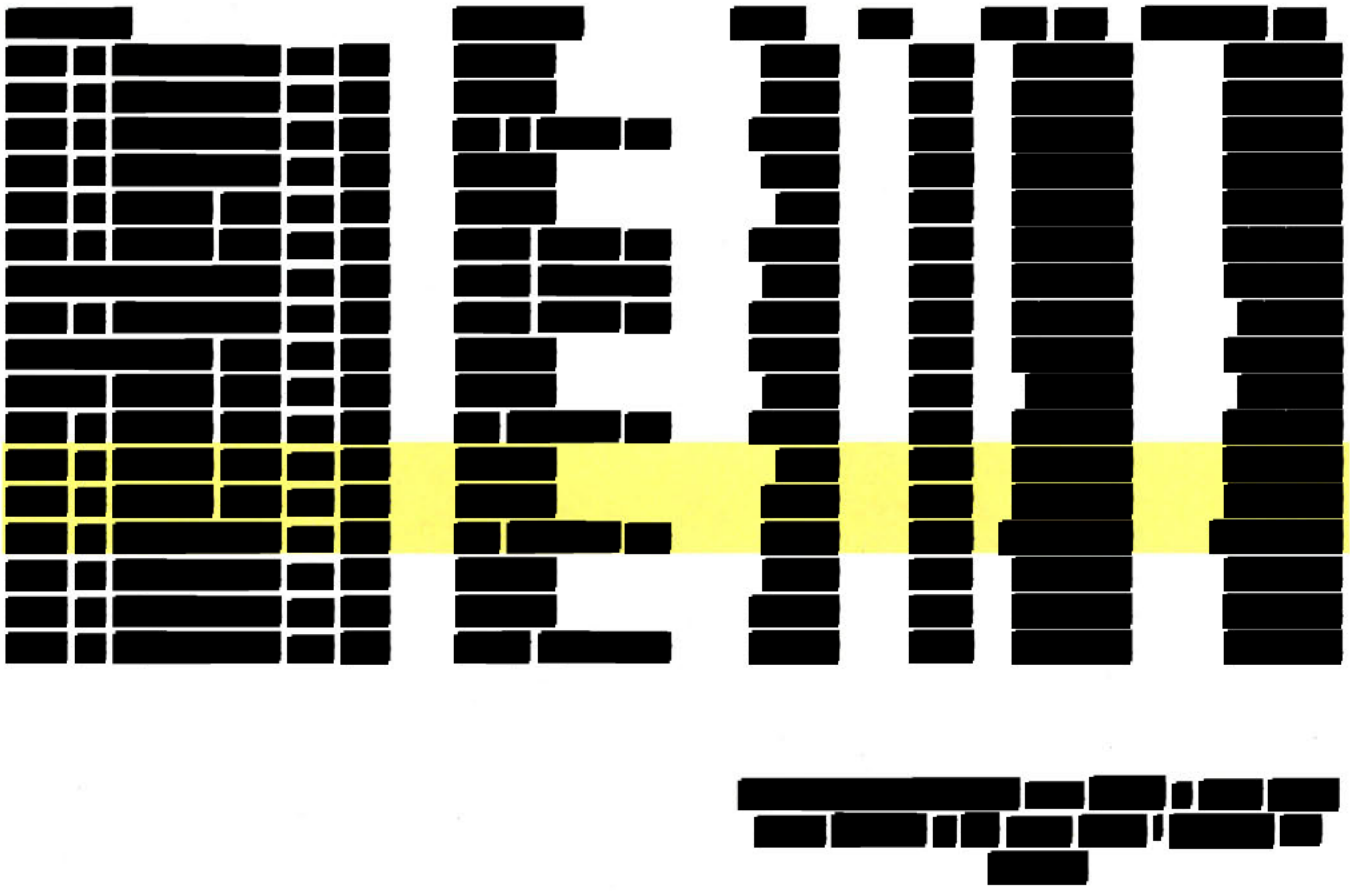
Energy Select Sector SPDR traded in Exxon equity during the time of the Board action - 9/28/2020.

Fund Name	Transaction	Shares	Price	Trade Date	Settlement Date
Marathon Oil Corp Common Stock USD 1.0	Purchase	51,900	8.23	3/2/2020	3/4/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	89,200	4.38	3/10/2020	3/12/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	232,000	3.56	3/20/2020	3/24/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	961,400	3.24	3/30/2020	4/1/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	12,100	3.26	4/1/2020	4/3/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	10,100	4.28	4/9/2020	4/14/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	10,700	5.54	5/6/2020	5/8/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	6,700	5.69	5/13/2020	5/15/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	10,400	5.69	5/15/2020	5/19/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	51,500	5.94	5/21/2020	5/26/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	10,400	5.56	5/29/2020	6/2/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	7,800	5.32	6/1/2020	6/3/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	6,900	5.98	6/3/2020	6/5/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	88,500	7.38	6/10/2020	6/12/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	1,166,400	6.36	6/19/2020	6/23/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	16,500	5.74	6/26/2020	6/30/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	20,800	5.23	7/14/2020	7/16/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	24,500	5.86	8/17/2020	8/19/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	8,800	5.51	8/20/2020	8/21/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	20,900	4.54	9/9/2020	9/11/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	318,500	4.82	9/18/2020	9/22/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	10,700	4.26	10/9/2020	10/14/2020
Marathon Oil Corp Common Stock USD 1.0	Purchase	20,900	5.06	11/13/2020	11/17/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	643,800	6.73	12/18/2020	12/22/2020
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	75,900	7.50	1/6/2021	1/8/2021
Marathon Oil Corp Common Stock USD 1.0	Sale or Pair-off Sale	105,900	8.39	1/12/2021	1/14/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	82,700	8.62	1/20/2021	1/22/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	68,800	8.75	2/11/2021	2/16/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	38,400	9.62	2/17/2021	2/19/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	19,700	11.23	3/2/2021	3/4/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	888,100	11.02	3/19/2021	3/23/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	21,700	11.61	5/19/2021	5/21/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	18,100	13.89	6/2/2021	6/4/2021
Marathon Oil Corp Common Stock USD 1.0	Purchase	124,100	13.80	6/3/2021	6/7/2021

Energy Select Sector SPDR traded in Marathon equity during the time of the Board action - 6/23/2020.

Fund Name	Transaction	Shares	Price	Trade Date	Settlement Date
Universal Health Services Inc Common Stock USD 0.01	Sale or Pair-off Sale	2,600	104.41	5/29/2020	6/1/2020
Universal Health Services Inc Common Stock USD 0.01	Sale or Pair-off Sale	16,900	96.70	6/19/2020	6/23/2020
Universal Health Services Inc Common Stock USD 0.01	Purchase	1,700	146.04	4/19/2021	4/21/2021

Health Care Select Sector SPDR traded in UHS equity during the time of the Board action - 4/30/2021.



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CVS/PHARMACY
Employer/Petitioner

and Case 13-UC-266228

TEAMSTERS LOCAL 272
Union

ORDER GRANTING REVIEW AND REMANDING

Pursuant to Section 102.67 of the Board's Rules and Regulations, the Employer's Request for Review of the Regional Director's Dismissal of the unit-clarification (UC) petition is granted as it raises substantial issues concerning the Regional Director's departure from officially-reported Board precedent.[1]

The petition seeks to exclude the Team Leader position from the bargaining unit on the basis that the employees holding that classification are allegedly supervisors under Section 2(11) of the National Labor Relations Act. The Regional Director found the petition untimely because the parties' expired contract expressly included Team Leaders in the unit, Team Leaders had been historically included in the unit, and the Employer did not assert that there have been substantial changes in the Team Leaders' duties. In so doing, the Regional Director rejected the Employer's reliance on *Washington Post Co.*, 254 NLRB 168 (1981), finding that, unlike the present case, the employer-petitioner in that case filed the UC petition immediately after an election in which the employer raised the issue of the challenged employees' supervisory status and the employer did not waive that issue.

The Regional Director erred in interpreting *Washington Post Co.* so narrowly. In *Goddard Riverside Community Center*, 351 NLRB 1234, 1234–1235 (2007), the Board interpreted *Washington Post Co.* as providing that, "where timely filed, a UC petition seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included," and that as long as the petitioner can establish that the employees holding the disputed classification are Section 2(11) supervisors, the Board clarifies the unit to exclude those employees even "where the employees sought to be excluded by a UC petition have long been included under previous contracts, and the job duties have remained unchanged[.]" 351 NLRB at 1235, citing *Washington Post Co.*, supra, and *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn. 5 (1999).

Nor did the Regional Director find that the parties stipulated to the inclusion of the Team Leader position in a representation case proceeding, which would be a "clear exception" to the

[1] The Board has treated the Regional Director's dismissal letter as the equivalent of a decision in reviewing the Employer's Request for Review under Sec. 102.67 and 102.63(c) of the Board's Rules and Regulations.

Board's general policy that a UC petition is appropriate when the petitioner, as is the case here, seeks to exclude a historically-included position based on alleged Section 2(11) status. *Goddard Riverside Community Center*, 351 NLRB at 1235 (this "clear exception" is also known as the "relitigation rule"), citing and discussing *Premier Living Center*, 331 NLRB 123 (2000), and *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997). As *Goddard Riverside Community Center* makes clear, the fact that the Team Leaders have been included in the unit by way of past contracts, as the Regional Director found, is not sufficient to support dismissal under these circumstances.[2] 351 NLRB at 1235 & fn. 6

Accordingly, we reinstate the petition and remand it to the Regional Director for further analysis consistent with *Goddard Riverside Community Center*.[3]

LAUREN McFERRAN, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., February 5, 2021.

[2] The parties have no active contract and have not executed a successor agreement or otherwise reached an entire agreement in principle on the same; therefore, there is no current contract or agreement that would serve as a bar to processing the petition. Cf. *Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994).

[3] The Employer filed a Request for Special Leave to File A Reply in Support of Request for Review, which the Board's Office of the Executive Secretary granted. Thereafter, the Union Filed an Opposition to the Employer's Request for Special Leave to File a Reply and Request for Reconsideration of the decision to grant the Employer's Request for Special Leave. In granting review and remanding, the Board finds it unnecessary to consider the Employer's Reply. Therefore, the Union's Request for Reconsideration is moot.

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1015 Half Street, SE
Washington, DC 20570

Re: CVS/Pharmacy
Case 13-UC-266228

ORDER GRANTING REQUEST THAT THE BOARD TRANSFER THE EMPLOYER'S MAY 11, 2021 REQUEST FOR REVIEW TO THE REGIONAL DIRECTOR FOR RECONSIDERATION

On May 11, 2021, the Employer filed with the Board a Request for Review of the Regional Director's dismissal of the UC-petition in the above-referenced case.

On May 24, 2021, the Acting Regional Director for Region 13 filed a Request that the Board Transfer the Employer's Request for Review to the Regional Director for Reconsideration.[1]

The Acting Regional Director's request is **granted**. Accordingly, the Employer's May 11, 2021 request for review is transferred to the Regional Director for reconsideration and will not be ruled on by the Board.

Dated, Washington, D.C., May 25, 2021.

/s/ Mark G. Eskenazi
Associate Executive Secretary

cc: Parties
Region 13

[1] The Acting Regional Director's request is dated May 20 but it was not filed until May 24.

ExxonMobil Research & Engineering Company, Inc. *and* Independent Laboratory Employees Union, Inc. Cases 22–CA–218903, 22–CA–223073, and 22–CA–232016

September 28, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On June 12, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

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

The Board has considered the decision and the record in light of the exceptions[2] and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[3]

I. BACKGROUND

The Independent Laboratory Employees Union (Union or ILEU) has represented employees at Respondent ExxonMobil's Annandale, New Jersey research facility since 1941. The current bargaining unit is comprised of approximately 165 employees, and the parties' most recent collective-bargaining agreement was effective from June 1, 2013, through May 31, 2018. During the term of this agreement, several divisive issues arose between the parties.

In November 2015, the Respondent began to permanently subcontract some unit jobs, believing that the parties' collective-bargaining agreement allowed such subcontracting. The Union filed a grievance, which went to an arbitration hearing in October 2017, in which it argued that the contract barred permanent subcontracting of unit positions.

In mid-2016, the Union filed an unfair labor practice charge alleging that a supervisor had denied an employee's personal time request in retaliation for the Union's filing of grievances. The Union alleged that the supervisor stated that he would not grant the request because the Union had become too aggressive. This charge was informally settled in August 2016. Shortly thereafter, the Respondent issued a letter to employees formally rescinding supervisory discretion to grant personal time off. The Union then filed another charge alleging, among other things, that the rescission of such supervisory discretion was in retaliation for the earlier charge. In affirming the Region's dismissal of that charge, the General Counsel's Office of Appeals noted that the plan to eliminate supervisory discretion had been in the works before the prior charge was filed. The Office of Appeals further found that the change in supervisory discretion was part of an effort to ensure companywide consistency in supervisory decision-making rather than a response to union activity.

In November 2017, the Respondent instituted, company wide, a policy providing 8 weeks of Paid Parental Time Off (PPTO) for all its unrepresented employees. Represented employees, however, did not automatically receive the benefit. The Union requested bargaining for PPTO on behalf of unit employees in early 2018, but the Respondent insisted on deferring the issue to the upcoming contract negotiations.

On March 7, 2018, the Respondent notified the Union of its plan, in the works since December, to modify the evaluation procedure for unit employees. Among other changes, the Respondent planned to eliminate a multi-tier rating system for evaluating employees' performance and replace it with a single binary rating (meets requirements/does not meet requirements). The parties held two meetings on this change, but no consensus was reached. At the end of March, the Respondent fully implemented the change, over the Union's strong objection.

Bargaining for a new contract began on May 7, 2018.[4] The negotiations were protracted, covering 23 sessions lasting through early 2019, and at times acrimonious. Approximately 54 issues were discussed, with the Union raising the great majority of new proposals. Although the parties successfully resolved a significant number of these issues, the unresolved issues were significant enough to prevent overall agreement. The Respondent made its purported last, best, and final offer on June 29—although it did not implement any changes at that time—and it pushed repeatedly for the Union to conduct a membership vote on the offer.

From the outset of bargaining, the Union sought limits on the Respondent's right to subcontract. Then, a month

[1] The General Counsel's answering brief was rejected as untimely filed.

[2] No party has excepted to the judge's dismissal of allegations that the Respondent violated the Act by insisting that the Union hold a ratification vote, by insisting on bargaining noneconomic issues to completion before negotiating economic ones, by insisting that the Union waive certain arbitration rights, or by foreshadowing impasse.

[3] The Respondent's motion to expedite processing of Respondent's Exceptions to the Administrative Law Judge's Decision is denied as moot.

[4] Most of the relevant events in this case took place in 2018 (although significant background events occurred before then), and thus, where not otherwise indicated, dates herein refer to 2018.

into bargaining, the arbitrator issued her ruling on the subcontracting grievance the Union had filed under the prior contract. The arbitrator found in the Union's favor, holding that the expiring contract's subcontracting language, read in conjunction with its recognition clause, forbade the permanent contracting out of unit jobs.

After the arbitrator's decision issued, the Respondent introduced a proposal that would have restored its right to subcontract, at least with respect to certain positions it deemed "noncore," subject to the limitation that current employees would not be displaced other than through attrition. The Respondent maintained that its business plan required that it have the right to contract out these noncore positions.

Subcontracting of unit jobs remained a divisive subject throughout negotiations, with the Respondent aggressively pursuing contract language allowing it to subcontract noncore positions and strongly suggesting that the inclusion of such language was key to reaching overall agreement. Although, on occasion, the Union appeared willing to compromise and allow the subcontracting of some unit jobs, it consistently asserted that such subcontracting would constitute a change to the scope of the bargaining unit and that, because such a change was a permissive subject of bargaining, the Respondent's insistence thereon was unlawful.

In addition to this dispute over subcontracting, the parties also disagreed over the Union's repeated proposals to reinstate discretionary personal time and to give unit employees the same 8 weeks of PPTO that unrepresented employees received. As to personal time, the Respondent's position from the outset of negotiations was that its interest in consistency—as credited in the General Counsel's dismissal of the Union's charge over the September 2016 implementation of the no-discretionary-personal-time policy—was what motivated its refusal to give ground on any Union proposals to restore such personal time. The issue resurfaced at numerous sessions and was discussed at length. As to PPTO, the Respondent expressed a willingness to bargain but insisted that unrepresented employees had traded off benefits to receive the PPTO and that represented employees would have to make commensurate tradeoffs to achieve the benefit in bargaining. The parties discussed the issue extensively. Eventually, the Respondent offered the Union 1 week of PPTO; the Union continued to press for the 8 weeks received by the unrepresented employees.

The parties' June 29 bargaining session was especially contentious. Russell Giglio, the Respondent's lead negotiator, accused the Union of having bargained regressively on the subcontracting issue. He also presented the Respondent's last, best, and final offer: a 5-year agreement that included broad subcontracting language sought by the Respondent, along with wage increases and a signing bonus. He further suggested that the Union was poorly representing its members by failing to put the Respondent's offer to a vote. On July 3, the Respondent sent a bulletin to employees, summarizing the terms of its final offer and stating in part:

> The Company presented its last, best, and final offer to the ILEU . . . [which] was the result of many productive negotiation sessions between the parties . . . . The offer is a good one, with significant and competitive benefits to the bargaining unit. . . . The ILEU has not yet informed the Company as to whether the offer will be presented to its membership for a vote. The Company believes that employees should have a choice in accepting the offer and deserve a chance to vote. If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.

On July 9, discussions over PPTO came to a head. Union President Michael Myers, following repeated efforts to convince the Respondent to give unit employees the same 8 weeks that unrepresented employees enjoyed, pressed Giglio on what it might take to garner PPTO benefits. Giglio replied that the employees could "walk away from the bargaining agreement." Later, at a sidebar, he suggested that, to secure PPTO benefits, employees could "go without a union."

Personal time also remained a contentious issue. Notably, at the July 9 sidebar, Giglio attributed the Respondent's unwillingness to compromise on personal time in part to the Union's unfair labor practice charge and "aggressive actions."

On July 25, the Respondent emailed a bulletin to unit employees to clarify its July 3 bulletin. The new bulletin read, in relevant part:

> [O]ur [July 3 bulletin] contained a statement that contradicted what the Company had presented to the ILEU . . . . Specifically, the [Employee Information Bulletin] stated relative to a potential ILEU vote on the Company's offer at the time that "it is expected that Union members be provided reasonable time away from work to meet and vote." . . . The Company should not have said this.
>
> . . . .
>
> [T]he Company's [Employee Information Bulletin] statement about time away from work to vote could be construed as what is called unlawful "direct dealing," meaning we bypassed the ILEU and made an offer directly to its members. That was not the Company's

> intention, but the Company cannot present a proposal to employees that it has not already presented to the employees' union. The Company will not engage in any direct dealing in the future.
>
> . . . .
>
> Our mistake was not intentional. We had simply forgotten about the details. . . . That is still no excuse, and again, we apologize. We also apologize to ILEU leadership.

Later, during the September 4 bargaining session, personal time came up again, and Giglio stated that the Respondent's refusal to give ground on discretionary personal time was in part due to "the stuff" the Union was bringing forward. He asserted that the Union should "work through channels" rather than invoking formal mechanisms like Board charges to resolve workplace disputes.

On September 28 the Respondent emailed its employees another employee bulletin, which stated in part:

> Despite the Company offering 7 dates to meet in August, the parties did not meet in the month of August and have only met 2 times in the month of September.

The bulletin went on to summarize each item of the Union's most recent counterproposal and the Respondent's last offer on each item. It continued:

> Before noon, the ILEU completely withdrew its counterproposal. The ILEU then violated the practice and spirit of the bargaining ground rules by leaving the session unilaterally, despite the Company's best attempt to continue discussions . . . .
>
> The Company is hopeful that an agreement can be reached, and will continue to bargain in good faith toward that end. As a reminder, the Company's offer from July 19, 2018 remains outstanding. The Company hopes ILEU represented employees will have an opportunity to vote on the Company's final offer. The decision of whether or not a vote will be held is made by the ILEU officers.

After the parties' September sessions, the parties met only four additional times over the next 6 months. No real progress was made on subcontracting, and the parties remained at loggerheads over personal time and PPTO.

II. DISCUSSION

A. Alleged unilateral change to evaluation procedures

The judge found that the Respondent violated Section 8(a)(5) by unilaterally implementing new employee evaluation procedures in March 2018. Following the issuance of the judge's decision, however, the Board issued its decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), in which the Board adopted the "contract coverage" standard for analyzing alleged unilateral changes occurring during the term of a collective-bargaining agreement and decided to apply the newly adopted standard retroactively in all pending cases. Accordingly, as the instant case was pending when *MV Transportation* issued, we analyze the claim here anew under the appropriate standard.[5] Under that standard, the threshold question is no longer whether there has been a clear and unmistakable waiver, but rather whether the change "falls within the compass or scope of contract language that grants the employer the right to act unilaterally." Id., slip op. at 11. If so, the change will not constitute an 8(a)(5) violation.

With respect to evaluation procedures, the parties' then-effective contract[6] specified: "The performance of employees will be evaluated and reviewed by Management on a regular and consistent basis in accordance with the established Company-wide procedures. The procedures may be revised by the Company as necessary, after Management has consulted with the Union and taken its views into consideration."

This contract language, which confers unilateral rights upon the Respondent, plainly encompasses the subject of evaluation procedures. In fact, language expressly reserves to the Respondent the ability to revise its evaluation procedures. The contract, however, makes the right to undertake this unilateral action contingent on the Respondent first consulting with and considering the views of the Union. The Respondent met with the Union twice concerning the proposed change. At the first meeting, the Union expressed concerns about the new evaluation system, and the Respondent listened and then explained why it was making the change. The parties also exchanged emails regarding the new performance evaluation system. Thus, for "contract coverage" purposes, the record shows that the Respondent consulted with the Union and considered its views, and therefore the disputed change was within the compass or scope of contract language granting the Respondent the right to act unilaterally. Accordingly, we dismiss the allegation that by making this change, the Respondent violated Section 8(a)(5) of the Act. Whether the Respondent *sufficiently* consulted with the Union and *sufficiently* considered its views before making the disputed change raise issues of contract interpretation—i.e., what degree of consultation and consideration was required under the collective-bargaining agreement and whether the

[5] We therefore do not pass on whether the judge correctly applied the clear and unmistakable waiver standard to the facts of this case.

[6] The parties' collective-bargaining agreement expired May 31, 2018.

Respondent satisfied that requirement—appropriately left to grievance arbitration. See *MV Transportation*, supra, slip op. at 6–7 (noting arbitrators' relative expertise in interpreting contract language).[7]

B. Alleged unlawful insistence on subcontracting proposal

Board law establishes that a party violates Section 8(a)(5) when it conditions agreement on a mandatory subject of bargaining on reaching agreement on a permissive subject of bargaining. See *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1732 (2011) (finding that "midterm modification of a collective-bargaining agreement is a nonmandatory subject of bargaining, and as such it cannot be insisted on as a condition for reaching agreement on mandatory subjects"). Conversely, parties are required to bargain over mandatory subjects and may insist on a mandatory subject as a condition of overall agreement.

Here, the judge found that that the Respondent unlawfully conditioned agreement for a new contract on agreement to a proposal to allow subcontracting of unit positions, reasoning that subcontracting of unit jobs constitutes a change in the scope of the bargaining unit and is thus a permissive subject of bargaining. In reaching this conclusion, however, the judge seems to have misinterpreted, and taken out of context, a passage in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). The Court's decision stated:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d).

Id. at 215. The judge read this passage as a suggestion by the Supreme Court that subcontracting of unit positions is a permissive, rather than a mandatory, subject. This, however, is clearly an incorrect interpretation of that language, as the holding in *Fibreboard*—that subcontracting "out" bargaining-unit work was a *mandatory* subject of bargaining—conclusively demonstrates. Thus, it is clear that the Supreme Court was merely noting that its holding was consistent with the extant understanding of the scope of mandatory bargaining.

Board cases further clarify that the subcontracting of unit jobs, even the work of an entire unit classification, is a mandatory subject of bargaining. In *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993), the Board rejected the argument that a "proposal seek[ing] to change unit scope [was unlawful] because [it] would permit actions that in theory could reduce the size of the bargaining unit or alter its membership." The Board cited *Fibreboard* in support, noting that the Supreme Court authorized proposals to subcontract all unit work. The Board concluded that a proposal to reassign unit work, even all the unit's work, affected only what work the unit employees performed – and *not* whom the union represented -- and was thus a mandatory subject. See also *Hill-Rom Co.*, 297 NLRB 351, 358 (1989) (finding that transfer of work outside bargaining unit is mandatory subject of bargaining, which is "not negated by a showing that upon such a transfer, a job classification within the unit will have no incumbents and, therefore, will be dormant at best"), enf. denied 957 F.2d 454 (7th Cir. 1992).[8]

Under these circumstances, the Respondent's insistence that an agreement include a subcontracting provision was consistent with a party's lawful prerogative to condition agreement upon resolution of a mandatory subject of bargaining. Therefore, we reverse the judge and dismiss this allegation.[9]

C. Alleged retaliatory refusal to bargain over personal time

The judge found that the Respondent violated Section 8(a)(5) by refusing to bargain about reinstating discretionary personal time. In so finding, the judge concluded that the Respondent's refusal to bargain was a response to the Union's filing of unfair labor practice charges.[10] The record, however, establishes that the Respondent's bargaining team repeatedly communicated a lawful rationale for its refusal to make any concessions on personal time, namely, that it sought to achieve consistency in its supervisory decisionmaking. Although a few statements by the Respondent's negotiators mention the Union's unfair labor practice charges, those statements are explanatory in nature rather than suggestive of a retaliatory motive. In fact, the statements are consistent with the Respondent's

[7] We do not pass on the Respondent's argument that the changes to evaluation procedures were not material.

[8] The court did not disagree with the above-quoted proposition from *Hill-Rom Co*. Rather, the Board found, on other grounds, that the respondent had altered the scope of the unit, and the 7th Circuit disagreed with that finding.

[9] We do not pass on the Respondent's argument that its conduct in bargaining did not amount to its conditioning of agreement to a contract on its subcontracting proposal, nor on its contention that the judge's permissive-subject analysis violated its due process.

[10] Although the Respondent was willing to discuss the issue of personal time at length, the issue is whether its repeated refusal to give ground or to entertain Union proposals was motivated by a purpose to retaliate against the Union for filing an unfair labor practice charge.

repeated and specific explanation of its legitimate managerial interest in maintaining internal supervisory consistency.

On May 24, for instance, Giglio confirmed that the Respondent could not accede to the Union's request to reinstate discretionary personal time, explaining that "when the [Union] brought the [unfair labor practice charge] claiming that the *lack of consistency* was causing issues, it forced the [Respondent's] hands to memorialize what would be a *consistent* interpretation, which was what we put into the September 2016 letter, which ultimately prevailed when it was brought through the various levels of the National Labor Relations Board, who agreed that the [Respondent] was correct in memorializing the consistent application of the parameters of that letter." (Emphasis added.) Although it is true that Giglio referenced the Union's unfair labor practice charge in this statement, it is clear that Giglio was merely explaining that the charge had alerted the Respondent to the fact that its lack of supervisory consistency in responding to personal time requests was a managerial problem. Giglio also sought to emphasize that when the Respondent acted to address its managerial interest in internal supervisory consistency, the Board recognized that its action was a valid means of addressing its legitimate interest in consistency; Giglio could not have made this point without referencing the unfair labor practice charge.

Similarly, at the July 8 session, the Respondent's human resource official Lyndsey Naquin reiterated the point that the Respondent was not hostile to Union charges, but merely sought to address conditions giving rise to such charges. She stated: "I know you are claiming that you are not going to file a lawsuit or an unfair labor practice, but there is going to be some instance when you guys are going to get angry at us for not being consistent. So unless we write down every single case and what the parameters are around it, it will never be the same." Giglio made the same point: "We see the real downside *to having inconsistencies*, and it has certainly been demonstrated by this leadership team in the ILEU that you are quick to grieve, quick to ULP, quick to file lawsuits, so *we want to keep as much ambiguity out of this* as we can." (Emphasis added.)

The judge also pointed to the November 29 session, where Giglio stated, "Personal time is not going to happen because of the ULP that was filed by the Union and determined by the NLRB that there was too much ambiguity in allowing supervisory discretion." Although he did not phrase the point artfully, Giglio was clearly attempting to explain, again, that as a result of the Union's charges, the Respondent recognized both that it had a managerial problem with internal consistency and that it needed to act to rectify this managerial problem, and that the General Counsel had credited this managerial interest in dismissing the Union's charge over the elimination of discretionary personal time.[11]

For the reasons set forth above, we find that the General Counsel has not met his burden to establish that the Respondent unlawfully refused to bargain over personal time in retaliation for Union unfair labor practice charges.[12]

D. Allegation that the Respondent unlawfully promised PPTO in exchange for employees' forsaking the Union

The judge found that the Respondent violated Section 8(a)(1) by unlawfully offering PPTO benefits to employees on the condition that they give up or decertify the Union.[13] However, the statement upon which the judge relied in finding this violation cannot reasonably be viewed as a serious promise of PPTO in exchange for abandonment of the Union.

Following numerous discussions on the issue of PPTO, Union negotiator Myers asked at the July 9 session, "So what would it take to get eight weeks of PPTO?" Giglio replied, "Walk away from the bargaining agreement." Myers asked what he meant by that, and Giglio responded: "If you weren't covered by a [c]ollective[-b]argaining [a]greement, if you were exempt, you would have eight weeks of PPTO." At that point Myers inquired, "So you are saying if we get [de]certified, you will give us eight weeks of PPTO?" Giglio answered, "You said that, I didn't." Giglio later said, "There are other ways to do it . . . . You will have to talk to your attorney." Later that day, Giglio also stated that to get PPTO, employees would have to "walk away from the Union."

Up to that time, PPTO had been discussed repeatedly and exhaustively, and the Union had made multiple

[11] To the extent that any of these statements expressed irritation, the Board has recognized that "[a]ngry outbursts and inartful comments uttered in the heat of bargaining are realities of negotiations, and when isolated, . . . do not necessarily bespeak a sinister motive." *American Packaging Corp.*, 311 NLRB 482, 482 fn. 5 (1993)).

[12] The judge's Conclusions of Law indicate that he found both that the Respondent committed a retaliatory refusal to bargain in violation of Sec. 8(a)(5) and (1), and that it committed an independent 8(a)(1) violation. However, the judge did not elaborate his reasons for finding an independent 8(a)(1) violation. In any event, based on the context that we have just described, the record demonstrates both that the Respondent's bargaining position was not motivated by unlawful animus and that its statements during negotiations would not be perceived as such by employees or otherwise interfere with their Sec. 7 rights. Accordingly, the record does not support a finding of an independent 8(a)(1) violation.

[13] The judge, apparently inadvertently, described this in the text of his decision as a 8(a)(5) violation as well as an independent 8(a)(1) violation. His analysis, Conclusions of Law, and the language of the complaint, however, make clear that the issue here is solely an independent 8(a)(1) allegation. Notably, we would dismiss any 8(a)(5) allegation even if one were alleged because the record shows that the Respondent bargained in good faith over PPTO.

presentations on the subject. Giglio had repeatedly made the point that unrepresented employees had implicitly paid for PPTO in their benefits package and that the Union had not articulated any commensurate concessions it was willing to give. Taken in this context, Giglio's July 9 statements appear to be an understandable exercise in sarcasm after being pressed repeatedly over numerous bargaining sessions on the issue, without having heard any response by the Union to suggest what concessions it would be willing to give.[14] While a joking or sarcastic manner does not automatically negate the impact of a facially coercive remark, see *Ethyl Corp.*, 231 NLRB 431, 434 (1977), we nonetheless must examine the objective context to determine whether reasonable employees would take it seriously. The context here is that Giglio made the statements to the Union's representatives, who were also employees of the Respondent, during collective bargaining. The reasonable inference in light of these circumstances is that the employees on the Union's bargaining team would understand that Giglio was not making a serious quid-pro-quo promise of benefits in exchange for their abandonment of unionization. Therefore, we do not find the alleged violation of an unlawful promise of benefits.[15]

E. Direct-dealing allegation

Direct dealing occurs when (1) an employer communicates directly with union-represented employees; (2) the discussion is for the purpose of establishing or changing wages, hours, or other terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication is made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010).

The judge found that, by telling its employees that it "believe[d] that employees should have a choice in accepting the [Respondent's last, best, and final] offer and deserve a chance to vote," the Respondent interfered with the internal union process of submitting a proposal to ratification and thereby engaged in unlawful direct dealing. See *Armored Transport, Inc.*, 339 NLRB 374, 378 (2003) ("[T]he Board has long held that contract ratification votes and procedures are internal union affairs upon which an employer is not free to intrude.") (internal quotation omitted). However, in cases involving an employer's encouragement of employees to seek a ratification vote, the Board has required an element of coercion (or, at a minimum, a backdrop of misconduct to render the communications coercive) in order to find a violation of the Act. See *Armored Transport*, supra; *Borden, Inc.*, 308 NLRB 113, 128 (1992), enfd. 19 F.3d 502 (10th Cir. 1994), cert. denied 513 U.S. 927 (1994). Here, the Respondent merely stated its "belief" that there should be a vote. Because this statement was not coercive, we find that it was lawful.

The General Counsel also argued at trial that the bulletin constituted direct dealing because it made an offer concerning terms of employment directly to employees. The General Counsel contended that, by noting that the Respondent "expected" that employees would receive paid leave for ratification voting, the Respondent made a proposal concerning a term of employment directly to employees before making it to the Union.

We need not pass on whether the Respondent committed a direct-dealing violation, however, because it effectively repudiated any such violation when it advised unit employees on July 25 that "it should not have said" that employees would receive paid time for a vote and apologized for bypassing the Union. The judge found that the Respondent's repudiation was not effective because, in his view, Board law requires that a repudiation be sent to all affected employees, including employees outside the bargaining unit.[16] In fact, however, Board law does not require that employees outside the bargaining-unit be notified. See *TBC Corp. & TBC Retail Group, Inc.*, 367 NLRB No. 18, slip op. at 2 (2018) (holding repudiation adequate that "notif[ied] the affected employees"). Because the repudiation here satisfies the criteria set forth by the Board for evaluating repudiation, we find that the General Counsel has not established a direct-dealing violation.[17]

[14] It is also notable that the Respondent offered 1 week of PPTO without insisting on commensurate concessions from the Union—a fact that further erodes any inference that PPTO was being withheld as a barter for employees' rejecting the Union.

[15] We reiterate that the Board must be cautious in finding isolated comments made in the course of lengthy negotiations to be unlawful. See fn. 11, supra.

[16] The language from the case the judge relies on indicates that the key concern is that all employees *affected by the unlawful conduct* receive the retraction. Although the case states that all employees who received the threat needed to receive the repudiations, it prefaces the discussion by stating the boilerplate law that there must be publication "to the employees involved." See *Auto Workers Local 785 (Dayton Forging)*, 281 NLRB 704, 707 (1986) (quoting *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978)). Thus, *Dayton Forging*'s reference to "all employees" was simply a paraphrase, and sending the repudiation to all employees affected by the unlawful conduct would be adequate.

[17] To be valid, "repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. . . . [T]here must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct . . . after the publication. . . . And, finally . . . such repudiation . . . should give assurances to employees that in the future their employer will not interfere with the exercise of their Sec[.] 7 rights." *Passavant Memorial Area Hospital*, 237 NLRB at 139 (internal quotations and citations omitted). We express no opinion with respect to whether the *Passavant* requirements represent a proper standard for effective repudiation of unlawful conduct, but we agree that the Respondent's actions met the *Passavant* standard in this case. Here, the repudiation was reasonably timely, unambiguous, and specific, and it assured that there would be no future

F. Alleged disparagement of the Union

The judge found that the Respondent's statements at the June 29 bargaining session and in its September 28 bulletin constituted disparagement in violation of Section 8(a)(1), reasoning that they suggested that the Union was the reason that unit employees had not received improved benefits. Specifically, at the June session, Giglio told the Union that it was engaging in regressive bargaining and suggested that its failure to take the Respondent's offer to a vote constituted ineffective representation of the unit employees. Further, the September bulletin, posted where unit employees could read it, claimed that the Union had violated ground rules and walked away from a bargaining session.

Unlawful disparagement generally involves an attempt to undermine the union as bargaining representative, either through falsely ascribing responsibility for the loss of benefits or otherwise misleadingly or coercively calling into question its ability to represent employees. See *Trinity Services Group, Inc.*, 368 NLRB No. 115, slip op. at 4 (2019) (finding an employer may "violate[] Section 8(a)(1) by misrepresenting the Union's position in a way that tend[s] to cause employees to lose faith in the Union") (citation omitted). But "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co.,* 305 NLRB 193, 193 (1991).

Notably, the judge did not point to any specific misleading or coercive statements in either the September 28 bulletin or the June 29 meeting. Rather, he concluded that, in general, the Respondent's words might convey to employees an "unflattering" impression of the Union's bargaining efforts. This, however, is not sufficient to constitute a "disparagement" violation. See *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (finding that "demeaning" comments that "did not suggest that the employees' union activity was futile, did not reasonably convey any explicit or implicit threats, and did not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights" did not establish unlawful disparagement). Cf. *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 9 (2016) (holding that statement "clearly calculated to mislead employees as to the Union's conduct with regard to restoration of . . . benefits" amounted to "interference, restraint, and coercion that unlawfully tended to undermine the Union"), enfd. in relevant part 885 F.3d 100 (2d Cir. 2018). Although the Respondent's September bulletin may not have cast the Union in the most favorable light, the Respondent's statements were not objectively false or misleading. Further, to the extent that the Respondent may have conveyed its version of events, a reasonable employee would expect a pro-Respondent slant from its communications. Similarly, Giglio's statements at the June 29 session were nothing more than a statement of his point of view as to the Union's conduct and, importantly, were spoken in the midst of intense discussions with the Union's bargaining team, in which context any critical comments would be viewed as part of the back-and-forth of heated negotiations.[18] In the absence of any false or misleading communication that misled employees into a negative impression of the Union's bargaining conduct, we find that the General Counsel has failed to establish that the Respondent unlawfully disparaged the Union.

G. Alleged overall bad faith

The judge concluded that the cumulative effect of the violations he found warranted a finding of overall bad faith on the part of the Respondent. Because we have reversed all of the judge's individual findings of violations, his finding of overall bad faith must fall away. Moreover, even were we to have found any of the violations the judge did, the record does not suggest that the Respondent lacked an intent to reach agreement, a key component of finding that a party engaged in overall bad faith in bargaining. See *Phillips 66*, 369 NLRB No. 13, slip op. at 4 (2020) ("The essence of bad-faith bargaining is a purpose to frustrate the possibility of arriving at any agreement, and the Board looks to the totality of an employer's conduct to determine whether the employer has bargained in bad faith."); *Latino Express, Inc.*, 360 NLRB 911, 921 (2014) (finding two indicia of bad faith insufficient to

making of proposals directly to employees. Further, as we find herein, there were no other violations that continued after this repudiation, nor any other conduct to cause employees to doubt the effectiveness of the repudiation or the Respondent's assurance that it would not bypass the Union to make offers of terms and conditions directly to employees. See *T-Mobile USA, Inc.*, 369 NLRB No. 50, slip op. at 1–2 & fn. 7 (2020).

Most repudiation cases involve violations of Sec. 8(a)(1). While we find that the Respondent did adequately repudiate the fairly minor direct-dealing violation alleged here, we do not pass on whether and, if so, by what conduct a respondent might repudiate a more serious direct-dealing violation.

[18] The judge also considered the July 3 email as background and found it to contain "false communications" that would drive a wedge between employees and the Union, and that the subsequent correction of the July 3 email was not timely enough to undo the harm. We disagree. Although the judge was unclear on what in the July 3 email was a "false communication," apparently, he was referring to the statement that allegedly constituted direct dealing. That statement was: "If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote." The statement expressed what was "expected," evidently by the Respondent. There is no evidence that the Respondent did not expect this, and therefore no evidence that the statement was false. Moreover, the statement was repudiated.

establish overall bad-faith bargaining in light of the absence of bad acts taking place at the bargaining table); *Reichhold Chemicals, Inc.*, 288 NLRB 69, 69 (1988) ("We . . . find that the Respondent violated Section 8(a)(5) and (1) by insisting to impasse on a nonmandatory subject of bargaining, i.e., the waiver of access to Board processes. . . . We, however, have decided to adhere to the Board's previous finding that the Respondent's overall conduct establishes that it engaged in lawful hard bargaining, rather than unlawful surface bargaining."), enfd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). Here, by contrast, the Respondent's actions during the course of bargaining reflect a desire to reach agreement: it engaged in numerous bargaining sessions and reached agreement on most issues, and, while it engaged in hard bargaining, it was clearly willing to give ground and make trade-offs on some issues to secure its desired outcome. Accordingly, we find that the Respondent did not bargain in bad faith.

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. September 28, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joanna Pagones Ross, Esq., for the General Counsel.
Jonathan Spitz, Daniel Schudroff, and *Amanda Fray, Esqs. (Jackson Lewis, P.C.),* and *Craig Stanley, Esq. (ExxonMobil),* for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Newark, New Jersey on March 19–21, 2019. The complaint alleges that ExxonMobile Research & Engineering Company, Inc. (the Company or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] on numerous occasions in 2018[2] by failing to bargain in good faith with the Independent Laboratory Employees Union, Inc. (the Union) while negotiating a successor collective-bargaining agreement, disparaging and denigrating the Union, promising employees higher wages and 8 weeks of paid parental time off (PPTO) if employees withdrew from union representation, refusing to bargain over personal time because of a previously filed unfair labor practice charge, implementing changes to the employee performance review system without prior notice to the Union and affording it an opportunity to bargain, and bypassing the Union and dealing directly with bargaining unit employees about being provided with time away from work to vote on contract ratification.

The Company denies that it engaged in bad faith bargaining, emphasizing the fact that the parties agreed to approximately ninety percent of the topics during that time and engaged in continuous negotiations over economic matters. It also contends that it lawfully disseminated information to employees regarding the status of negotiations, retracted its statement to employees about time away from work to vote, insists that the statement about PPTO was a sarcastic, stray remark that merely reflected that all non-union employees receive PPTO, and was entitled to revise the performance evaluation process after taking the Union's views into account.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged in the operation of a research and development facility located in Annandale, New Jersey, where it annually provides services valued in excess of $50,000 to customers located outside the State of New Jersey, and purchases and receives materials valued in excess of $50,000 directly from points outside the State of New Jersey. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company's Research and Engineering Technology Center is located close to the larger town of Clinton, New Jersey and for that reason is commonly referred to as the Clinton facility. The facility supports the Company's Upstream, Downstream and Chemical business operations, including 432 laboratories, 92 plants and 850 offices. The Clinton facility "is responsible to project thirty to forty years forward seeking solutions to anticipated energy challenges" by developing differentiated and high-impact technologies and products that are the foundation of the Company's competitive advantage.

Prior to 2018, the Company endeavored to remain competitive in the energy industry by selling two refineries, most of its retail fuels business, and a number of pipeline assets. It also consolidated various business units at its central campus in Houston and,

[1] 29 U.S.C. §§ 151–169.

[2] All dates refer to 2018 unless otherwise stated.

in 2018, merged its research operations in Paulsboro, New Jersey with the Clinton facility.

B. The Collective-Bargaining Relationship

The Company has been a party to approximately 25 collective- bargaining agreements throughout the United States over the past 30 years, including the latest one with the Union at the Clinton facility. None have resulted in a work stoppage, strike or lockout and the Company has never declared an impasse during collective bargaining.

The Union's relationship with the Company dates back to August 31, 1944, when it was certified as the exclusive collective-bargaining representative of the following bargaining unit:

> Accountant, Accountant Senior, Accounting Assistant, Audio-Visual Assistant, Audio - Visual Technician, Audio-Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X-Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

The most recent collective-bargaining agreement was effective from June 1, 2013, through May 31, 2018 (the CBA). The parties reached agreement in 2013 after seven bargaining sessions. As of May 2018, approximately 165 employees were members of the bargaining unit. Approximately eighty percent of bargaining unit employees are research technicians.

During the bargaining period at issue, the Company's chief negotiators were Russell Giglio, a research and development business advisor, and Lyndsey Naquin, a human resources and labor advisor.[3] The Union's chief negotiators were senior research technicians Michael Myers and Thomas Fredriksen, the Union's president and vice president, respectively.

C. Key Excerpts from the CBA

1. Article X—Pay

Section 8—Time Paid During Regular Schedule

A. Straight time shall be paid for any time worked during an employee's regular schedule.

B. In computing the 40 hours of time in the regular weekly schedule, in addition to time actually worked, time in the regular schedule not worked by reason of any of the following absences shall be included:

> 1. With pay—
> a) Reporting for work with a reasonable expectation of work but being sent home for lack of work or other reason beyond the employee's control.
> b) Vacationing.
> c) Jury duty and death in the immediate family to the extent provided in Sections 1 and 2 of Article XVI.
> d) On a recognized holiday falling within the regular schedule.
> e) Any absence approved with pay by the Company.
>
> 2. Without pay—
> a) An absence approved by the Company for conducting Union business.
> b) Any absence approved by the Company.
> c) Disability certified by a Medical Division.

Section 11—Accelerations

A. The Company may, on the basis of performance and ability as judged by the Company, accelerate for any employee the time intervals between scheduled pay increases shown on the Progression Schedule, in any such case the date of the accelerated scheduled pay increase shall be the anniversary date for determining subsequent schedule pay increases.

B. The Company will provide the Union with a list, without names, of all salaries for represented employees by. classification, once each calendar year within thirty days of a Union request.

Attachment 1—Uprates (partial chart)

Represented by Bargaining Unit—Contract Coordinator, Designer, Lead Pay—10% Typical Criteria for Consideration—(for contract coordinators and designers) Higher PA rating, High Initiative, Potential for Promotion, Appropriate skills/experience for assignment, Availability from current assignment; (for leads) Satisfactory or better PA rating, Good initiative, Appropriate skills/experience for assignment, Availability from current assignment, Involvement in activity.

2. Article XIII—Promotions

> There are two kinds of promotion: (a) Earned–for jobs above the entering level job other than "vacancy only" jobs. (b) To fill permanent job vacancies in "vacancy only" jobs above the entry level. Promotions will be made on the basis of the rules hereinafter.

Section 3—Determining Available Employees for Consideration for "vacancy only" promotions

> C. Additionally, effective 6/1/02, in the Administrative-Technician /Assistant and Systems Technician /Assistant job families only, employees will be eligible for promotion to the Senior classification, notwithstanding the fact that no vacancy then currently exists, if they are rated outstanding for twenty four (24) consecutive months. Effective 6/1/06, in the

[3] Giglio and Naquin are admitted supervisors and/or agents within the meaning of Secs. 2(11) and 2(13) of the Act.

Administrative Technician /Assistant and Systems Technician/Assistant job families only, employees will be eligible for promotion to the Senior classification, notwithstanding the fact that no vacancy then currently exists, if they are rated outstanding for thirty six (36) consecutive months.

Section 4—Earned Promotion—Guide

The following is the guide to the application of performance appraisals to earned promotions on or after June 1, 1996.

A. Earned Promotion in the Minimum Time—A designation of "will be eligible for earned promotion in the minimum time" for a consecutive period of twenty four (24) months after reaching the top of progression in Section V, "Eligibility for Earned Promotion," on the Performance Appraisal Form, means that the employee will earn promotion to the next higher level of job classification in twenty four (24) months after reaching the top of progression.

B. Earned Promotion But Not in the Minimum Time – A designation of "will be eligible for earned promotion but not in the minimum time," for a consecutive period of thirty six (36) months after reaching the top of progression, in Section V, "Eligibility for Earned Promotion," on the Performance Appraisal Form, means that the employee will earn promotion to the next higher level of job classification at the end of the 36 -month period if a candidate for advancement to Grade 1. Employees will not be eligible for advancement to Senior Grade unless they meet the requirements of Paragraph A which requires an employee to be rated outstanding for twenty four (24) consecutive months.

C. Not Eligible for Earned Promotion -A designation of "will not be eligible for earned promotion in the foreseeable future," in Section V, "Eligibility for Earned Promotion," on the Performance Appraisal Form, means that the employee will not earn promotion to the next higher level until the progress and development improves.

D. Performance Change -If an employee's rate of progress and development has changed such that it does not appear that the employee is eligible for advancement in the time period indicated during the last performance appraisal(s), it is urged that a current appraisal be provided as soon as practical after identifying the changed rate of progress and development with an appropriately modified designation in Section V on the Performance Appraisal Form. Such a change in the rate of progress and development should be brought to the employee's attention via a performance appraisal at least three (3) months before the expected date of earned promotion based upon the prior appraisal(s).

3. Article XVIII—Contract Work

The Company may let independent contracts.

At the time a contract is let, involving work customarily performed by employees on or after Jan. 1,1975, the dollar value of which will be in excess of $50,000, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such contract irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

At the time a purchase order is let, involving work customarily performed by employees on or after January 1,1975, the aggregate cost of which will be in excess of $50,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

In the event a purchase order is let, involving work customarily performed by employees on or after January 1,1975, the aggregate cost of which is not anticipated to be in excess of $50,000 in a year and it becomes apparent that the aggregate cost of said order will exceed $50,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

However, during any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available in the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.

Furthermore, in the event that employees have been demoted or laid -off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities, will (1) repromoted demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid-off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

4. July 1, 2014 Side Letter Agreement Amending Article XVIII—Contract Work

At the time a contract is let, involving work customarily performed by employees on or after August 1, 2014, the dollar value of which will be in excess of $250,000, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such contract irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

At the time a purchase order is let, involving work customarily performed by employees on or after August 1, 2014, the aggregate cost of which will be in excess of $250,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in

writing by the Division Management involved.

In the event a purchase order is let, involving work customarily performed by employees on or after August 1, 2014, the aggregate cost of which is not anticipated to be in excess of $250,000 in a year and it becomes apparent that the aggregate cost of said order will exceed $250,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

However, during any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available in the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.

Furthermore, in the event that employees have been demoted or laid -off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities, will (1) repromoted demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid -off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

This Agreement shall remain in effect until 12:01am on June 1, 2018, and may not be modified without the mutual consent of the parties hitherto.

5. Article XXVI—Work Performance

Section 6—Performance Reviews

The performance of employees will be evaluated and reviewed by Management on a regular and consistent basis in accordance with the established Company -wide procedures. The procedures may be revised by the Company as necessary, after Management has consulted with the Union and taken its views into consideration.

Section 7—Unsatisfactory Work Performance

A. When the work performance of an employee is unsatisfactory, Management will call to the attention of the employee the shortcomings of the employee's work as part of the routine supervisory function and will attempt to assist the employee to improve the employee's performance. Employees whose work is deemed unsatisfactory after the prescribed remedial steps may be subject to a formal discussion with a supervisor, demotion, written warning or termination.

B. Any employee whose work is unsatisfactory and has not been made satisfactory as a result of prior informal discussion will be called in by the employee's supervisor for a formal discussion. The employee will be told of the elements of the employee's work which are inadequate and the ways in which the employee's performance may be made satisfactory. The employee may request that a Union representative be present at such discussion. The fact that such discussion was held will be subsequently confirmed in writing to the employee, with a copy to the Union.

C. During such discussion, Management may inform the employee that if the employee's work performance has not become satisfactory within a specified period of time (for example, 30 days, or some longer period), the employee may be demoted. If the employee's performance does not become satisfactory during the period specified, the employee may be demoted to a job with a lower rate of pay in the Promotional Group.

D. At the time of such discussion, or subsequent thereto, Management may determine that the work performance of the employee is so unsatisfactory as to warrant a warning notice, and may give the employee such notice. The warning notice will state the basis of Management's determination that the employee's work is unsatisfactory, the improvements in performance required, the period of time to which the warning notice applies, and that unless the employee's performance improves sufficiently within the time specified, the employee's employment may be terminated at the expiration of the warning notice or within six (6) months thereafter. A copy of the warning notice will be sent to the Union, and the Union will be notified in advance if the employee will be terminated.

E. The period of time in which a warning notice for unsatisfactory work performance is effective varies according to the circumstances of the case, but is ordinarily not less than thirty (30) days nor more than six (6) months.

F. A warning notice for unsatisfactory performance will be removed from an employee's file two (2) years after its expiration.

6. Article XXVIII—Management Rights

The Company shall retain all rights of management for facilities covered by this Agreement or pertaining to the operation of business, except to the extent that such rights are limited by the provisions of this Agreement.

D. Contracting of Unit Work

The contracting out of unit work was an issue prior to the commencement of bargaining over a new CBA. The issue emanated from the July 21, 2014 side letter agreement, which amended Article XVIII—Contract Work. In or around November 2015, the Company began permanently contracting out certain unit positions. On August 25, 2016, the Union filed unfair labor practice charges alleging that the Company replaced unit employees "with contractors supplied by third-party joint employers without paying union wages/benefits or recognizing the Union as the bargaining unit representative of said employees." The Board deferred the charges to the parties' grievance procedure and the Union promptly grieved the contracting issue. The Company denied the grievance and the Union submitted the dispute to arbitration. Arbitration hearings were conducted on August 4, 2016, and October 18, 2017.

On May 25, arbitrator Joyce Klein concurred with the Union's

assertion that the Company violated the CBA by permanently filling bargaining unit positions with contractors and directed "that the Company cease and desist from the permanent contracting of bargaining unit positions" at the Clinton facility. The arbitrator determined that the Company's broad management rights regarding the contacting out of unit work were overridden by the "limitations inherent both in the plain language of Article XVIII and in the Recognition Clause." On June 20, the Union filed a motion to confirm the arbitration in United States district court. In August, the Company filed a motion to vacate the arbitration award but subsequently withdrew its petition to enforce the arbitration award.

E. Excused Absences with Pay

The Union also filed unfair labor practice charges regarding "excused absence with pay." On May 5, 2016, the Union filed Case 22–CA–175772 alleging, in relevant part, that the Company unilaterally changed a term and condition of employment by refusing to grant an employee "excused absence with pay." In that regard, a bargaining unit employee was granted time off from work with pay for the birth of his child using a mixture of vacation days and "excused absence with pay" in accordance with Article X, Section 8 of the contract entitled "Time Paid During Regular Schedule." Upon the employee's return to work, his supervisor informed him, "Union represented employees only receive personal time for jury duty and a death in the family and this is because the Union is getting more aggressive." The parties resolved this charge through an informal settlement agreement requiring the Company to post a notice and pay the affected employee's lost wages.

On September 29, 2016, the Company issued a letter clarifying that represented employees are entitled to absences "excused with pay" only for jury duty and a death in the family. The Company explained that "[f]or items such as doctor's appointments, home maintenance appointments, family medical issues, baby bonding, and other issues that may arise, employees have the right to vacation time as outlined in the [CBA] or excused without pay." In response, the Union filed Case 22–CA–187777 on November 7, 2016, alleging that the Company unilaterally ended the practice of "excused absence with pay" for baby bonding in retaliation for the Union filing Case 22–CA–175772. The Board's Region 22 dismissed the charge and the ensuing administrative appeal was denied.

In November 2017, the Company implemented a parental paid time off policy (PPTO) granting employees 8 weeks paid time off for the birth or adoption of a child. At the Company and Union's quarterly meeting in December 2017, however, the Company clarified that PPTO did not apply to bargaining unit employees. The Union requested to bargain over PPTO on or about January 29 and again on February 28, but the Company insisted that discussions be put off until negotiations for a successor agreement commenced.

F. Changes to the Performance Approval Process

In accordance with the CBA, unit employees' performance evaluations are conducted annually for the previous calendar year. Prior to 2018, the evaluation forms specified eleven criteria: job knowledge; reliability and consistency of performance; working with supervisors, peers and customers; initiative and supervision required; adaptability and flexibility in responding to changes; punctuality and attendance; safety/health/environment; supports diversity; other; overall equality of work; and overall quantity of work. As of March, the form also listed five categories in rating overall assessment of performance: outstanding; exceeds expectations; meets expectations; needs improvement; and unsatisfactory. The eligibility for promotion section required supervisors to identify whether an employee was eligible for promotion in the minimum time, eligible for promotion but not in the minimum time, or not eligible for promotion.[4]

On March 7, Giglio informed Myers that the Company intended to change the performance appraisal process for 2017.[5]

> Please let this email serve as advanced notice of changes to the Wage Performance Appraisal Process per Article XXVI, Section 6—Performance Review, as outlined in the attached letter. There are no changes or implications to the current Employee Development Review (EDR) process. Please let me know if you have any questions or wish to discuss this matter further. Thank you.

Giglio's email proposed removing the dimensions of performance from the performance appraisal form. His letter attached to the email read:

> The purpose of this letter is to provide you advanced notice of the proposed changes to the wage performance appraisal process per Article XXVI, Section 6—Performance Review, as outlined below. There are no changes or implications to the current Employee Development Review (EDR) process.
>
> Summary of Changes:
> Performance measured by current job assignment expectations, strengths, and developmental opportunities of each employee:
> - Details of Current Assignment (comments only)
> - Strengths (comments only)
> - Development Opportunities (comments only)
> - Overall Assessment (rating based on above-mentioned comments)
> - Eligibility for earned promotion excluded from performance appraisal form
> - Performance Appraisals in the form of a SharePoint list (hard copies available to print, as requested)
> - Overall Assessment–2 categories (Meets Requirements & Does Not Meet Requirements)
> - Does Not Meet Requirements should be interpreted by the Union as Needs Improvement and/or Unsatisfactory. The Company will continue to follow the guidance outlined in Article XXVI, Section 7—Unsatisfactory Work Performance for

[4] Myers testified credibly that his performance evaluations were done sometime between June and November following the evaluated year. (GC Exh. 6, 12; Tr. 35.)

[5] Giglio conceded that the Company had been planning the change since December 2017 but neither notified nor consulted the Union because it wanted to have the new change in place before giving notification. (Tr. 48, 192.)

these cases

Please let me know promptly if you have any concerns or questions on these items- happy to discuss further.

Myers replied on March 8 that the Union was reviewing the proposal and asked that it not be implemented until it had an opportunity to bargain over the change. He also asked for clarification as to whether the Company planned to implement this new system for 2017 evaluations. Naquin, replying shortly thereafter, explained that the Company intended to implement the new evaluation process in the near term as part of the 2017 performance evaluation process." Citing Article XXVI, Section 6, she expressed the Company's willingness to "take the Union's views into consideration but ask that you share those with us as soon as practical given the time-sensitive nature of the performance appraisal process." Giglio confirmed Naquin's remarks the following day.

On March 14, Myers and Fredriksen met with Giglio. Myers asked if the proposal was a corporate-wide change or limited to the Clinton facility. Giglio told him that the Company had been reviewing the performance appraisal process since December 2017. Myers asked why the Union had not been involved sooner with the proposed changes. He expressed concerns about a performance appraisal process that evolved from five categories to a system that simply reported whether an employee was or was not doing his/her job. He further explained that employees wanted to know how they were doing in the various facets of their jobs and be acknowledged when they performed beyond their job expectations. Giglio explained that "they were making this change because unless people received an outstanding rating, they're often unhappy with the process, so they wanted to get rid of that."[6]

Giglio met again with Myers and Fredricksen on March 17 in response to the announced changes. The Union objected to the changes and several emails followed. On March 20, Giglio emailed a summary of the discussions from the March 14 meeting. On March 23, Fredricksen sent an information request regarding the announced changes. Giglio provided the requested information on March 27. Giglio responded to Fredricksen's March 26 email on March 28 stating, in relevant part, that the Company would implement the change in the performance appraisal form as of March 28.

The Union objected to any changes in the performance evaluation process for the 2017 assessment period on the grounds that employees were not notified of the change in rating criteria prior to the start of the assessment period and its retroactive application. The Company disagreed, maintaining that it provided the Union with the requisite notice under the CBA on March 7 and followed it with consultation on March 14.[7]

At the March 14 meeting, however, Giglio claimed that "needs improvement" and "unsatisfactory" would not both fall into the newly created category of "does not meet requirements." When questioned about his explanation in the March 7 email, Giglio responded, "I guess I did not read what I signed."

Giglio rejected the Union's objections in subsequent emails on the grounds that this CBA provision is not limited to the yearly performance rating. On March 20, he rejected the Union's request not to use the new form in assessing 2017 performance because it learned of the change too late:

> The Company's position remains that it intends to utilize the updated performance appraisal forms for the upcoming assessment period. In accordance with Article XXVI, Section 6—Performance Review, the Company gave the ILEU advanced notice of its intent to update the appraisal process and furthermore provided a reasonable amount of time to take its views into consideration. The Company's formal notice on March 7, 2018 and verbal discussion on March 14, 2018 to understand the ILEU's views and specific recommendations took place in advance of the performance appraisal process being kicked off.

Giglio also dismissed the ratings change from "needs improvement and/or unsatisfactory to "does not meet requirements" on the grounds that Article XXVI, Section 7 did not change past practice because it is utilized to address concerns for unsatisfactory "work performance." Finally, Giglio asserted that the Company notified the Union of the proposed changes, offered it an opportunity to consult, and took the Union's views into consideration prior to implementation.

On March 26, Fredriksen replied to Giglio and Naquin with "some corrections/additions" to Giglio's March 20 email:

> More accurately, the [Union] expressed their disagreement with changing the wage performance appraisal system membership had already after the worked under the expectation they were being evaluated the same way they had been since at least 1996. This change is ex post facto, and the [Union] finds this unfair to the membership.
>
> * * * * * *
>
> In the meeting, there was a lot of confusion over "Does Not Meet Requirements should be interpreted by the Union as Needs Improvement and /or Unsatisfactory." Russ said this had to be addressed. In response, the [Union] seeks clarity on this point: is the new "once- yearly performance rating" process divorced from administration of Article XXVI, Section 7
>
> * * * * * *
>
> Russ stated that development of this new process had begun in December 2017, and that he first became aware of it in Jan 2018. The Union was not consulted at all until the Company was fully ready to implement the process, as is evident by the alarmingly rapid deployment. Russ was unable to fully articulate the new performance appraisal process on March 14, and yet calendar appointments were sent out across the company as early as the very next day.
>
> When the Union made a proposal over PPTO on January 29th, with a follow-up on February 28th, Russ responded: "we

[6] This finding is based on Myers' credible and unrefuted testimony. (Tr. 46–50.)

[7] Giglio testified that under the new performance appraisal form "there is no hurdle of two outstandings" for an employee to be accelerated into the next pay increase level, which he recognized is not consistent with the collective-bargaining agreement's requirements. (Tr. 270).

suggest that the impending formal contract negotiations (approximately 2 months hence) presents a better opportunity to comprehensively consider and address this issue, which requires significant internal discussion and analysis."

The Union estimated three people would qualify for PPTO between now and the end of the contract. The Company provided less than two weeks notice for a change that will directly affect the entire bargaining unit. There was no true interest in hearing any of our ideas. Why is a topic of this magnitude not being addressed at negotiations?

We are aware that evaluations have already taken place. Again, evaluations were scheduled the day after we met—March 15—and took place the business day after your last correspondence—March 22.

> The lack of interest in attempting to obtain a meaningful input from the Union has yet again left us in a sour position. As stated in our March 14th meeting, the Union believes that involving us early, and negotiating in good faith, would more easily facilitate the arrival of mutually agreeable terms for any and all changes the Company would seek to make.

On March 26, Fredriksen also requested information relating to unit employee performance appraisals for the previous 3 years: total number of performance appraisals given; and number of performance appraisal assessments rated at each of the categories in the "Overall Assessment of Performance" (Exceeds Expectations, Meets Expectations, Needs Improvement, and Unsatisfactory). On March 27, Giglio provided the information, listing the total number of performance appraisals rated at the applicable levels for 2014, 2015, and 2016.

On March 28, Giglio replied to Fredriksen's March 26 email protesting the unilateral change as a fait accompli:

Thank you for clarifying your concerns related to this matter. The Company has and will continue to seek improvements in all business processes, including but not limited to wage performance appraisals. Further, the Company will continue to follow the existing agreement for the consideration and implementation of any and all changes.

***

The "new once-yearly performance rating" could result in an individual being subject to Article XXVI, Section 7—Unsatisfactory Work Performance in the same manner, and to the same extent as at any other point in the performance cycle when the individual's work performance is determined to be unsatisfactory. The Company has already clearly articulated that Article XXVI, Section 7—Unsatisfactory Work Performance has always; been interpreted and applied to facilitate contemporaneous performance management. Again, this is no change from historical administration of the agreement.

***

As stated in the Company's March 7, 2018 notification letter, "The purpose of this letter is to provide you advance notice of the proposed changes to the wage performance appraisal process per Article XXVI, Section 6—Performance Review, as outlined below. There are no changes or implications to the current Employee Development Review (EDR) process." The fact is that the EDR process has not changed. The Performance Appraisal form was modified to be a more appropriate tool for documenting management input and conclusions concerning employee performance. Employees are still afforded an opportunity to provide input, orally or in writing, in support of their performance accomplishments and knowledgeable other recognitions, or disagreement with his or her supervisor's evaluation.

To clarify our March 14, 2018 discussion, the process to identify efficiencies and improvements to the wage performance appraisal process actually did not begin until the end of January 2018. Whether "calendar appointments were sent out" on the day following our discussion is not relevant. Calendar appointments are merely placeholders for a discussion that occurs on a yearly basis. We can, however, verify to you that to date no performance appraisal document or formal Communication initiating the 2018 performance appraisal process has been sent out to supervisors[8]; and this is because the Company has delayed initiation of the process to insure the Union more than ample time to address its concerns regarding this minor change in accordance with Article XXVI, Section 6 – Performance Review. Because the Company has notified the Union and provided the Union with ample time to provide input, and has given reasonable consideration to the Union's input prior to formal implementation of the new form, it is now the Company's intention to formally initiate the performance review process for the 2017-2018 performance period.

On March 28, Fredriksen thanked Giglio for his timely response and requested a copy of the most recent performance appraisal template. Giglio provided a copy a short time later.

The change was rolled out without the next several months, as evidenced by Myers' most recent evaluation in August. At that time, his supervisor, Kathleen Edwards, handed him the "2018 Performance Assessment" for the 2017 calendar year. In accordance with the Company's custom and practice, she discussed the assessment and incorporated his comments in the form.

G. Bargaining Over a Successor Agreement

1. Overview

The parties met on twenty-three occasions. The Union made thirty-four proposals, the Company made five and there were numerous modified versions of those proposals. Approximately fifty-four issues were discussed and the parties resolved about fifty of them.

[8] That representation was not true, however, since at least 1-unit employee was evaluated in accordance with the new appraisal form in March.

2. The Parties Agree to Commence Bargaining

The Union sent the Company a request to bargain over a new agreement on March 28, along with an information request. Giglio responded on April 16 and, consistent with the parties' most recent bargaining in 2013, proposed seven meeting dates commencing on May 7. He proposed several ground rules and four "clean-up/housekeeping items." Myers replied on April 23, generally agreeing to the proposed ground rules changes and expressing the Union's willingness "to agree to extend the contract to June 15 as long as any agreement will be retroactive to June 1." Giglio replied on April 27 that it was "premature to consider a contact extension at this time. The Company's expectation is that both parties work diligently to reach an agreement by June 1, 2018, 12:01 a m." Myers replied on May 2 with proposed minor changes. The parties agreed to commence bargaining on May 7 but did not, however, reach agreement regarding the timing and location of the ratification meeting or whether non-economic proposals would be bargained to conclusion prior to discussing economics.

3. The May 7 Bargaining Session

On May 7, the Company and the Union commenced bargaining for a successor contract. Giglio opened by reiterating the Company's preference that the parties reach tentative agreement on noneconomic issues before addressing economic proposals. The Company and the Union then exchanged written proposals. After a 4-hour recess to review the Union's thirty-four proposals, the Company returned and Giglio explained that "there were a number of proposals where the verbiage either didn't match the CBA or there was a lot of the section left out." He proposed "going forward . . . to standardize the format the way we provided our proposals to you. Take the entire section of the CBA that you are looking to make changes to and delete, you know, put a line through what you propose, deleting and highlight. . . . I think it will make it a lot more efficient going forward." Myers responded by asking if Giglio had "any particular proposals that were questioned." He did not directly respond to Giglio's suggestion, but the parties started the discussions by focusing on noneconomic proposals. Both proposals included competing amendments to Article XVIII and the Company's ability to contract out bargaining unit work. The Union's proposal (U-31) replaced Article XVIII with the following:

> The Company may let independent contracts. The purpose of independent contracts is not to erode the bargaining unit or restrict or limit its growth.
>
> The company will not use contractors for more than a maximum of 5% of the total Represented work force or 10% of any given job family. Number of contractors engaged in Project work in the trades are not limited or included as part of the total count towards the maximum limit.
>
> No position will be contracted for more than six months without the consent of the Union.
>
> Furthermore, in the event that employees have been demoted or laid-off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities, will (1) repromote demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid-off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

The Company's contract work proposal (C-2) eliminated the threshold dollar amounts and the requirement that the Company notify the Union before contracting out work:

> The Company may let independent contracts. However, during any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available In the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.
>
> Furthermore, in the event that employees have been demoted or laid-off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities will (1) repromote demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid-off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

4. The May 14 Bargaining Session

Giglio opened the second day of bargaining by informing the Union that the Company's negotiators were not authorized to extend the CBA past June 1. He expected the parties to proceed as efficiently as possible in bargaining over their respective proposals but raised "the possibility of, come June 1st, we say, 'Wow, we just reached impasse.' And if that is the case, the Company would give you a last, best, and final. We hope not to do that. We hope that collectively we will reach an agreement on each one of those proposals and side letters, but that is the way the process works."

Myers replied that he was surprised by the number of issues that the Company considered noneconomic. Giglio recapped the Company's four issues: 12-hour standard shifts, contracting out work, the grievance procedure, and the direct payment of dues to the Union. A bunch of items stacked under "housekeeping," however, amounted to a fifth set of issues.

The parties exchanged written proposals again. The Company responded to each of the Union's noneconomic proposals, including contracting, PPTO and personal time. The Company's contracting proposal remained the same as the one that it proposed on May 7.

5. The May 16 Bargaining Session

On day 3 of bargaining, the Company modified its contracting proposal to amend Article XVIII as follows:

> The purposes of independent contracts is not to erode the bargaining unit nor to restrict or limit its growth.

> The Company will not use contractors for more than a maximum of 5% of the total Represented workforce or 10% of any given job family. The number of independent contractors engaged in project work in the trades are not limited as part of the total count towards the maximum limit.
> No position will be contracted for more than six months without consent of the Union.

When Giglio got to the Union's contracting proposal, however, he said there was no "need to spend a lot of time on that right now because that one is where there is a very, very wide gap between [the proposals], and I don't see that gap narrowing significantly with more debate at this point in time, unless you care to discuss it." Myers replied that "a large gap would be reason to discuss it." Extensive discussion ensued over the Company's rationale for contracting flexibility and resistance to any limitation on such authority. Pressed by Myers for an explanation, Giglio revealed the Company's bottom line:

> Because it is untenable. Number one, it is not the way we run our business. At the very worst case that we are talking about here, Mike, which is why I wanted to defer discussion about this, we will live with it as it is written. We are not going to make these changes. If you are not going to be agreeable to deal with the changes that we have proposed, I can tell you that these are not changes that the Company would be interested in. So, I mean, we can continue to talk about it. We can continue to debate it, I have no problem with that, but I think we are so far apart on this that it probably won't resolve itself by living with the existing language.

6. The May 21 Bargaining Session

During the 4th day of bargaining, the parties agreed to several proposals and the Union modified several proposals and withdrew eight others. Among the proposals agreed to by the Company were nearly all of the Union's items relating to benefits, including health dependent care leave and an educational refund program. However, the Company did not acquiesce to the Union's proposal for 4 weeks of PPTO. Instead, Giglio asked the Union to provide data as to how many unit employees might benefit from such leave. With respect to contracting out unit work, the Company's proposal remained unchanged.

At the end of the session, the Company requested a copy of the Union's bylaws and posed several questions: whether the Union had a strike vote in place; the time, date and location of the ratification vote; the "verbiage" the Union planned to use on the ballot for a ratification vote; the process to be used for the ratification vote; who would conduct the count for the ratification vote; and how the Union would inform employees of the results.

7. The May 24 Bargaining Session

Myers and Giglio opened the fifth bargaining session by briefly addressing the Company's information request from the previous day. Then they engaged in legal jousting over whether the Company's reliance on accrued vacation time, as opposed to personal time, sufficed in complying with New Jersey's new disability law. That debate was followed by extensive discussion regarding the Union's PPTO proposal. Giglio asserted that the compensation packages of non-represented employees indirectly paid for those benefits and then asked what the Union offered in return. Myers asked what non-represented employees paid for such benefits. Giglio did not have an answer but said he would look into it.

After the lunch break, the parties discussed the Company's contracting proposal and its desire to address spikes in workload with contractors in lieu of hiring and firing employees. The Union challenged the Company's contention that there had been spikes in demand and the parties discussed the cost benefits of employing contractors versus employees. Myers concluded that discussion by suggesting that the parties move on since the matter was in the midst of arbitration.

Giglio and Myers also argued over personal time and the Company's insistence on leaving it to supervisory discretion. Giglio attributed the Company's position to the Union's previous unfair labor practice charge, and Myers replied that it amounted to retaliation.

The Union withdrew five proposals for a total of fifteen withdrawn to that point. Otherwise, the status of the proposals on contracting, personal time, and PPTO remained the same as the parties' May 14 proposals.

8. The May 25 Bargaining Session

Myers opened the session the following day by explaining the Union's economic proposals, including a discussion of position descriptions. There was also discussion about the number of contractors that have been brought in since 2013. Myers asserted that ninety-six percent of all new hires since 2013 were contractors and opined that contracting was being used to screen new hires. After the lunch break, Giglio said that the Company would review the Union's economic proposals and come up with a counteroffer. The session concluded with agreement on several items and disagreement on several others. However, there was no change in position regarding contracting, personal time, or PPTO.

9. The May 25 Arbitration Award

On May 25, arbitrator Joyce Klein issued an arbitration award regarding a 2016 grievance challenging the Company's ability to permanently contract certain work. The Company took the position, based on Article XVIII and its long-standing practice, that its contracting rights were limited only to the extent that they would not result in layoffs. The arbitrator, however, rejected that position, ruling that irrespective of layoffs, the Company could not prospectively contract permanent jobs. The award did not limit the Company's rights on temporary contracting.

10. The May 29 Bargaining Session

The parties started the seventh bargaining session by following up the discussion from May 25 regarding several economic items. The Company countered with a package that included a proposal to eliminate Side Letter 100 and add a safety shoe subsidy if the Union agreed to withdraw its unfair labor practice charge regarding the alleged changes to performance appraisals. The Union's counter declined to address withdrawal of the charge at that point but included several concessions, as well as a modified proposal on personal time.

After reviewing the Union's proposals during the lunch break, Giglio returned and stated that the parties were far apart and the Company was not going to counter the Union's latest proposals.

He did, however, say that the Company would provide a modified contracting proposal at the next session.

The discussion then turned to the Company's wage rate proposals for a 7-year contract and the Union's request for copies of other CBAs agreed to by the Company. Giglio and Naquin objected and raised the matter of their May 21 request to the Union for information regarding its voting process for ratification and going out on strike. Myers explained that the Union did not see the relevance regarding its internal processes and noted that the Company initially rejected the Union's ground rule proposal to allow for ratification votes during work time as had been allowed during past negotiations. He concluded by asking whether the Company obtained information as to how non-represented employees paid for PPTO. Giglio simply replied "not yet" and did not address the ratification issue further. Otherwise, there was no discussion of the parties' proposals on contracting, personal time and PPTO.

11. The May 31 Bargaining Session

The 8th day of bargaining focused mostly on wages. Early on, however, Giglio requested a brief side bar meeting. During that encounter, he handed Myers a revised contract work proposal, acknowledged that the Union won the arbitration, and expressed the Company's desire for a solution. Giglio then proceeded to say that the Company would not agree to the Union's personal time proposal, but suggested that employees would not notice it because of the additional compensation that the Company would agree to.[9]

The Company's proposal included an agreement not to appeal or challenge the May 25 award and apply it only prospectively, eliminated the dollar thresholds, eliminated the permanent contracting of research technicians through attrition but permitted it for the materials, trades, graphics, and admin technician positions, permitted the continuation of temporary contracting, and eliminated any obligation to replace contractors with employees. Myers reviewed the proposal and replied that it was "not going to work." Giglio replied that it was just a first draft. At a subsequent side bar meeting, the parties agreed to extend the CBA until June 9.

Aside from the side bar discussion, the rest of the session focused on the Company's presentation of wage data and discussion about technical changes to contract language. The parties recessed early in order to caucus and for Giglio to return with a modified proposal. Instead, however, the parties resumed off-the-record discussions in the hotel bar.[10]

12. The June 4 Bargaining Session

During day 9 of bargaining, the Union countered with 8 weeks of PPTO, personal time as proposed on May 7, a requirement for new employees to join the Union within 30 days, the discontinuation of 1 day of leave for United Way contributions, pay schedules, and standardizing the 12 hour nonstandard shifts. It also objected to the permanent contracting of positions but agreed to remove the audiovisual, reproduction, accounting and administrative positions from the bargaining unit and keep the 16 mechanics as unit employees while consenting to the permanent contracting of future mechanic hires. Finally, the Union also rejected the proposal to limit future interpretation of the side letter to its terms to the exclusion of the Act, prior awards, standards, practices or any applicable provisions in the CBA.

After caucusing, the Company partially responded to the Union's counter proposal, offering in pertinent part: to refrain from appealing the arbitration award; amend the side letter by eliminating monetary thresholds; refrain from permanently contract out wastewater treatment and utility operators, research techs, electronics techs and information techs through attrition or as vacancies occur; allow contracting in lieu of hiring research techs, electronics techs and information techs for work fluctuations and other short term or discrete business needs; continue temporary contracting practices, including the right to utilize contractors to staff relative to projects, work fluctuations and other short term or discreet business needs; continue to contract any jobs contracted as of June 1, 2018; and permanently contract materials, mechanics, graphics, and admin techs. The Company also proposed to render the May 25 award and the Act inapplicable for future interpretation of the letter agreement;

Giglio also said that personal time was "not going to happen." The parties then caucused for 3 hours before resuming late in the afternoon. The session concluded shortly thereafter, with Giglio emphasizing that the parties needed to reach closure on the contracting issue before it was able to present its last, best and final offer.

13. The June 5 Bargaining Session

At the tenth bargaining session, the Union countered the Company's June 4 proposal. Myers stated at the outset that the Union was "not interested in changing the scope of the bargaining unit" and would only consent to the contracting of services trainees. Otherwise, the Union maintained its position regarding safety shoe allowances, PPTO and eliminating the United Way day off practice. The Union also modified its proposal by limiting the 12-hour nonstandard shift to operations requiring "24/7 staffed operations." The Union also restored the 8 percent temporary pay increase, specific overtime pay differentials, a $5000 ratification bonus, and pay increases of 7.5 percent in year 1, 5 percent in year 2 and 5 percent in year 3.

In response, Giglio asserted that the Union's counterproposal limiting contracting out to services trainees regressed from the previous negotiations over eleven items in the side letter. He was "willing to speak about everything" but warned that the Company would be unable "to talk bundles until we nail down the contracting out verbiage."

After extensive argument over the issue, the parties caucused and reconvened about an hour later. The Company proposed a package that included the contract work side letter proposal from June 5, the safety shoe subsidy, limited the 12-hour nonstandard shift, discontinued the United Way Day off, and 1 week of PPTO if the Union withdrew its unfair labor practice charge relating to

[9] Giglio did not refute Myers credible testimony regarding this remark. (Tr. 86, 274-275.)

[10] Giglio testified that he was optimistic about an impending deal after the bargainers met for drinks later on. However, whatever transpired during that dialogue was not documented and Giglio did not refute Myers' credible testimony that he rejected the proposed C-2 side letter almost immediately after being presented with it during the first side bar meeting that day. (Tr. 85-87, 277–279.)

the performance appraisal form.[11] The Company opposed the Union's agency shop provision and its revised personal time policy, and urged dropping these proposals to finalize the contract. The Company also submitted its first wage proposal: a $2500 ratification bonus and a 5-year contract with step pay increases: 1 percent in year one, 1 percent in year two, 1.5 percent in year three, 2 percent in year four, and 2.5 percent in year 5. Giglio concluded by stating that the Company would consider the Union's suggestion that the parties seek the assistance of a federal mediator.

14. The June 8 Bargaining Session

Giglio opened the eleventh bargaining session by announcing the Company's agreement to extend the CBA during negotiations. He reiterated the Company's position as the one presented on June 5 and proposed discussion over contracting, the 12-hour shift and wages. Myers replied by reiterating his proposals of June 4 and 5.

The parties then engaged in extensive discussion over the Company's proposal for 1 week of PPTO. Meyers asked if the Company ascertained how it paid for the PPTO afforded to nonrepresented employees, but neither Giglio nor Naquin had an answer. No progress was made on that issue. The Company then went through its revised wage and benefits proposal, and the parties broke with an agreement to meet again on June 19.

15. The June 19 Bargaining Session

At the thirteenth bargaining session, the Company reiterated its proposal from June 5, including 1 week of PPTO and no personal time. After extensive arguing as to the applicability of the arbitration award and whether it was retroactive, the Union countered the Company's June 5 proposal by agreeing to the permanent contracting of the audio visual, reproduction, and accounting positions, in addition to the attrition of administrative positions and maintaining at least twenty mechanics. The Union's revised proposal otherwise prohibited the Company from permanently contracting out the positions listed in the recognition clause without its expressed permission but agreed to temporary contracting out "to manage fluctuations in workload and other short term or discrete business needs. The Company may not utilize a contractor in the same position for more than 12 months without consent from the Union."

Frustrated with the Union's new proposal on the contracting issue, Giglio announced that the contract would expire in forty-eight hours. With about an hour left in the bargaining session, the Company clarified its shift proposal. The session concluded after further accusations that neither party budged from their proposals—the Union's May 31 counteroffer and the Company's June 5 proposal. Giglio also rejected Myers proposal for a mediator.

16. The June 25 Bargaining Session

At the 13th day of bargaining the Company maintained its position from June 5 with respect to contracting, 1 week of PPTO, and no personal time. The Union submitted a revised counterproposal agreeing to withdraw the charge relating to the performance appraisal form in return for 8 weeks of PPTO and personal time for births/adoptions (5 days), and severe and discretionary emergencies (16 hours annually for each). It also proposed to withdraw its agency shop proposal and discontinue the United Way Day off. The wage proposal included a $5000 ratification bonus and a 4-year contract with pay increases of 5 percent in year 1, 3 percent in year 2, 3 percent in year 3, and 3.5 percent in year 4. The shift proposal was modified to specify a normal work weeks of either 36 hours or 48 hours based on mutual agreement between the parties and an 8 percent shift differential.

The Union's revised counterproposal also reduced the number of mechanics from 20 to 16 and increased the number of days the Company could utilize contractors in certain bargaining unit positions from 60 days to ninety days without extending a permanent job offer due to demonstrated spikes in workload. Auto mechanics and medical positions, however, would remain under the 12-month limit.

Giglio branded the counterproposal as "incredibly regressive" and expressed displeasure that the Union had not closed the gap with the Company's contract work side letter proposal. He also noted the difference between the proposed wage increases. Giglio emphasized that the Company had been "clear since Day 1 that we weren't looking to fill what we consider noncore positions permanently with contactors.[12] That is what we are bargaining for. . . . All I can tell you is that we have been consistent for as long as we have had proposals on the table and that is what we are looking for and you are not making any progress whatsoever in that area."

17. The June 29 Bargaining Session

Giglio opened the fourteenth bargaining session by describing the parties' bargaining effort as having lasted already more than doubled the amount of sessions compared in 2013 and nearly 2000 hours of employee and management participation. He asserted that that the parties were moving closer to an agreement until June 4 when the Union's proposals submitted a regressive proposal and then failed to submit a good faith counteroffer to the Company's June 5 proposal and, in particular, the Company's "primary outstanding proposal in contracting out."

Giglio then conveyed the Company's last, best, and final offer (LBFO). It also included a $5000 ratification bonus and 1 week of PPTO but no personal time. The proposal did not include any economic concessions. Its revised C-2 portion stated the following:

> 1. The Union agrees to immediately withdraw and dismiss with prejudice its current petition to confirm Arbitration Award. The Company and the Union will not appeal or challenge the Arbitration Award issued by Arbitrator Joyce Klein on May 25, 2018.
>
> 2. Paragraphs 2, 3 and 4 will be removed from Article XVIIII, and the supplemental Side Letter on notice and dollar thresholds is hereby terminated.

[11] Giglio's testimony that the Company previously proposed 1 week of PPTO during "the second or third bargaining session" was incorrect. (Tr. 261.)

[12] Considered in context with the record as a whole, Giglio apparently meant to say core instead of noncore position. (Jt. Exh. 13 at 33–34.)

3. The Company will add the Auto Mechanic position to Exhibit II of the contract.

4. The Company will not permanently contract Research, Electronics, Sr. Info Tech, Info Tech/Asst., Sr. Wastewater Treatment Operator, Wastewater Treatment Operator, and Sr. Utilities Operator, Utilities Operator job families through attrition or as vacancies occur.

5. The Company may permanently contract Material & Service Coordinator, Mechanics, Graphics Design, and Sr. Admin Tech, Admin. Tech/Asst. job families through attrition or as vacancies occur.

6. The Company may continue, at its sole discretion, its current temporary contracting practices across all job families, including the right to utilize contractors to staff relative to projects, work fluctuations and other short term or discrete business needs.

7. The Company may continue to permanently or temporarily contract any positions contracted as of May 25, 2018.

8. Nothing in this Letter of Agreement or in the CBA shall be interpreted to require the Company to maintain a specific level of staffing or mixture of work.

9. Any arbitrator, court or government agency shall be limited to the express terms of this Letter of Agreement and shall not consider prior arbitration awards, custom, prior practice, industry standards, the NLRA, or the CBA's Recognition Clause, Work Classifications or other provisions in the interpretation of this Agreement, its terms or intent.

10. To the extent there is a dispute between Article XVIII or any other provision of the CBA and this Letter of Agreement, this Letter of Agreement shall govern.

Giglio warned that if the offer was not accepted and ratified by July 11 it would result in a significantly lower wage and ratification bonus offer. Myers repeated his view that the LBFO was premature, and the Union caucused to consider the offer.

Myers returned 5 hours later and stated that the Union was still reviewing the LBFO. He noted, however, that the offer was illegal because there were still other issues on the table and unfair labor practice charges had been filed. Giglio reiterated the deadline and predicted that the Company's next offer would be significantly lower. He said he would be willing to meet again on July 9 but the Union would only hear a "broken record:" the Company's LBFO. Myers replied that the bargaining committee would not recommend the LBFO for ratification. Giglio criticized Myers' response and accused him of misrepresenting 144-unit employees for the sake of preserving "13 jobs because we're not putting anybody out—those would be filled through attrition or vacancy." He implored Myers to bring the matter to his "constituency because I think they're going to say: Man, are you wrong, and maybe we elected the wrong guy . . . see how they feel about this offer because we're certainly going to tell them about it."

18. The July 3rd Employee Information Bulletin

The Company did just that. Following this session, on July 3, the Company sent an employee information bulletin to all employees at the Clinton facility:

> The purpose of this bulletin is to advise you that EMRE and the Independent Laboratory Employees' Union, Inc. (ILEU) have met for 14 collective bargaining negotiation sessions. The Company presented its last, best, and final offer to the ILEU on Friday, June 29, 2018 with an expiration date of July 11, 2018 at 12:01am. This offer was the result of many productive negotiation sessions between the parties and tentative agreement was reached on nearly all items. The offer is a good one, with significant and competitive benefits to the bargaining unit. The Company believes a longer-term contract is beneficial; with an uncertain economy, a longer-term contract provides greater continuity and clarity regarding general wage increases. This very fair and competitive offer should allow us to continue to be a world class research organization.
>
> The ILEU has informed the Company that it is considering the offer and the parties have agreed to meet and discuss on Monday, July 9, 2018. The ILEU has not yet informed the Company as to whether the offer will be presented to its membership for a vote. The Company believes that employees should have a choice in accepting the offer and deserve a chance to vote. If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.
>
> The key aspects of the offer are summarized below:
> - 5-year agreement (Date and Month Agreement is Ratified 2018 to Date and Month Agreement is Ratified 2023)
> - Annual wage increases of 1% Year 1, 1 % Year 2, 1.5% Year 3, 2% Year 4, 2.5% Year 5; and a $5,000 ratification bonus paid to all ILEU members upon acceptance of the offer if ratified on or before July 11, 2018 at 12:01am
> - Parental Paid Time Off (PPTO) 1 week per occurrence of birth /adoption of a child
> - Safety shoe allowance of $175 /employee (currently $150 /employee)
> - Overtime meal allowance of $10 /employee (currently $8 /employee)
>
> If you have specific questions regarding the full offer, please contact your supervisor or your Union Representative.
>
> Employee Information Bulletins (EIBs) such as this one will be sent to you via email and also posted on this SharePoint site. Any Clinton employee may respond to the "Submit A Question" survey on the SharePoint site anonymously or choose to include his/her name if requesting follow-up. Questions received from employees may be converted to anonymous FAQs for the benefit of the entire site population.
>
> As always, our number one priority is the safety of employees. Thank you for continuing to keep safety at the forefront.

19. The July 9 Bargaining Session

Myers opened the 15th session by reading a counterproposal to June 29 LBFO, which included: a safety shoe allowance; 8 weeks of PPTO; discontinuance of the United Way Day; a 4-year contract with no ratification bonus; a pay schedule of 2.5 percent pay increase in year one, 2.5 percent pay increase in year 2, 3 percent pay increase in year 3, and 3.5 percent pay increase in

year 4; nonstandard shifts to be negotiated; and a personal time policy eliminating designated categories. The C-2 portion deleted the proposal that the Union withdraw its petition to enforce the arbitration award, agreed to continue temporary contracting for up to twelve months unless the Union agreed to a longer period, prohibited the permanent contracting of positions through attrition without the Union's consent, consented to permanently contracting certain bargaining unit positions but specifically rejecting the permanent contracting of others, required maintaining an agreed upon number of mechanics, and deleted the proposal to limit a court, arbitrator, or government agency's interpretation of this side agreement.

After discussing the Union's counterproposals, the Company caucused for 3 hours. Upon returning, Giglio attempted to elicit whether the Union was claiming illegality as to the Company's proposal that it withdraw the arbitration claim and/or agree to have the side letter override the Act. Myers explained that the Union would continue to object to any language that limited its rights under the Act. Giglio replied that the arbitration award was not retroactive.

At one point, the parties recessed for a side bar discussion where Giglio emphasized the Company's continued insistence on the discretion to contract out and that it was "not interested in personal time at this time, because of the Union's filing of the [unfair labor practice charge] in 2016 and its aggressive actions." When asked by Myers as to what the Union would have to do for the Company to agree to 8 weeks of PPTO, Giglio said, "go without a union."[13] When they returned, Giglio reiterated the Company's continued insistence for the right to contract out noncore positions. He characterized the Union's failure to yield at all on its proposal as regressive and "wordsmithing." Fredrickson replied that the Company should not have the right to determine who should be excluded from the bargaining unit.

The parties also discussed included Myers' request to reinstitute labor-management quarterly meetings, supervisory discretion in granting personal time off, shift pay differentials, and the ratification bonus. Finally, the discussion turned to the Union's demand for 8 weeks of PPTO, a benefit that is available to the Company's non-represented employees. Giglio stated that personal time "goes back to the issue we had that was resolved after the Union filed a ULP and was resolved in 2016, I guess, at the National Labor Relations Board." He explained that inconsistencies had led to grievances and unfair labor practice charges."[14] Myers then asked what the Company wanted in exchange for 8 weeks of PPTO. Giglio said "[w]alk away from the bargaining agreement," adding that "[i]f you weren't covered by a [CBA], if you were exempt, you would have eight weeks of PPTO." He also noted that there were other ways to achieve the PPTO benefit and advised the Union to consult with counsel. Myers then asked, "So you are saying if [we] get [de]certified, you will give us eight weeks of PPTO?" Giglio replied, "You said that, I didn't."[15]

The meeting concluded with Myers asking to schedule another meeting. Giglio replied, "[n]o, I think you guys can take the vote." When asked by Fredriksen if Giglio would meet with them again, Giglio replied, "[i]f the contract is not ratified, we will certainly meet again."

20. The July 19 Bargaining Session

The parties met very briefly for the 16th day of bargaining since a stenographer was not available. The Company proposed a modified version of its LBFO. It reduced its previous offer of a $5000 ratification bonus to $2500 but withdrew its demands that the Union withdraw its petition to confirm the arbitration award and exclude the provisions of the Act from future interpretation of the contracting side letter.

21. E-mail dated July 25

On July 25, the Company emailed all employees at the Clinton facility a correction regarding the representations in the July 3rd employee information bulletin:[16]

> The ILEU notified the Company last week that our EIB of July 3, 2018 contained a statement that contradicted what the Company had presented to the ILEU prior to bargaining. The Company confirmed that the ILEU was correct, and we apologize. Specifically, the EIB stated relative to a potential ILEU vote on the Company's offer at the time that "it is expected that Unión members be provided reasonable time away from work to meet and vote:" The Company included the same statement in an MIB. The Company should not have said this.
>
> When discussing bargaining ground rules in early May before bargaining, the Company's last ground rule proposal to the ILEU included a proposal stating that the Company would not authorize employees to be away from work for ratification activities: The ILEU responded that it disagreed with this proposal. The parties agreed to move forward with bargaining. The Company communicated internally that it was agreeable to allowing employees time away from work to vote but never notified the ILEU or modified its proposal.
>
> Under the National Labor Relations Act (NLRA), the Company's EIB statement about time away from work to vote could be construed as what is called unlawful "direct dealing," meaning we bypassed the ILEU and made an offer directly to its members. That was not the Company's, intention, but the Company cannot present a proposal to employees that it has not already presented to the employees' union. The Company will not engage in any direct dealing in the future.

[13] This finding is based on the credible and unrefuted testimony of Myers and Fredrickson, and corroborated by Giglio's subsequent comments at the table. (Tr. 101–102, 324–325, 334–335; Jt. Exh. 15 at 86.) Giglio's denial that he made the comment during the side bar was not credible given his subsequent comments on the record. (Tr. 263.)

[14] Giglio testified that he referenced the charges as examples of what happens when there is discretionary language. He also conceded that the Union previously proposed a personal time policy with specific categories and hour allotments. (Tr. 263, 266, 286; Jt. Exh. 86-87.)

[15] Myers and Fredrickson understood the remarks to mean that unit employees would receive the same amount of PPTO as non-represented employees if they were not covered by the CBA. Giglio testified that he was being sarcastic and made the comment during bargaining "out of frustration." (Tr. 101–103, 160–162, 166, 263, 300, 325, 334, 341–343; Jt. Exh. 15 at 113–115.)

[16] Myers credibly testified that only bargaining unit employees received this e-mail, in contrast to the July 3 employee information bulletin, which was sent to all employees. (Tr. 113.)

> The Company goes to great lengths to ensure that it always follows the law and always provides accurate information. Our mistake was not intentional. We had simply forgotten about the details arid final status of the ground rules discussions both internally and with the ILEU. That.is still no excuse, and again, we apologize. We also apologize to ILEU leadership: The parties have had their differences and disagreements during these negotiations, but the Company would never intentionally misstate or act unlawfully. We will be more diligent moving forward.
>
> We are sending this communication because we want to do what is right and we want to comply with the NLRA, which the above-described statement violated. To the extent that the Company's misstatement interfered with your and/or the ILEU's rights under the NLRA, again, the Company was wrong. It is our sincere desire to comply with the NLRA and all other laws. Therefore, going forward we will not do anything to interfere with your or the ILEU's rights.

22. The July 26 Bargaining Session

The parties continued negotiations over the C-2 proposal on the 17th day of bargaining. There was no movement from the Union's July 9 proposal and the Company's July 19 proposal. Giglio acknowledged that contracting was the primary stumbling block and, as for the Union's refusal to agree to changes to the scope of the bargaining unit, "[w]e can't live with that." He reiterated that position later on, emphasizing that "[t]his is what the Company requires . . . if there is something that you need in return to make this happen, bring it forward, we are here to negotiate." Myers replied that the Union was not interested in the contracting proposal.

23. The September 4 Bargaining Session

During the 18th day of bargaining, the Union replied to the Company's July 19 proposal with a slightly modified version of its July 9 proposal relating to nonstandard shift schedules. After a 3-hour break to caucus, the parties returned and Myers asked if Giglio had a counteroffer. Giglio replied that the Company was waiting for a counteroffer on the contracting issue and urged the Union to provide one in order to "wrap this whole thing up very quickly." He restated the Company's priority that core positions be staffed by employees and noncore positions permanently replaced by contractors once they become vacant.

During subsequent discussion, Fredriksen noted that noncore is not a term defined in CBA. Giglio agreed but asserted that it is a term mentioned during arbitration proceedings and "discussed across this table for quite a long time, and it is a term we can memorialize in the CBA going forward, if that is so desired."[17] There was, however, no movement on the contracting issue, leading Giglio to declare that "we have been as clear as we possibly can be that C2 is the linchpin in moving these negotiations forward. So we will continue to meet, but unless and until [the Union] gets serious about a counterproposal to C2, we are going to continue to do what we are doing and go through these exercises in futility."

Giglio did not directly address the Union's proposal for 8 weeks of PPTO except to refer to it during the discussion on the contracting. He explained that there used to be an "unwritten process" that supervisors had the discretion to grant personal time off. However, that process ended when the Company attempted to formalize the process and the Union brought charges. Giglio concluded by remarking that "is why we won't agree to personal time, because this is the stuff that the [Union] brings forward." Personal time was, as Giglio described it, a "gravy train that has now moved on."

24. The September 27 Bargaining Session

During the nineteenth bargaining session, the Union submitted a revised counterproposal package, which included a $5000 ratification bonus and a higher frontloaded pay increase proposal: 5 percent in year 1, 3 percent in year 2, 3 percent in year 3, and 3.5 percent in year 4. The Union agreed to maintain the Company's corporate personal time policy and proposed: nonstandard shift schedules requiring Union notification prior to implementation; a 40-hour rest period; 48 hours of consecutive rest between days off; two out of every 4 weekends as scheduled days off; and no more than three switches between the standard shifts every 4 weeks. The C-2 portion was revised in pertinent part:

> Add: Auto Mechanic
>
> Remove: Sr. Systems Tech, Systems Tech /Asst., Accounting, Sr. Medical Lab Tech, Medical Lab Tech, X-Ray Tech
>
> Altered Contracting Practice
>
> For the Mechanics job family, the Company may fill any future vacancies with contractors. All employees currently in these positions will retain their jobs until they retire, are promoted, or leave on their own accord. All employees currently in these positions will receive lead pay for the remainder of their time in said positions.
>
> Additionally, the Services Trainee positions may be regularly staffed by contractors. In the event of a surplus of employees, backdowns, or layoffs, all contractors in these positions will be removed before any bargaining unit employee is laid off.
>
> For the Audio Visual, Reproduction Services, Materials & Services Coordinator, and Maintenance and Operations job families, the Company must fill any future vacancies with employees. Contractors currently in these positions may remain as contractors until they are removed by the Company, are hired as employees, or leave on their own accord.

Giglio appreciated the "movement on C-2," and the parties broke to caucus. During that time, Giglio complained to Myers about the formatting of the Union's counterproposal because it did not adhere to the side letter format agreed to by the parties. He characterized it as a regressive proposal and accused Myers of "throwing the mechanics under the bus."[18]

When the parties returned to the table, Giglio rebuked the Union for failing to submit its counteroffer in the same format as the Company's C-2 proposal. Giglio complained that the

[17] The core/noncore references were mentioned during arbitration but only by the Company and were never adopted by the Union.

[18] This finding is based on Myers credible and unrefuted testimony. (Tr. 115–119.)

Union's proposal was unacceptable because it was not in the same format as, and would have to be reworked into, the Company's July 19 proposal – a task that would take the rest of the day. He asked if the Union intended to provide the counterproposal in the format previously agreed to by the parties. Myers attempted to change the discussion to the mechanics classification proposal, but Giglio insisted that the parties resolve the formatting issue first. Myers then asked, "[d]id you tell us to put contract language that we were comfortable with into a proposal for you.?" Giglio replied that he wanted the Union's proposal in "the standardized, agreed-to-format" and asked, "Mike, answer my question. Okay? Are we wasting time here? Do you want us to take the rest of the day to manipulate this into our July 9 proposal, or do you want to do it?" He added that "[i]t is a yes-or-no answer." Frustrated, Myers responded by withdrawing the Union's proposal from that morning and dared Giglio to go tell his boss, Bruce March, that he was making the format an issue. The parties continued quibbling over format, with Giglio noting that, although not in the ground rules, the parties agreed early on to "line out and highlight" the previous proposals.[19] Myers then called for a caucus. Upon returning from lunch, Myers announced that the Union was leaving, and the session adjourned.

25. September 28th Employee Information Bulletin Disparaged the Union

Following that contentious session, the Company emailed an employee information bulletin to all Clinton employees:

> The purpose of this note is to provide an update on collective bargaining between [the Company] and the . . . ILEU.
>
> As a reminder, any Clinton employee may respond to the "Submit a Question" survey on the SharePoint site anonymously or choose to include his/her name if requesting follow-up. Questions received from employees may be converted to anonymous FAQs for the benefit of the entire site population.
>
> Despite the Company offering 7 dates to meet in August, the parties did not meet in the month of August and have only met 2 times in the month of September. The 19th session was held on Thursday, September 27, 2018.
>
> In the 19th session, the ILEU made a counterproposal to the Company's July 19, 2018 outstanding offer. The ILEU's counterproposal dated September 27, 2018 included but was not limited to the following terms:
>
> 1. $5,000 non -benefits bearing payment to union members in good standing only
> - Company's July 19, 2018 outstanding offer Includes a $2,500 ratification bonus to all ILEU represented employees as of the date of ratification
> 2. Retroactivity to June 1, 2018
> - Company's July 19, 2018 outstanding offer does not include retroactivity
> 3. Contracting Out Language
> - The ILEU's counterproposal did not counter the Company's July 19, 2018 outstanding offer
> 4. Personal Time and 8 weeks of PPTO
> - Company's July 19, 2018 outstanding offer includes 1 week of PPTO and no personal time
>
> Before noon, the ILEU completely withdrew its counterproposal. The ILEU then violated the practice and spirit of the bargaining ground rules by leaving the session unilaterally, despite the Company's best attempt to continue discussions during the remainder of the day. The ILEU's refusal to continue bargaining was extremely disappointing. No progress was made, and the next session has not yet been scheduled.
>
> The Company is hopeful that an agreement can be reached; and will continue to bargain in good faith toward that end. As a reminder, the Company's offer from July 19, 2018 remains outstanding. The Company hopes ILEU represented employees will have an opportunity to vote on the Company's final offer. The decision of whether or not a vote will be held Is made by the ILEU officers. Any questions on if the Company's final offer will be presented to membership for a vote should be directed to the ILEU.
>
> As always, your safety and the safety of all employees at the Clinton site is the single most important factor as these negotiations continue. Thank you for your continued patience and diligence.

26. The November 29 Bargaining Session

During the 20th day of bargaining, the Union submitted a revised counterproposal package which included two revisions from its September 27 counterproposal. The personal time proposal was modified to reflect the one proposed on July 9 and the contract term was reduced to 3 years with pay increases of 3.5 percent for each year.

Giglio replied that contracting out positions remained the "number one priority for the Company. We are not going to make an agreement unless contracting out is addressed." He then clarified that statement by "finding it unlikely that we will be able to reach an agreement between the [Union] and the Company unless we address the contracting out. I am not saying we can't. I am saying we are here to bargain for that."

The parties then discussed the Union's counterproposals. Giglio agreed to consider the Union's contracting proposal, but said that PPTO was "not going to happen. You are governed by a [CBA]; therefore, you do not get the same benefits as everyone else . . . the Company has magnanimously offered one week of PPTO. . . So you have to bargain for it."

Giglio also rejected the Union's personal time proposal due to "the ULP [charge] that was filed by the Union and determined by the NLRB that there was too much ambiguity in allowing supervisory discretion." As Myers attempted to explain how the

[19] Myers testified that he withdrew the proposal because Giglio "was dictating on how we were supposed to give proposals for many days and we were kind of tired of it . . . He told me I was wasting his time and that they would have to spend hours formatting our proposal into what they wanted it to be and I didn't think that was necessary." (Tr. 133–135.)

Union's proposals benefited the Company, Giglio interjected that "we are not addressing contracting out. Are you refusing to bargain over contracting out?" Myers denied that the Union was refusing to bargain and insisted that the Company's proposal was unacceptable.

After caucusing for an hour and a half, Giglio countered by agreeing to the Union's request for notification prior to the implementation of non-standard shift schedules and increasing base pay from five percent to six percent. Otherwise, the proposal did not deviate from the Company's July 19 offer for contracting, no personal time and 1 week of PPTO.

27. The January 16, 2019 Bargaining Session

Myers opened the twenty-first session by handing out a letter stating that an additional remedy from the arbitration ruling required the parties to bargain any future United Way Day off. He reiterated that it was a benefit that the Union was still willing to discontinue in accordance with other benefits. Giglio replied that it was a step backward but opined the parties were close to resolving most items except for the contracting issue. He proposed that the parties pick up where they left off on November 29. Myers agreed.

Myers began with the Union's November 29 proposals relating to non-standard shifts, the discontinuation of United Way Day off, 6 weeks of PPTO, and 32 hours of personal time. The Company responded with a counterproposal on nonstandard shifts. The Union did not submit a contracting proposal.

28. The February 28, 2019, and March 14, 2019 Bargaining Sessions

The parties met two additional times, most recently 1 week before the hearing on Marc 14, 2019. Transcripts of those sessions were not offered into evidence.

LEGAL ANALYSIS

The General Counsel alleges that the Company violated Section 8(a)(5) and (1) by conducting the twenty-three bargaining sessions in bad faith. Specifically, she describes eleven different instances that evidence the Company's bad faith in the bargaining process, portraying the Company as scheming at every possible turn to thwart the Union and engage in surface bargaining. She also alleges four 8(a)(1) violations.

The Company denies each specific allegation of bad faith and presents its bargaining representatives as reasonable but hard bargainers. It characterizes the Union as intransigent and blames the breakdown of the bargaining process on irreconcilable differences between the Union and itself, insisting bad faith on its part had nothing to do with these protracted negotiations.

I. BAD FAITH GENERALLY

The duty to bargain in good faith in Section 8(a)(5) requires that an employer bargains with the "sincere purpose to find [a] basis of agreement" with the Union. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). To comport with this duty, an employer must make "reasonable effort in some direction to compose its differences with the union." Ibid. An employer fails to satisfy this duty when it "will only reach an agreement on its own terms and none other." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). To determine whether an employer failed to bargain in good faith, the Board examines the totality of the conduct at and away from the bargaining table. See *Public Service Co. of Oklahoma*, 334 NLRB 487, 488–490 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (examining the total content of the employer's activity to determine whether it violated the Act). This includes the nature of the bargaining demands, unilateral changes, withdrawal of already-agreed-upon provisions without sufficient explanation, the failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid-Continent Concrete*, supra at 261.

II. INTRUSION INTO THE UNION

The General Counsel alleges that the Company intruded by asking for internal Union information at the May 21 and 29 meetings and directly dealing with bargaining unit members in the July 3 email. In support of this position, the General Counsel contends that the requests for information and email to employees amounted to an impermissible attempt to influence internal Union processes. The Company denies that it unlawfully tried to influence the ratification vote by asking for information or direct dealing. It further argues that even if it did engage in direct dealing, it adequately repudiated any unlawful conduct.

A. Direct dealing

An employer directly deals with bargaining unit members when it: (i) communicates directly with union-represented employees; (ii) to establish or change wages, hours, and terms and conditions of employment or to undercut the role of the union; and (iii) does so to the exclusion of the union. *Metalcraft of Mayfield*, 367 NLRB No. 116, slip op. at 8 (2019) (employer "sent the . . . letter directly to Union employees and did not provide a copy to the Union"). Cf. *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000) (no purpose to exclude when employer included union in feedback for implementation of a new system). The Board applies a totality-of-the-circumstances inquiry when determining whether an employer intends to undercut the union's role. See *Public Service Co. of Oklahoma*, supra.

Here, the Company communicated directly with union-represented employees in the July 3 email, meeting the first prong of the *Permanente* test. *Permanente*, supra. By sending the July 3 email, the Company attempted to coerce the Union to hold a ratification vote for the contract that would result in changes to the wages and hours. The Company also used this email to undercut the Union's bargaining position since the bargaining committee did not acquiesce to the Company's proposals at the time. Instead, the Company encouraged employees to ask their bargaining representative for a ratification vote rather than leaving it to internal union processes. Thus, the Company's conduct met the second prong of the *Permanente* test. Cf. *Southern California Gas Co.*, 316 NLRB 979, 981–982 (1995) (employer did not meet the second prong by merely collecting information from employees rather than communicating proposals to them). Finally, the Company excluded the Union by not sending it the July 3 email to the Union, thus satisfying the third prong of the *Permanente* test. *Metalcraft of Mayfield*, supra.

The Company argues that the emails constituted a simple communication of the way it viewed the bargaining process to

unit members. Ye it concedes that the communication conveyed Giglio's "expectation" that the Union hold a vote, conveying an effort to changes terms and conditions of employment. Cf. *Southern California Gas Co.*, supra. Accordingly, the Company engaged in direct dealing with bargaining unit employees.

When an employer engages in direct dealing, it can repudiate its conduct under the *Passavant* standard. To make an effective repudiation under *Passavant*, an employer must specifically repudiate the coercive conduct in a timely and unambiguous manner. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978). The repudiation must also be free from other proscribed illegal conduct, adequately published, and free of subsequent illegal conduct. Ibid. An employer adequately publishes a repudiation when the employer communicates it to all employees who received the coercive communication, not just to bargaining unit members. *Auto Workers Local 785*, 281 NLRB 704, 707 (1986).

Here, the Company sought to repudiate its July 3 email on July 28 but did not publish it adequately. By only sending the repudiation to bargaining unit employees, the Company violated the requirement in *Auto Workers Local 785* to communicate the repudiation to all employees who received the coercive communication, not just the bargaining unit employees. 281 NLRB at 707. Therefore, the Company's repudiation is insufficient.

The Company also seeks refuge in *Eagle Transport Co.*, where an employer did not violate the Act by unilaterally correcting miscalculated paychecks. 338 NLRB 489, 490 (2002) (reasoning that a mistake unilaterally corrected did not constitute a unilateral change). There, the Board reasoned that punishing an employer for a simple mistake which it promptly corrected would exceed the Act's scope. Ibid. The Company's comparison, however, does not hold water because the violation in *Eagle Transport Co.* was unintentional, while the violation here was clearly intended (i.e. not sending the repudiation to all affected employees). Moreover, *Eagle Transport Co.* analyzes whether a unilateral change in wages without bargaining was unlawful. Ibid. This is inapplicable as to the question of whether the Company adequately published its repudiation. Thus, the Company unlawfully engaged in direct dealing with unit employees and failed to adequately repudiate that action in violation of Section 8(a)(5) and (1).

B. Intrusion into the certification process

A union has sole authority as to when or whether it will submit a contract for ratification to its membership. *M&M Oldsmobile*, 156 NLRB 903, 905 (1966). Thus, an employer violates the Act by insisting that a union submits its contract for ratification. *Dish Network Corp.*, 366 NLRB No. 119, slip op. at 3, fn.6 (2018). Employers can, however, communicate their opinions regarding the process a union uses for a vote. See, e.g., *Westinghouse Electric Corp.*, 232 NLRB 56, 56 (1977) (lawful communication that a union strike vote was premature and that employees should instead vote to certify the contract); *Alexander Linn Hospital Assn.*, 244 NLRB 387, 392-393 (1979) (lawful communication about which site could be used for a union vote); *Putnam Buick, Inc.*, 280 NLRB 868, 869 (lawful communication that employees should ratify contract individually and not hold strike vote).

Here, the Company asked for internal Union information, including the procedures for ratification votes, at the May 21 and May 29 meetings. The Company also mentioned its desire for the Union to hold ratification votes over its proposed contract in the July 3 and September 28 emails. These communications, however, did not amount to insistence. The Union did not respond to the two requests for information on May 21 and 29, and the Company did not push back on this denial. The record reflects no other requests, and the Company dropped the topic in future negotiations. Thus, the record does not support the General Counsel's allegation of unlawful insistence. Cf. *Dish Network Corp.*, 366 NLRB at 3 (lack of good-faith bargaining when the employer refuses to meet until the Union agrees to submit a contract for ratification).

Furthermore, the content of the emails merely indicates that the Company sought to communicate its views regarding the contract and its views as to whether the Union should hold a ratification vote on its proposals. The General Counsel stresses that the Company said that failing to ratify its proposal at that meeting would result in a much worse offer at the June 29 meeting. Giglio made that statement, however, to condition the acceptance of a new CBA on the contracting side letter—not to make the Union hold a vote on the contract. Like in the cases cited above, the Company lawfully communicated its opinion in a way that demonstrates no coercive intent. Accordingly, this allegation is dismissed.

III. REFUSAL TO BARGAIN OVER PERSONAL TIME AS RETALIATION FOR FILING UNFAIR LABOR PRACTICES CHARGE

The General Counsel alleges that the Company refused to bargain with the Union over personal time policies in retaliation for the Union filing a previous unfair labor practice charge against the Company. The Company denies this allegation and insists that it refused to adopt the flexible policy proposed by the Union because the previous charge alleged that supervisors arbitrarily applied their discretion.

Personal time is a mandatory subject of bargaining. *Venture Packaging, Inc.*, 294 NLRB 544, 553 (1989). Refusal to bargain over a mandatory subject violates the duty of good faith. Id. at 544. When examining the refusal to bargain, the Board considers factors such as the motives and parties' states of mind, whether the parties have maintained an ongoing relationship, and whether other unfair labor practices are involved, among others. *Chevron Chemical Co.*, 261 NLRB 44, 45-47 (1982), enfd. 701 F.2d 172 (5th Cir. 1983). The Board examines these factors with an emphasis on the totality of the circumstances. See *Public Service Co. of Oklahoma*, 334 NLRB at 488-490.

Several times throughout the bargaining sessions, the Company declared that it would not bargain over personal time because the Union previously filed an unfair labor practice charge. On July 8, the Company stated that it was not interested in bargaining about personal time because of the previous charge and "[the Union's] aggressive actions." On September 4, the Company stated that "the gravy train has moved on" regarding a favorable personal time policy due to the previous charge. The Company reiterated the same position at the November 29 meeting. In each circumstance, the Company clearly expressed a refusal to bargain due to the previous unfair labor practice charge.

The Company seeks to justify these statements as a modification of the policy to comply with the Act, but the evidence demonstrates otherwise. Cf. *Otis Elevator Co.*, 283 NLRB 223, 226 (1987) (no violation where the employer refuses to budge on one issue due to disagreement rather than any underlying unfair labor practice). Accordingly, the Company violated Section 8(a)(1) by refusing to bargain over personal time in retaliation for the Union filing a previous unfair labor practice charge.

IV. DENIGRATION OF THE UNION

The General Counsel alleges that the Company unlawfully denigrated the Union at the June 29 bargaining session and in the September 28 email. Specifically, the General Counsel alleges that the Company made false accusations about the Union that effectively drove a wedge between employees and the Union and implied that the Union bore fault for employees not receiving improved benefits. The Company denies these allegations and characterizes its communications as accurate descriptions of the bargaining process to employees.

Employers denigrate unions in violation of the Act when they discourage the exercise of Section 7 rights. *Dayton Hudson Corp.*, 316 NLRB 477, 483 (1995) (violation when employer denounced one employee in the presence of another). One way they denigrate unions is by communicating with employees in a way that places the burden on the union for the employer withholding benefits. See, e.g., *Met West Agribusiness*, 334 NLRB 84, 84 (2001) (employer's "statement placing the onus on the Union for denying a wage increase clearly violated the Act"); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987) (attribution to union of denial of wage increase is unlawful). Another way is by making false communications that will likely drive a wedge between the union and employees. See *Armored Transport*, 339 NLRB 374, 378 (2003) (employer denigrated the union by trying to drive a wedge between the union and employees). The employer can, however, inform employees about the status of negotiations, proposals previously made to the union, or its version of a breakdown in negotiations. *Procter & Gamble Manufacturing Co.*, 160 NLRB 334, 340 (1966) ("As a matter of settled law, Section 8(a)(5) does not . . . preclude an employer from communicating, in noncoercive terms, with employees during the collective bargaining negotiations.").

Here, the Company took several actions that implied the union bore fault for employees not receiving better benefits. At the June 29 bargaining session, the Company said that the Union began to act regressively and stated that Myers was poorly representing bargaining unit members. Read in this context, the September 28 email, by characterizing the Union as ungrateful and comparing employees' contemporary benefits to those proposed by the Company, implied that the Union bore fault for passing on the opportunity to increase benefits. Additionally, the Company included false communications in its July 3 email. It corrected these misconceptions in the July 28 email, but waiting nearly a month to do so tended to drive a wedge between employees and the Union. These communications included enough disparaging content that in the totality of the circumstances these messages denigrated the Union. See *Public Service Co. of Oklahoma*, supra.

The Company characterizes these messages as merely informing the Union of its version of the breakdown in negotiations, citing *Procter & Gamble*, supra. Despite this characterization, the unflattering portrayal of the Union in these emails unlawfully disparaged it because it placed the burden on the Union for employees not receiving improved benefits. *Met West Agribusiness*, supra. Thus, the Company violated Section 8(a)(1) by disparaging the Union and its leadership on June 29 and September 28, 2018.

V. UNILATERAL CHANGE TO THE APPRAISAL SYSTEM

The General Counsel alleges that the Company unilaterally changed the terms of the appraisal system. The Company does not deny the unilateral change. It argues, however, that it lawfully changed the appraisal system in a non-material way and, in any event, that the Union waived its right to bargain over changes to the appraisal system.

Employers violate the Act when they enact unilateral changes of mandatory subjects without giving the union an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 735, 747 (1962). Specifically, an employer must notify and bargain with its employees' bargaining representative before changing employment appraisal systems. *Safeway Stores*, 270 NLRB 193, 195 (1984). Unilateral changes to appraisal systems only violate the Act, however, when those changes are "material, substantial, [or] significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

Changes in policy that modify employee incentives are material changes. *Murphy Diesel Co.*, 184 NLRB 757, 764 (1970), enfd. 454 F.2d 303 (7th Cir. 1971) (material change where change from informal time requirements to requiring the submission of written excuses for lateness). Mere changes in the way an employer conducts an existing procedure are not material, though. *Rust Craft Broadcasting of New York*, 225 NLRB 327, 327 (1976) (change from handwritten timecards to time clocks not significant); *UNC Nuclear Industries*, 268 NLRB 841 (1984) (change from non-oral to oral startup readiness tests for nuclear operators not significant). When changes are so minimal they lack impact, employers can unilaterally enact them. *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991) (citing *Rust Craft Broadcasting*, supra).

Before the Company changed the appraisal system, the form contained eleven specific criteria for evaluating employees. These evaluations led to promotion or discipline if employees met specific thresholds on the eleven factors. After the unilateral change, the form only contained three general criteria that gave reviewing supervisors significantly more discretion. The Company also did not specify how promotion and discipline would work under the new system. These changes drastically affect the incentives of the employees due to changing what employees strive toward when seeking to gain promotion or avoid discipline. The transformation here from many discrete factors to a few generalized factors mirrors the large shift in *Murphy Diesel*. *Murphy Diesel*, supra.

The Company argues that this change merely modifies the way supervisors record evaluations. This assertion, however, flatly contradicts the Company's testimony that it currently had no specific process addressing promotion and discipline under the new system. The changes here bear no resemblance to the minor changes in *Rust Craft Broadcasting* and *UNC Nuclear*.

Those changes did not materially change employee incentives; these changes will. Thus, the change is material.

The Company next argues that the Union waived its right to bargain over these changes in the CBA. Unions can waive the ability to bargain over unilateral changes in terms or conditions of employment through a collective-bargaining agreement. *Omaha World-Herald*, 357 NLRB 1870, 1871 (2011). This waiver must be clear and unmistakable. *New York Mirror*, 151 NLRB 834, 839–840 (1965) ("The Board will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject unless the contract expressly or by necessary implication confers such a right."); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated.").

Pursuant to a waiver, an employer can lawfully enact a unilateral change if the employer has a sound basis for ascribing a particular meaning to the contract. *Vickers, Inc.*, 153 NLRB 561, 570 (1965) ("The Board is not the proper forum for parties seeking an interpretation of their collective-bargaining agreement. Where . . . an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, . . . the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct"). The Board will not find a waiver, however, when the employer presents the bargaining representative with a "fait accompli." *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip. op. at 2 (2018).

Article XXVI, Section 6 of the CBA permits the Company to revise appraisal procedures "as necessary, after Management has consulted with the Union and taken its views into consideration." This clause establishes a process allowing the Company to change appraisal procedures in a way that sidesteps its statutory obligation to bargain. The Company thus has a sound basis for interpreting this text as a waiver since the Union agreed to only consult with the Company. *Vickers, Inc.*, supra. The General Counsel argues that this language does not waive the right to bargain since it does not mention any release of the right to bargain under the Act, but such an explicit release is not necessary given the freedom afforded to employers with a reasonable understanding of a contract. Ibid. Thus, the Union waived its rights to bargain over changes to the appraisal system.

The Company did, however, present the change as a fait accompli. After notifying employees of the change in a March 7 email, the Union emailed the Company, laying out its concerns. The Company and the Union discussed them, and the Company eventually proceeded with the change as planned on March 28. By not taking any of the Union's concerns into account, the Company "merely [presented information] concerning the fait accompli." *Harley-Davidson Motor Co.*, supra at 3. In *Harley-Davidson*, the Board found notice of under a month to be insufficient. Ibid. The 21-day time period between notice and implementation is insufficient under *Harley-Davidson*. Ibid. (finding a time of 20 days insufficient). Therefore, the Company violated Section 8(a)(5) and (1) by enacting a unilateral change to its appraisal system without first notifying and consulting with the Union.

VI. BAD FAITH DEMANDS IN THE BARGAINING PROCESS

The General Counsel alleges that the Company bargained with a general demeanor of bad faith throughout the bargaining process by making repeated unlawful demands, including conditioning acceptance on a contracting side letter that addresses a permissive subject and foreshadowing an impasse. She also alleges three per se violations: (i) offering PPTO in exchange for decertifying the Union; (ii) demanding to bargain non-economic issues to conclusion prior to bargaining economic issues to conclusion; and (iii) conditioning acceptance of the contract on a contracting side letter that is repugnant to the Act.

A. Promise of PPTO if Employees Decertified the Union

Employers cannot give an implied promise of benefits if a reasonable employee thinks he receives the benefits in exchange for voting out the union. See *Viacom Cablevision*, 267 NLRB 1141, 1141 fn. 3 (1983) (describing *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979), where the Board found a violation when the employer went to great lengths to contrast union and non-union pension plans). One way they make an illegal implied promise is by comparing the benefits afforded to union members and nonmembers. *Grede Plastics*, 219 NLRB 592, 593 (1975) (letter stressing non-union employees receive better wages and benefits than union employees illegally implies better benefits in exchange for decertifying the union). An employer has a general right to compare represented and unrepresented employees' wages and benefits absent a threat, though. *Langdale Forest Prods.*, 335 NLRB 602, 602 (2001) (finding lawful statements about a legal obligation to bargain accompanied with comparisons of union and non-union benefits).

Here, when Myers asked Giglio at the July 9 meeting what the Union could give in return for the Company's agreement to eight weeks of PPTO, Giglio said the employees could "go without a Union." Myers sought clarification and asked Giglio whether decertification of the Union would lead to 8 weeks of PPTO. Giglio replied, "You said that, I didn't." These statements clearly express an offer to exchange PPTO for decertification of the Union. Compare *Grede Plastics*, supra, with *Langdale Forest Prods.*, supra.

The Company argues that Giglio made these remarks sarcastically. The facts demonstrate, however, that Giglio intentionally made these statements during protracted bargaining over PPTO. But even if the statement was intended as sarcastic, the Board analyzes its legality based on its impact on a reasonable employee. *Viacom Cablevision*, supra. A reasonable employee would understand such statements as implying a promise of a benefit in exchange for decertifying the Union. Under the circumstances, Giglio's July 9, 2018 statement violated Section 8(a)(5) and (1).

B. Bargaining Non-Economic Issues to Conclusion

When an employer inflexibly insists on bargain non-economic issues to completion before addressing economic issues, the employer acts in bad faith. *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034 (1986). Merely deferring the discussion of economic issues to a later date, however, does not violate the Act so long as the deferral does not lead to undue delay. *Long Island*

Jeep, Inc., 231 NLRB 1361, 1367 (1977). In *Long Island Jeep*, the Board found no undue delay when parties did not bargain over economic issues until the fifth meeting. Id. at 1361.

Here, the General Counsel characterizes the Company as unyielding and ceaselessly insistent on bargaining non-economic issues to completion. The facts do not demonstrate that, though. The Company opened the first bargaining session by stating its desire to bargain non-economic issues to completion. The Union did not agree to this demand but bargained only over noneconomic issues for the first few meetings. In subsequent meetings, the Company and the Union started to discuss economic issues (personal time on May 21, wages on May 25, wage data on May 31). This behavior demonstrates that the Company did not insist on bargaining non-economic issues to completion. In fact, it began bargaining economic issues at the sixth meeting, similar to the employer and union waiting to discuss economic issues until the fifth meeting in *Long Island Jeep*. Ibid. Therefore, the Company's position as to the timing for discussion of the economic issues did not violate Section 8(a)(5) and (1).

C. The Side Letter as Repugnant to the Act

Employers can legally hard bargain over provisions to arbitrate. *Chevron Chemical Co.*, 261 NLRB at 46. Unions can also completely waive their rights to the Act through their collective-bargaining agreements. See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (the Act does not override the requirements of the Federal Arbitration Act); Id. at 1631 (courts shall "enforce arbitration agreements according to their terms, including terms that specify . . . *the rules* under which that arbitration will be conducted" (emphasis original) (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)).

Here, the General Counsel first argues that waiving rights to the Act under an arbitration agreement is repugnant to the Act, claiming that the purpose of the Act requires preventing employees from waiving their rights to the Act under arbitration agreements. She also cites Board precedent that significantly predates *Epic Systems* and the modern line of Federal Arbitration Act precedent. But these arguments hold no weight. The Court in *Epic Systems* summarily rejected the General Counsel's argument. Id. at 1631 (rejecting a purposive argument against enforcement of the Federal Arbitration Act and citing many previous decisions where that same argument failed). Thus, a waiver of rights to the Act under an arbitration agreement is not repugnant to the Act itself.

The General Counsel also asserts that the Company unlawfully insisted on the arbitration waiver as a side term. If it did, however, it did so lawfully because the decision whether to arbitrate claims is a mandatory subject of bargaining. See *Chevron Chemical Co.*, supra. The Company did no such thing, though. It offered the arbitration term at the June 4 bargaining session in a side letter. At the July 19 session, after the Union indicated it would not agree to that term, the Company dropped the term from the side letter. The Company cannot unlawfully insist on a term it eventually dropped. See *Smurfit Stone Container Enterprise*, 357 NLRB 1732, 1735–1736 (2011), enfd. 594 Fed. Appx. 897 (9th Cir. 2014) ("The proper test for unlawful insistence is whether agreement on the mandatory subjects of bargaining [was] conditioned on the nonmandatory subject of bargaining."). Thus, the Company's efforts to have the Union agree to an arbitration waiver did not violate Section 8(a)(5) and (1). That allegation is dismissed.

D. Conditioning on the Side Letter as Bad Faith

An employer bargains in bad faith when it unlawfully insists on a term that is a permissive subject of bargaining. Id. at 1732. "The proper test . . . is whether agreement on the mandatory subjects of bargaining [was] conditioned on the nonmandatory subject of bargaining." Id. at 1735–1736 (2011). Altering the scope of a bargaining unit is a permissive subject. See *Wackenhurt Corp.*, 301 NLRB 835, 852 (2005) ("Once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board." (quoting *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)).

The Company cites the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB* to establish that contracting to alter the scope of the bargaining unit is a mandatory subject of bargaining. 379 U.S. 203 (1964). In doing so, however, the Company ignores the Court when it states:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d).

Id. at 215. Thus, when an employer unlawfully insists on changing the scope of the bargaining unit as a term of employment, it violates the Act.

Here, the Company insisted on altering the scope of the bargaining unit as a condition of its agreement at several meetings. At the third meeting, the Company proposed allowing contracting up to 5 percent of the bargaining unit and up to 10 percent of any job family for no more than 6 months without the consent of the Union. At this meeting, when the Union objected, Giglio said that removing this provision was "not [a] change[] that the Company would be interested in." The Company argues that this conduct is not intended to change the scope of the bargaining unit, but that has no merit because the Supreme Court in *Fibreboard* held otherwise. Ibid. (describing changing the bargaining unit as replacing bargaining unit employees with independent contractors who perform the same work).

At a side bar on May 31, the Company introduced a similar proposal. At the June 4 meeting, the Company said that it needed the Union to "come to an agreement on contracting before [it could] provide a last best and final." The Union received a letter on June 5 stating the same information. On June 19, the Union acquiesced somewhat to the Company's demands, but the Company returned on June 25 and insisted on the same proposal. On June 29 the Company conveyed an LBFO that included language on contracting. At that meeting, the Company said "the offer would go down significantly" if the Union did not ratify the proposal with contracting terms by July 11. At the July 9 meeting, the Company continued to insist on contracting language, as it

did on September 4. On September 27, the Union offered a counterproposal that changed the contracting term, but the Company excoriated the Union for not using the proper format to the point that the Union had to leave the meeting. On November 29, the Company again said that it could not reach an agreement with the Union without this proposal.

The Company repeatedly insisted that it could not reach a final agreement without an agreement on its contract work proposal. This demonstrates that the Company conditioned a final agreement on the contracting term, a permissive subject. The Company argues, however, that insistence is not unlawful as long as the insisting party does not press to impasse, citing *Taft Broadcasting Co.*, 274 NLRB 260 (1985). That position is meritless, however, since the Supreme Court, in *NLRB v. Borg-Warner Corp.*, held otherwise. See 356 U.S. 342, 346-348 and 350 (1958) (describing the insistence in the absence of impasse as violating the Act). The Company only needs to unlawfully condition its agreement to violate the Act—and it did. Thus, the Company violated Section 8(a)(5) and (1).

E. Foreshadowing Impasse as Bad Faith

An employer bargains in bad faith when it does not bargain with a sincere effort to reach an agreement. *Mid-Continent Concrete*, 336 NLRB at 259. Here, the General Counsel alleges that the Company foreshadowed the rocky road ahead when Giglio expressed concern on June 4 that the Union would not acquiesce to contract work proposal and, as a result, impasse would ultimately occur. Giglio made this statement, however, when expressing fear of an impasse before June 15, the CBA's expiration date. Impasse was never declared at any of the sessions, nor did the Company seek to manufacture one. Accordingly, this allegation is dismissed.

F. General Conduct

The Company's general conduct throughout the entire bargaining process demonstrates overall bad faith on its part. Although the Company did not violate the Act in every manner alleged by the General Counsel, it did engage in several unfair labor practices. Specifically, the Company directly dealt with unit members, refused to bargain over personal time in retaliation for the Union filing unfair labor practice charges, denigrated the Union, unilaterally changed the appraisal system in violation of the Act, offered to decertify the Union in exchange for PPTO, and conditioned a new CBA on a permissive contracting side letter.

The Board examines the totality of the circumstances when examining whether the conduct of an employer constitutes bad faith. *Public Service Co. of Oklahoma*, 334 NLRB at 488–490. The total conduct of the Company here demonstrates numerous instances of bad faith. See *Mid-Continent Concrete*, supra at 261 (describing various indicia of bad faith, factors that appear here). Thus, the Company violated Section 8(a)(5) and (1) by its overall conduct throughout the bargaining process.

CONCLUSIONS OF LAW

1. The Respondent, ExxonMobile Research & Engineering Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit of employees (the bargaining unit):

> Accountant, Accountant Senior, Accounting Assistant, Audio -Visual Assistant, Audio - Visual Technician, Audio -Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X -Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Failing and refusing to bargain collectively and in good faith with the Union over personal time as the exclusive bargaining representative of its employees on July 8, September 4 and November 29, 2018;

(b) Implementing material changes to its employee performance review system on March 28, 2018 without prior notice to the Union and affording it an opportunity to bargain with respect to this conduct and the effects of this conduct;

(c) Bypassing the Union and dealing with employees in the bargaining unit on July 3, 2018, through Employee Information Bulletin 2018-06; and

(d) Its failure to bargain in good faith by unlawfully insisting on reaching an agreement on contracting out unit employees' work, a permissive subject of bargaining, as a condition to reaching a final agreement.

(e) Its overall failure and refusal to bargain collectively and in good faith with Union as recited above during the period of March 2018 to January 2019.

6. The Respondent violated Section 8(a)(1) by:

(a) Failing and refusing to bargain collectively and in good faith with the Union over personal time as the exclusive bargaining representative of its employees on July 8, September 4 and November 29, 2018;

(b) Disparaging the Union's leadership during bargaining on June 29, 2018 and by email on September 28, 2018; and

(c) Promising to grant unit employees 8 weeks of parental paid time off on July 8, 2018, if they withdrew from Union representation.

7. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including rescinding the unlawful unilateral change to employee performance appraisals, make whole employees for any loss of pay or benefit they may have suffered as a result of said unilateral change in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River,* 356 NLRB 6 (2010).

Additionally, having found that the Respondent unlawfully conditioned negotiations with the Union on a nonmandatory subject of bargaining—the contracting out of unit employees' work—it is ordered, upon request by the Union, to bargain collectively and in good faith concerning terms and conditions of employment of unit employees, and, if an understanding is reached, to embody it in a signed agreement. Upon resumption of bargaining, it is further ordered to reinstate all tentative agreements reached during contract negotiations. See *Health Care Services Group*, 331 NLRB 333 (2000).

The Respondent shall also be ordered to schedule meetings to ensure the widest possible attendance where a representative shall read the notice to employees during worktime and in the presence of a Board agent or, in the alternative, have a Board agent read the notice to employees during worktime in the presence of the Respondent's supervisors and agents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, ExxonMobile Research & Engineering Company, Inc., Annandale, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the Independent Laboratory Employees Union, Inc. (the Union) and giving it an opportunity to bargain.

(b) Disparaging or denigrating the Union as the exclusive collective-bargaining representative of unit employees.

(c) Bypassing the Union and dealing directly with employees in the bargaining unit regarding terms and conditions of employment.

(d) Promising to grant unit employees parental paid time off if they withdraw from the Union.

(e) Insisting on bargaining over permissive subjects as a condition to reaching a final collective-bargaining agreement.

(f) 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) Upon request of the Union, rescind the unilateral change to the employees' performance appraisal system.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Accountant, Accountant Senior, Accounting Assistant, Audio-Visual Assistant, Audio-Visual Technician, Audio-Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X-Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

(c) Make whole the employees for any loss of earnings and other benefits suffered as a result of the change in the employees' performance appraisal system.

(d) On request, bargain with the Union in good faith to an agreement or impasse concerning any proposed changes in terms of employment.

(e) Within 14 days after service by the Region, take the following actions to notify employees of this Order at its facility in Annandale, New Jersey:

(1) Post copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 22, 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.

(2) Distribute the notices 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

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

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 28, 2018.

(3) Schedule meetings to ensure the widest possible attendance where a representative shall read the notice to employees during worktime and in the presence of a Board agent or, in the alternative, have a Board agent read the notice to employees during worktime in the presence of the Respondent's supervisors and agents.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. June 12, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT implement any changes in wages, hours or other terms and conditions of employment of the following employees exclusively represented by the International Association of Machinists and Aerospace Workers, Tyson Lodge No. 175, District 98 (the Union) without first notifying and affording the Union the opportunity to collectively bargain over said changes:

> Accountant, Accountant Senior, Accounting Assistant, Audio-Visual Assistant, Audio- Visual Technician, Audio -Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X-Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

WE WILL NOT disparage or denigrate the Union as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT bypass the Union and deal directly with employees in the bargaining unit

regarding terms and conditions of employment.

WE WILL NOT promise to grant unit employees parental paid time off if they withdraw from the Union.

WE WILL NOT insist on bargaining over permissive subjects as a condition to reaching a final collective-bargaining agreement.

WE WILL NOT 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.

WE WILL, on request of the Union, rescind the unilateral change to the employees' performance appraisal system.

WE WILL, on request by the Union, bargain collectively and in good faith concerning terms and conditions of employment of unit employees, and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request, bargain with the Union in good faith to an agreement or impasse concerning any proposed changes in terms and conditions of employment of employees in the following bargaining unit exclusively represented by the Union

WE WILL make whole the employees for any loss of earnings and other benefits suffered as a result of the change in the employees' performance appraisal system.

EXXONMOBIL RESEARCH & ENGINEERING COMPANY, INC.

The Administrative Law Judge's decision can be found at www nlrb.gov/case/22-CA-218903 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

Re: Marathon Petroleum Co., d/b/a Catlettsburg Refining, LLC
Case 09-CA-162710

ORDER

Counsel for the General Counsel's Motion to Remand this Matter to the General Counsel to Process the Charging Party's Withdrawal Request is granted. Accordingly, this case is remanded to the Regional Director for Region 9 for further appropriate action.

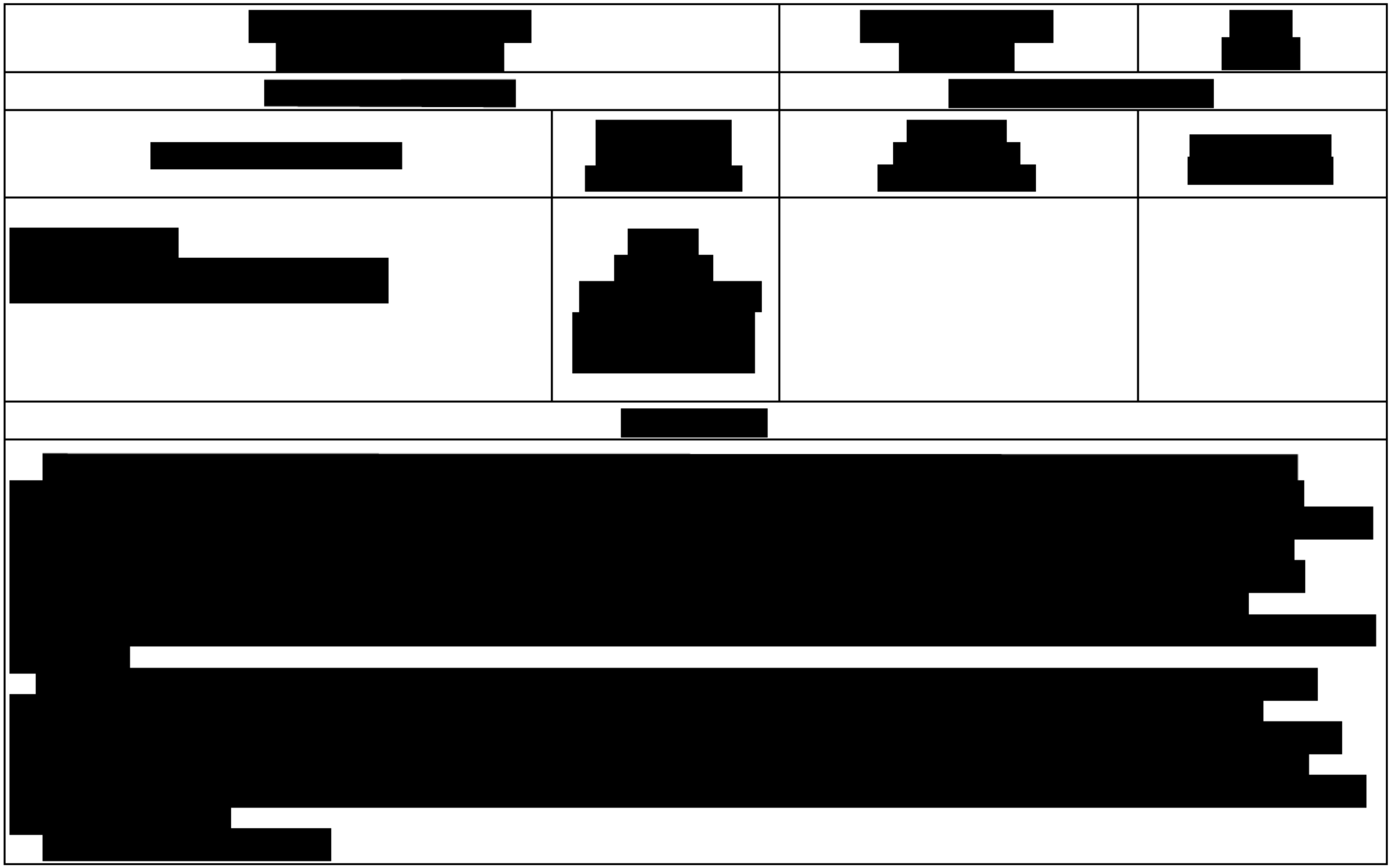
Dated, Washington, D.C., June 23, 2020.

By direction of the Board:

/s/ Farah Z. Qureshi
Deputy Executive Secretary

[redacted]

[redacted]



District Hospital Partners, L.P. d/b/a The George Washington University Hospital, A Limited Partnership, and UHS of D.C., Inc., General Partner *and* 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region a/w Service Employees International Union. Cases 05–CA–216482, 05–CA–230128, and 05–CA–238809

April 30, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

On September 4, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions only to the extent consistent with this Decision and Order.

The principal issue in this case is whether the Respondent failed and refused to bargain in good faith with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region (the Union) in violation of Section 8(a)(5) and (1) of the Act solely

[1] There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(1) by telling employees, when it announced a new transit benefit, that "[p]reviously the union did not negotiate this benefit on your behalf so you did not receive it." There are also no exceptions to the judge's finding that the Respondent's "bargaining briefs"—summaries of the state of negotiations from the Respondent's point of view—were lawful, and even if there were, those communications were protected under Sec. 8(c). Thus, unlike our colleague, we do not rely on them in assessing the lawfulness of the Respondent's initial bargaining proposals.

The dissent takes the position that the 8(c)-protected status of the bargaining briefs does not preclude considering them as evidence of "the Hospital's motivation." Yes, it does. Evidence of "the Hospital's motivation" would be relevant to whether the Respondent bargained with a purpose to frustrate agreement—i.e., whether it bargained in bad faith. But statements protected under Sec. 8(c) cannot be used as evidence of an unfair labor practice. 29 U.S.C. § 158(c).

The cases the dissent relies on are distinguishable in two respects. First, the statements at issue in those cases were not found protected under Sec. 8(c). Second, those cases involved employers whose communications to employees reinforced an unlawful "take-it-or-leave-it" approach to collective bargaining, which the Respondent did not employ.

In *American Meat Packing Corp.*, 301 NLRB 835 (1991), at the outset of negotiations for a successor contract, the employer proffered a series of proposals, the most significant of which sought extensive changes in job classifications and wage rates. Three days later, the employer's president, Herrmann, announced to employees that the proposal on job classifications and wage rates "[would] go into effect on December 20, 1985," the day after the current contract expired. Id. at 836. And in subsequent letters to employees, Herrmann "pictured the union negotiators as people with no legitimate role to play other than agree to the Respondent's proposals." Id. at 839. Meanwhile, in collective bargaining, it was starkly apparent that the employer had entered negotiations with a predetermined resolve not to budge from its initial proposals. Based on this "take-it-or-leave-it" stance, plus additional unlawful conduct, including direct dealing, unilateral implementation of the job classifications proposal, and a threat of plant closure, the Board found that the statement to employees 3 days into negotiations further evidenced the employer's "hostility to the bargaining process," id. at 836, and that the totality of the evidence, including the employer's communications to employees, "manifested an intent to undermine employee support for the [u]nion and enable [the employer] to impose, virtually unchanged, what it unilaterally decided at the outset was a fair set of terms and conditions of employment." Id. Notably, the Board rejected the judge's reasoning that the employer's bargaining proposals alone constituted bad-faith bargaining. Id. at 835.

In *General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970), the Board relied in part on a statement the employer made to employees, by means of which it "consciously placed itself in a position where it could not give unfettered consideration to the merits of any proposals the [u]nion might offer." Id. at 196. Before bargaining commenced, the employer told employees that it would make "a fair and 'firm' offer that would include 'everything' shown by its total research to be in the common best interests of employees, shareowners, and others concerned with the success of its business." Id. at 216. Then, in negotiations, it told the union that "everything we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now." Id. at 196.

Here, unlike the employers in *American Meat Packing* or *General Electric*, the Respondent never refused to consider union proposals, did not adopt a take-it-or-leave-it posture, and did not use statements it made to employees as leverage in negotiations. And the General Counsel never contended otherwise: the only issue in this case is whether the Respondent's proposals alone demonstrated bad-faith bargaining. Moreover, as discussed in more detail below, after presenting its initial proposals to the Union, the Respondent demonstrated a willingness at the bargaining table to move from its starting positions, unlike the employers in the cases the dissent cites.

[2] The Respondent has excepted to the judge's ruling at the hearing to permit the General Counsel to amend the Amended Complaint to allege that the Respondent violated Sec. 8(a)(1) when, during its trial preparation, it interviewed employees without first adequately advising them of their rights under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). The Respondent asserted that Sec. 10(b) barred the allegation because it was not closely related to any of the timely-filed unfair labor practice charges against it. Although the judge granted the General Counsel's request to amend, he found that the Respondent's interviews did not violate Sec. 8(a)(1). No party excepted to the judge's dismissal of the allegation. Accordingly, we find it unnecessary to pass on the Respondent's exception because it is moot.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

because of the bargaining proposals it presented to the Union during the course of the parties' negotiations for a successor collective-bargaining agreement (CBA). The judge found that the Respondent's bargaining proposals evidenced unlawful surface bargaining.[4] For the reasons discussed below, we disagree with the judge. We find that, although the Respondent clearly engaged in hard bargaining, the General Counsel failed to show that the Respondent's proposals in and of themselves demonstrated bad-faith bargaining. All other excepted-to findings depend on the surface-bargaining finding; reversing the judge's decision as to the latter, we necessarily reverse as to the former. Accordingly, we dismiss the complaint in its entirety.

Facts

The judge's decision goes into far more detail concerning what transpired at the parties' collective-bargaining meetings than we will attempt here. What follows are the more salient facts.

For more than 20 years, the Union represented a bargaining unit of around 150 full- and part-time employees of the Respondent who worked in the Environmental Services, Linen Services, Ambulatory Care Center, and Food Services Departments of the George Washington University Hospital in Washington, D.C. The parties' most recent CBA expired on December 19, 2016. In anticipation of the CBA expiring, on November 21 and 22, 2016, the parties held their first negotiation sessions. The parties discussed bargaining schedules, "housekeeping" items, and several contract provisions. Wanting to rectify what it viewed as numerous deficiencies in the current CBA, the Respondent mentioned upfront that it would seek to substantially alter many of the contract provisions to make them less antiquated and ambiguous. Specifically, the Respondent told the Union that it sought "a contract that is clear [] to the managers that will utilize it" and explained that "a lot of what we have is out of date and antiquated. We want to streamline and [make it] as modern as possible."[5]

The Respondent's Initial Management Rights Proposal

On December 6, 2016, at the parties' next bargaining session, the Respondent tendered its initial Management Rights proposal. In its proposal, the Respondent sought to reserve for itself the right to act unilaterally with respect to a number of important managerial prerogatives.[6] Because it was also proposing to nullify all past practices, the Respondent explained that it wanted a comprehensive Management Rights clause that captured all of the rights it had already been exercising under the soon-to-expire CBA.

At the parties' fourth negotiation session, on December 7, 2016, the Union was represented by new counsel, Stephen Godoff. Although the Union addressed a few of the Respondent's proposals at this session,[7] its new representative used his initial appearance at the negotiations to level accusations and question motives. He accused the Respondent of creating a difficult negotiating atmosphere and called the Respondent's proposals "disturbing." He questioned the Respondent's "intentions," i.e., whether the Respondent was interested in reaching a new agreement, even though it was only the fourth bargaining session, and only 2 weeks had elapsed since the negotiations had commenced. He described one of the Respondent's proposals as "a nothing burger" and another as "an absolute waste of everyone's time." As the judge succinctly put it, "Godoff started off with a bang." His performance at this session was not atypical, however. In later sessions, he told the Respondent's representatives to "kiss my ass" and to "get the fuck out of here," among other profanities. And later in December 2016, instead of countering the Respondent's initial proposal, the Union opted to threaten

We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[4] The judge also found that the Respondent's alleged bad-faith bargaining caused a majority of the unit employees to sign a disaffection petition, and hence he concluded that the Respondent could not rely on the petition to withdraw recognition from the Union. Based on that finding, the judge found that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from, and refusing to bargain with, the Union and by subsequently implementing unilateral changes to the unit employees' terms and conditions of employment.

[5] Our colleague asserts that the Respondent's "modernizing" proposals "amounted to eliminating crucial guarantees and protections" for employees and the Union. Without accepting her characterization of the potential impact of the Respondent's initial proposals if ultimately agreed to by the parties, we note that the Respondent presented them as its *initial* proposals. The Respondent expressed its willingness to modify those proposals as part of the back-and-forth process of collective bargaining, and it did modify its proposals. For its part, however, the Union mostly declined to participate in the process, resorting to vituperation and curt rejections of the Respondent's proposals rather than seeking to move negotiations forward by offering its own counterproposals.

[6] This included, among other things, the right to (1) allow supervisors to perform bargaining unit work; (2) use contractors and subcontractors to perform bargaining unit work; (3) search unit employees; (4) discipline employees without cause; (5) change benefit plan carriers, insurers, administrators, fiduciaries, and/or trustees; (6) determine the existence, number, and type of positions to be filled by employees; (7) determine the extent to which bargaining unit work could be performed at the facility.

[7] As the judge found, by the end of the December 7 bargaining session the Union had rejected one of the Respondent's proposals and tendered counteroffers regarding three others.

that the Respondent "will wind up being at war. War with SEIU."[8]

The Respondent's Initial Discipline Proposal; Progress on Management Rights

On January 17, 2017,[9] the Respondent submitted its initial Discipline proposal to the Union.[10] At that negotiation session, the Union continued to make profane and denigrating comments about the Respondent's proposals while failing to offer written counterproposals. For instance, the Union's representative referred to one of the Respondent's proposals as "[g]ratuitous bullshit and nastiness I have no interest in[,] disgusting," and he responded to a concern raised by the Respondent with the retort, "[m]anagement flexibility my ass."

At the January 31 negotiation session, the parties discussed the Respondent's initial Discipline proposal. The Union proposed changes, and the Respondent showed flexibility in response, agreeing to provide written notification to employees of certain discipline, to pay discharged employees by a stated deadline, to refrain from disciplining employees in a manner that would embarrass them before other employees or the public, and to strike catchall provisions regarding conduct exempt from progressive discipline. On February 1, the Union responded to the Respondent's initial Management Rights proposal, agreeing to much of it. At negotiation sessions on February 22 and 23, the parties further discussed the Respondent's initial Discipline proposal, and the Respondent made significant concessions in response to concerns raised by the Union, including reducing the length of time that discipline would remain active in employees' files.[11] On March 28, the Respondent presented a revised Management Rights proposal, which addressed a concern raised by the Union. Upset that the Respondent did not make more substantive concessions, the Union responded to the revised Management Rights proposal by telling the Respondent to "[g]et the fuck out of here." The Union made no counterproposal.

The Respondent's Initial No Strikes and No Lockouts, Grievance and Mediation, and Union Security and Dues Checkoff Proposals

On March 29, the Respondent presented its initial proposals on a number of additional subjects. The Respondent tendered its initial No Strikes and No Lockouts proposal, under which employees would be prohibited from picketing and using other economic weapons in response to violations of the CBA or federal law. The Union did not counter this proposal because it did not perceive it as "serious," but it expressed the concern that the proposal would postpone an employee pay raise. At the same negotiation session, the Respondent presented its initial Grievance and Mediation and Union Security and Dues Checkoff proposals.[12] In response to the Grievance and Mediation proposal, Godoff remarked, "This is potentially goodbye to this session. We won't have time to read through this today." Before the parties had a chance to discuss the Respondent's initial Union Security and Dues Checkoff proposals, the Union told the Respondent, "This is bullshit," "We're out of here," and "Kiss my ass. We'll let you know where we are going from here."

On April 5, the parties discussed the Respondent's initial Grievance and Mediation proposal, particularly some

[8] Although the Union threatened "war" with the Respondent, there is no evidence that it seriously considered holding a strike vote or providing the required strike notification to the Federal Mediation and Conciliation Service (FMCS). So also, the Union expressed "concern," as early as March 29, 2017, that negotiations would be prolonged and would delay a wage increase for the unit employees. It reiterated its concern over that delay on June 12, 2017, and colorfully and heatedly complained at various times about the pace of negotiations—and yet it did little to push negotiations to a conclusion, allowing month after month to pass without presenting counteroffers to the Respondent's proposals.

The Union's conduct appeared to acknowledge, implicitly, that the Respondent had superior bargaining leverage, which only increased the longer negotiations continued. The unit employees had not received a wage increase since January 2016, and it was to be expected that they would lose patience with the Union—helped along in this regard by the Respondent's bargaining briefs—as time went by without a successor agreement. Notably, there is no allegation in this case that the status quo *required* the Respondent to increase wages. The dissent implies as much, claiming that the Respondent "withheld" a wage increase "to sow disillusionment among employees." But the Union never filed such a charge, which it presumably would have done if the facts allowed. Our colleague's insinuation to the contrary notwithstanding, the Union evidently recognized that the Respondent's duty was to maintain the status quo while bargaining continued, including keeping wages frozen until the parties either concluded a successor agreement or reached overall impasse. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). In other words, time was on the Respondent's side.

[9] All dates hereinafter are in 2017 unless otherwise indicated.

[10] The Respondent sought, among other things, to delete just-cause language, remove any discipline short of discharge from arbitration, place limits on union representation at investigatory interviews, and only apply progressive discipline "where appropriate."

[11] Our colleague faults the Respondent for meeting no more than two sessions a month, while ignoring the fact that it was the Union that declined to have full-day bargaining sessions.

[12] The Grievance and Mediation proposal would have granted the Union the right to file grievances over certain contractual disputes that it could ultimately submit to non-binding mediation using the services of the FMCS. It also would have permitted an employee to pursue a claim in court for breach of any contractual provision subject to mediation. The Union Security proposal sought to delete the union security provision in the expired CBA in its entirety. The Dues Checkoff proposal sought to eliminate a requirement that, when remitting dues deductions, the Respondent provide the Union a report containing unit employees' contact and work information and to eliminate employee authorization to have their contributions to the 1199SEIU Political Action Fund deducted.

discrepancies between it and the Respondent's Discipline proposal. The Respondent also explained several reasons for its March 29 Union Security proposal, including employee complaints about dues obligations. The Union pointed out that the Respondent had negotiated a CBA in Boston that contained a union security clause. The Respondent replied that the CBA in Boston, including the union security clause, was the "result of back and forth" with the union in Boston. Godoff said, "We'll give you our answer now. No." At that same negotiation session, with respect to proposed changes to the safety clause in the expired CBA, the Union asked, rhetorically, "Do you guys give a shit? It's a disgusting proposal" and exclaimed, "You just don't give a goddamn about these workers." When the Respondent suggested the Union devote more time to countering instead of critiquing, the Union replied, "Here's the counter—no."

On April 6, the Union continued to refuse to negotiate over the Respondent's initial Union Security proposal and instead presented a written counterproposal that summarily stated, "REJECT." Also, at that same negotiation session, despite acknowledging that the wage structure in the expired CBA had created significant problems, the Union proposed a 5 percent across-the-board pay raise. At the May 16 negotiation session, the Respondent stated that it would be tendering a proposal related to employees' hours. Godoff replied, "I'm going to tell you we're not going to accept [new noneconomic] proposals at this point. You can send it to us but, no, we are not going to agree."

The Respondent's Revised Discipline Proposal; Wage Discussions

At the May 25 negotiation session, to resolve a discrepancy the Union had highlighted between the Respondent's Discipline proposal and its Grievance and Mediation proposal, the Respondent amended the former so that it was not inconsistent with the latter.[13] At the June 12 negotiation session, the Union accused the Respondent of causing the negotiations to drag out and noted that employees had been working for months without a pay increase. Nonetheless, at the July 31 negotiation session, the Union insisted that it would not agree to a CBA that did not include "just cause" for discipline and binding arbitration.

On October 6, the parties continued to discuss problems with the wage structure in the expired CBA,[14] and toward the end of the session the Respondent asked whether the discussion would lead the Union to move from its wage proposal, which maintained the existing wage structure and called for an across-the-board increase. The Respondent also remarked that "it shouldn't surprise anyone that we're going to propose a new [wage] str[u]cture." The Union conceded that "it's a terribly unfair system." The Respondent agreed that the parties owed it to future employees and managers "to be clear and make it easier to figure out."

The parties held additional negotiation sessions on January 17, 2018 and February 13, 2018. Godoff was absent from these sessions for medical reasons. On March 12, 2018, the Union filed an unfair labor practice charge against the Respondent alleging that its bargaining proposals constituted surface bargaining.

The Respondent's Initial Wage Proposal

At the parties' May 18, 2018 bargaining session—the first session after the Union filed its unfair labor practice charge—the Respondent made its initial Wage proposal. Under the Respondent's proposal, employees would receive a market-based adjustment and merit-wage increases based on performance evaluations.[15] The Respondent also proposed pay ranges for each classification, and employees' placement within the applicable pay range would be based on their years of experience. According to the Respondent, the transition to pay ranges, which would happen when the CBA was ratified, would result in an immediate wage increase. The Respondent also proposed awarding employees nondiscretionary lump-sum bonuses and shift differential pay.[16]

On May 21, 2018, the parties met for another bargaining session. Despite recognizing problems with the current wage structure, which its proposal for an across-the-board increase retained, the Union objected to the Respondent's proposal on several grounds, including that the proposed merit-wage increase would not go into effect until August 2019 when, as the Union observed, the employees had not received a raise since January 2016.[17] The Respondent replied that the employees would receive a significant wage increase as soon as a new CBA was ratified, but it also noted that the delay in employees receiving a wage

[13] The judge erroneously stated that the Respondent never reconciled the discrepancy.

[14] Relatedly, the parties discussed a lingering wage-underpayment issue. Godoff testified that the Respondent ultimately made the affected employees whole, with interest, after extensive discussion with the Union over the amount of backpay due.

[15] The proposal specified that the market-based adjustment would not reduce pay rates of current unit employees.

[16] Notwithstanding our colleague's suggestion, the nondiscretionary components of the Respondent's initial Wage proposal and placement of employees within pay ranges based on their years of experience demonstrate that the Respondent's proposal did not give it unfettered discretion over employees' compensation.

[17] The judge incorrectly quoted Godoff as stating that employees had not received a raise since January 2015.

increase was "an unfortunate side effect to bargaining." The Respondent also invited the Union to counter its proposal.[18]

The Respondent's Revised No Strikes and No Lockouts and Wage Proposals

On June 7, 2018, after further negotiations about its No Strikes and No Lockouts proposal, the Respondent made a significant concession and withdrew the proposal. On July 31, 2018, the Union rejected outright the merit component of the Respondent's Wage proposal, stating that "merit is not anything the [U]nion is looking to do." At the conclusion of the session, the Respondent noted that the Union had failed to counter 15 of its proposals while the Respondent had responded to all but 2 of the Union's proposals. Godoff's explanation was that the Respondent had moved away from the expired CBA. (Again, the Respondent had announced at the very start of the negotiations that it would seek to substantially alter many provisions of the expired CBA.) At the negotiation session the next day, the Respondent modified its Wage proposal to provide that every employee would receive, at minimum, a 2 percent wage increase at the time a successor CBA was ratified. The Respondent also offered to work with the Union to ensure the accuracy of its calculations as to employees' years of experience to determine the correct placement of each employee within the applicable pay range. The Union never made a written counter to the Respondent's Wage proposal.

The Union's Counterproposals on Union Security, Management Rights, and Grievance Procedure

On September 5, 2018, the Union presented counterproposals on union security, management rights, and grievance procedure—more than 18 months after the Respondent presented its proposals on union security and grievances (March 29, 2017) and its revised proposal on management rights (March 28, 2017). The union security proposal contained the same language as the union security provision in the Boston CBA that the Union had referenced at the April 5, 2017 negotiation session. The management-rights and grievance procedure proposals were taken from CBAs between the Union and hospitals in New York. They were substantially different from the comparable provisions in the parties' expired CBA and unresponsive to the Respondent's initial proposals. In particular, the Union's management-rights proposal effectively rescinded the Union's previous acceptance of numerous subsections in the Respondent's December 6, 2016 management-rights proposal. The Union acknowledged that its counterproposals needed revision. Nonetheless, the Respondent discussed the Union's counterproposals and expressed its continued willingness to negotiate.

The parties held their last negotiation sessions on October 10 and 11, 2018. The parties continued to discuss numerous noneconomic issues, including management rights, discipline, dispute resolution, and union security. The Respondent also noted that the Union had yet to respond to its revised Wage proposal. Despite reaching tentative agreements on several provisions at three of their last four negotiation sessions, the parties were unable to reach a complete agreement. However, the Respondent repeatedly expressed its willingness to bargain, asked the Union to offer further counterproposals, and reminded the Union of the status of the pending proposals that it had previously made to the Union.

Employee Disaffection Petition; Respondent's Withdrawal of Recognition

On October 25, 2018, the Respondent received a petition signed by a majority of employees in the bargaining unit. The following morning, the Respondent emailed the Union that it had "received objective evidence which clearly and unequivocally indicates that the Union has lost the support of a majority of bargaining unit employees" and that it was "withdrawing recognition of the Union effective immediately." Accordingly, the Respondent also cancelled all future bargaining sessions.

On November 1, 2018, the Respondent distributed a memorandum to the unit employees about "the new pay rates and benefits you will now have as a non-union employee." The Respondent informed the employees that many of them would receive significant wage increases—at least 3 percent—and would also be eligible for a merit increase based on their performance evaluation, as well as a new lump-sum bonus program. In addition, the Respondent notified the employees that it would be "transitioning everyone to [its] non-union benefit programs including PTO, Holidays, and Leave Banks," that a monthly commuter subsidy would be automatically added to their paychecks, and that they would have the opportunity to participate in new employee engagement activities. The Respondent unilaterally implemented the wage increases in November and December 2018.

[18] Thus, the judge's and the dissent's suggestion that the Respondent refused to bargain over its Wage proposal is incorrect. In addition, as the judge noted, the Union conceded at the October 10, 2018 bargaining session that it had failed to respond to the Respondent's Wage proposal, blaming its failure to do so on the time spent on noneconomic issues. It cannot be "take it or leave it"—as our colleague posits—when one party simply fails to test the other party's willingness to move from its proposal. Moreover, as noted below, the Respondent *did* move from its initial Wage proposal—after the Union complained that employees had not received a raise since January 2016—modifying it to provide a minimum 2 percent increase for every unit employee at contract ratification.

Analysis

Section 8(d) of the Act requires parties engaged in collective bargaining "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." When determining whether an employer has violated its statutory duty to bargain in good faith, the Board must ultimately determine, under the totality of the circumstances, "'whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.'" *Kitsap Tenant Support Services, Inc.,* 366 NLRB No. 98, slip op. at 8 (2018) (quoting *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003)); see also *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 367 NLRB No. 103, slip op. at 6–7 (2019) (finding that the parties engaged in lawful hard bargaining by holding firm to their positions because "neither party was required to give up its position or make concessions"), affd. sub nom. *International Alliance of Theatrical Stage Employees, Local 15 v. NLRB*, 957 F.3d 1006 (9th Cir. 2020).

Where an employer is alleged to have violated its good-faith bargaining obligation on the basis of its bargaining proposals, the Board will not decide whether specific proposals are "acceptable" or "unacceptable," but it will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." *Reichhold Chemicals*, 288 NLRB 69, 69 (1988), enfd. in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). However, this does not deny a party the right to "stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); see also *Phillips 66*, 369 NLRB No. 13, slip op. at 5 (2020) (finding that the parties engaged in hard but lawful bargaining as they stood firm on their respective core positions, while the employer also showed its willingness to adjust its proposals and reach agreement on other issues).

Moreover, the Board will not find that an employer failed to bargain in good faith if the union assumes that the employer's initial proposals reflect unalterable positions without testing the employer's willingness to engage in the give and take of collective bargaining. See *Audio Visual Services Group*, above, slip op. at 8 ("[W]e find that the [u]nion did not sufficiently test the [r]espondent's willingness to bargain prior to filing its bad-faith bargaining charge."); *Captain's Table*, 289 NLRB 22, 23 (1988) ("Nor do we find that when negotiations ended prematurely through the default of both parties . . . the [u]nion had sufficiently tested the [r]espondent's proposals to permit us to assess the latter's willingness to bargain in good faith.").[19]

The General Counsel alleged, and the judge found, that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining based solely on the following four bargaining proposals that the Respondent presented to the Union during the course of the parties' 2 years of negotiations: 1) its Grievance and Mediation proposal in tandem with its No Strikes and No Lockouts and Management Rights proposals; 2) its revision to its Discipline proposal to make disputes over discharges no longer subject to binding arbitration; 3) its Union Security proposal deleting the union security provision in the parties' expired CBA; and 4) its Wage proposal, which purportedly gave

[19] The dissent cites *Wright Motors, Inc.*, 237 NLRB 570 (1978), enfd. in relevant part 603 F.2d 604 (7th Cir. 1979), for the proposition that when an employer's initial bargaining proposals are unreasonable, the union need not test the employer's willingness to bargain over them. *Wright Motors* is not comparable to the instant case. For example, under the Respondent's initial No Strikes and No Lockouts proposal, employees would be prohibited from picketing and resorting to other economic weapons in response to violations of the collective-bargaining agreement or federal law. In *Wright Motors*, the employer's initial no-strike proposal, among other things, would have (a) required the union to fine any employee who engaged in a work interruption, (b) granted the employer the right to seek an injunction and file suit for damages against the union without arbitrating the claimed violation, (c) made the union, its officers, agents, and members individually and collectively liable for damages, (d) required the union to waive its legal right to remove a suit filed by the employer from a state or federal court, and (e) required the posting of a $20,000 bond to be forfeited as liquidated damages in the event of a violation of the article. Id. at 571–572. The differences between that case and this are stark, and *Wright Motors* does not excuse the Union's failure to test the Respondent's willingness to bargain.

The conduct of the employer in *Hydrotherm, Inc.*, cited by our colleague, is also markedly different from how the Respondent approached its negotiations with the Union. In *Hydrotherm*, prior to the first negotiation session, the union presented a package of proposals. 302 NLRB 990, 990 (1991). In response, the employer presented only one proposal at the first negotiation session, which vested it with exclusive authority over numerous subjects. Id. At the second session, the employer presented a proposal that was silent on several important issues and failed to counter any of the union's economic proposals, instead insisting on a "take-it-or-leave-it" approach to merit wage increases. Id. at 990–991. Over the five remaining negotiation sessions, the employer either failed to present proposals or did so on only a few subjects without addressing important outstanding issues, including management rights, temporary employees, grievance and arbitration, or the treatment of discharge and discipline. Id. at 991–992. By the last negotiation session, the employer insisted on unilaterally implementing merit raises and told the union that it saw no reason for further meetings. Id. at 992. Here, unlike the employer in *Hydrotherm*, the Respondent, over the course of 30 negotiation sessions, was consistently responsive in offering its own bargaining proposals and responding to the Union's.

the Respondent unfettered discretion over employees' pay. For the reasons that follow, we reverse the judge's finding that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) by tendering these proposals to the Union.

Although the Board examines the totality of the circumstances and not the propriety of individual proposals in making surface-bargaining determinations, we note initially that not one of the Respondent's proposals was unlawful in and of itself.[20] Moreover, although the

[20] The Supreme Court has held that proposing and bargaining for a management-rights clause is not a per se violation of the duty to bargain in good faith, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 407–409 (1952), and the Board has found broad management-rights proposals consistent with fidelity to that duty. In *Rescar, Inc.*, the Board found that proposals for broad management-rights and no-strike clauses with a limited grievance and arbitration procedure did not evince a disposition not to reach an agreement with the union. 274 NLRB 1, 2 (1985). Our colleague notes that the Board in *Rescar* relied on the fact that the employer did not maintain these proposals as a package, but the same is true here. The Respondent did not insist on the Union considering its proposals as all-or-nothing. Rather, it advanced its proposals as entry points for discussions, it repeatedly invited the Union to offer counterproposals, it never refused to entertain counters on the rare occasions the Union offered them, and it ultimately withdrew its no-strike proposal. Under these circumstances, that the initial proposals were aggressive does not support an inference that the Respondent was seeking to frustrate the possibility of reaching an agreement. See *Artiste Permanent Wave Co.*, 172 NLRB 1922, 1924 (1968) (Even assuming the respondent's proposals "can be called 'outlandish,' inflated or extreme . . . , it is well settled that [r]espondent had the right to submit them for consideration without penalty under the Act, provided it did not continue an adamant insistence on them in arbitrary fashion as a condition of any agreement, without offering reasons or justification for its position, or without displaying any willingness to discuss their terms, make concessions, or compromise on their terms and scope."). And while the dissent sharply criticizes the Respondent's proposals, she does not mention the inconvenient fact that the Union initially *accepted* most of the Respondent's proposed management-rights clause.

Likewise, the Respondent's other bargaining proposals were lawful in and of themselves. First, the record does not support the judge's finding that the Respondent "essentially concede[d]" that its no-strike proposal was unlawful. The Respondent merely exercised its right to withdraw a proposal that the Union had objected to in the hopes of furthering the bargaining process. Cf. *Reichhold Chemicals*, 288 NLRB at 70 (the employer's narrowing of its initial no-strike proposal in response to the union's concerns supported a finding of no bad faith).

Second, the Respondent's proposal to change the existing wage structure does not evidence an intent to frustrate agreement. The Union itself acknowledged that the existing structure was a "terribly unfair system," and yet its only wage proposal would have retained it. Moreover, as the Board recognized in *McClatchy Newspapers*—the holding of which the judge and the dissent mischaracterize—an employer may lawfully "attempt[] to negotiate to agreement on retaining discretion over wage increases." 321 NLRB 1386, 1391 (1996), enfd. in relevant part 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); see also *Woodland Clinic*, 331 NLRB 735, 740 (2000) ("[A] merit wage increase proposal that confers on an employer broad discretionary powers is a mandatory subject of bargaining on which parties may lawfully bargain to impasse.") (citing *McClatchy*). Our colleague analogizes the Respondent's Wage proposal to the unlawful wage proposal in *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). But that comparison fails. In *A-1 King Size Sandwiches*, the employer steadfastly refused to deviate from its 24-year practice of granting completely discretionary wage increases solely on the basis of merit and never offered to bargain with the union over non–merit-based wage increase factors, such as seniority. Id. at 857–859. Here, the Respondent not only expressed its willingness to bargain over its Wage proposal, it also revised the proposal to provide a minimum 2 percent wage increase for all employees at the time a successor CBA was ratified. By its own admission, the Union never countered the Respondent's revised proposal. Moreover, unlike the wage proposal in *A-1 King Size Sandwiches*, the Respondent's Wage proposal included non-discretionary components—lump-sum bonuses, shift differential pay, and reliance on years of experience in placing employees within pay ranges—so it did not seek unlimited managerial discretion over employees' wages.

The record does not support the dissent's suggestion that the Union's failure to counter the revised Wage proposal was due to a refusal on the Respondent's part to tell the Union where unit members would be placed on the pay scales until October 11, 2018. Rather, the record shows that at the August 1, 2018 bargaining session, the Respondent offered to work with the Union to determine the correct placement of each employee within the applicable pay range. Besides, the Union itself blamed its failure to respond to the Wage proposal on the time spent on noneconomic issues.

Third, assuming without deciding that philosophical opposition is an insufficient basis for opposing union security, the Respondent's Union Security proposal was not based exclusively on philosophical grounds. Although the judge failed to mention this, the Respondent explained that it had received complaints from its employees about the union security clause—a fact the Union acknowledged—and that union security also impeded its recruitment efforts. Cf. *Phelps Dodge Specialty Copper Products*, 337 NLRB 455, 455 fn. 1 (2002) (finding that employer did not bargain in bad faith with regard to union security where, in relevant part, "some bargaining unit members informed management that they objected to joining the [u]nion"). Also, as noted above, the Respondent expressed its willingness to engage in "back and forth" over union security, which the Union failed to test. See *AMF Bowling Co.*, 314 NLRB 969, 974 (1994) (reversing the judge's bad-faith finding where the General Counsel failed to show that the respondent was unwilling to discuss its union security proposal with the union), enfd. in relevant part 63 F.3d 1293 (4th Cir. 1995). With respect to dues checkoff, the Respondent's initial proposal was not to eliminate but only to modify certain aspects of the dues-checkoff article in the expired contract, in particular language pertaining to remittance report information and checkoff of political action committee contributions. The Respondent stood ready to negotiate over the issue.

Fourth, although the judge found that the Respondent regressed from its Discipline proposal when it modified the proposal to subject discharges to mediation rather than arbitration, "[t]he fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make proposals unlawful if they are not 'so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith.'" *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018) (quoting *Genstar Stone Products Co.*, 317 NLRB 1293, 1293 (1995)). The Respondent's explanation for its change to its Discipline proposal was not unreasonable; it was made to remove a mistaken discrepancy between that proposal and its Grievance and Mediation proposal—a discrepancy the Union pointed out. And there was no tentative agreement on the Discipline proposal at that time. We see no reason for questioning the Respondent's stated motive for revising its Discipline proposal to ensure consistency across its proposals.

Respondent's initial combination of proposals sought substantial concessions from the Union, a party does not violate its duty to bargain in good faith by testing its bargaining leverage in this way. As it turned out, the Respondent did have substantial leverage due to fact that the unit employees had not received a wage increase for some time. The Union was well aware of the situation, as demonstrated by its repeated expressions of concern over that prolonged delay. Notwithstanding its concern, however, the Union itself contributed to the very delay about which it complained. Negotiations dragged on for many months without counterproposals from the Union on numerous issues. To the extent the Respondent adhered to its proposals on these issues, it was not being intransigent; it merely refrained from bargaining against itself. Moreover, the Union initially accepted most of the Respondent's proposed management-rights clause. And when it subsequently regressed on that issue in its counterproposal on management rights, and also when it presented its counterproposal on grievances, the Union immediately admitted that its proposals needed to be revised. Importantly, the Respondent never insisted on any of its proposals—either alone or in combination—to impasse or presented them as part of a last, best, and final offer. Compare *Altura Communication Solutions, LLC*, 369 NLRB No. 85 (2020) (finding that the employer failed to bargain in good faith based in part on the proposals contained in its final offer); *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 488–489 (same).[21]

In fact, nothing in the record indicates that the Respondent was unwilling to bargain over its proposals. For instance, the Respondent never refused to continue bargaining over its combined Management Rights, No Strikes and No Lockouts, and Grievance and Mediation proposals, and it eventually withdrew its No Strikes and No Lockouts proposal—a significant concession. The Respondent made other concessions as well. For instance, at the January 31, 2017 negotiation session, the Respondent relented on some changes sought by the Union to the Respondent's Discipline proposal, agreeing to provide written notification to employees of certain discipline, to set a deadline by which discharged employees must be paid, to refrain from disciplining employees in a manner that would embarrass them before other employees or the public, and to strike catchall provisions regarding conduct exempt from progressive discipline. The Respondent made further concessions on discipline the following month, including reducing the length of time that discipline would remain active in employees' files. The Respondent's modification of its proposals in response to the Union's counters was not the behavior of a party seeking to frustrate the possibility of reaching an agreement.

At the same time, the Union repeatedly declined to test the Respondent's willingness to bargain over its proposals. As an example, at the April 5, 2017 negotiation session, when the Union presented a union security proposal lifted from a CBA with a Boston hospital, the Respondent observed that the Boston CBA was the "result of back and forth" in negotiations and invited the Union to offer a counterproposal and engage in a comparable "back and forth." The Union refused to do so and the next day summarily rejected the Respondent's initial Union Security proposal. On management rights, the Union initially agreed to many of the subsections in the Respondent's initial proposal, but then regressed 18 months later by presenting a counterproposal that completely disregarded the Respondent's proposal and repudiated its prior tentative agreement.

Based on its conduct in negotiations, the Union seems to have decided early on that the Respondent had no interest in reaching an agreement. It said as much, just 2 weeks into collective bargaining. Perhaps the Union decided that its best chance of prevailing lay in Board litigation rather than at the negotiating table. It filed a surface bargaining charge on March 12, 2018, without having attempted to test the Respondent's willingness to bargain in good faith on a range of issues. Indeed, several months later, on July 31, 2018, the Respondent pointed out that the Union had yet to offer counterproposals to 15 of the Respondent's proposals, while the Respondent had countered all but two of the Union's. By way of explanation, the Union replied that the Respondent had moved away from the expired

[21] In support of her view that the Respondent bargained in bad faith, our colleague relies heavily on the Board's recent decision in *Altura Communication*, but that case is readily distinguished. In *Altura Communication*, the employer presented the union with a last, best, and final offer that would have given the employer unilateral control, during the term of the contract, over almost all terms and conditions of employment. The offer included a two-tier wage proposal that set minimums but otherwise gave the employer complete discretion to increase, and substantial discretion to decrease, individual employees' wages. It also included a proposal to transfer almost all contractual employee benefits to an extra-contractual handbook, the terms of which were exclusively controlled by the employer. In addition, the no-strike clause in the final offer would have precluded any and all protests, regardless of the reason. The employer also insisted that the union submit written proposals as a condition of further bargaining and then refused to meet even after the union responded with comprehensive written proposals, and it declared impasse and implemented some of the terms of its final offer despite the fact that the union's proposals significantly narrowed the differences between the parties' positions. In contrast, the Respondent in this case never presented wage and benefit proposals like those in *Altura*, never refused to meet and bargain (until it received evidence that the Union had lost majority status), never suggested that its proposals were a final offer or claimed that bargaining was at an impasse, and never proposed as broad a no-strike clause as that in *Altura*—and the no-strike clause the Respondent did propose it later rescinded.

CBA. But at that time, the parties had been in collective bargaining for more than 18 months, and the Respondent made clear at the outset of negotiations that it *intended* to bargain for a contract that "moved away" from the expired CBA. Instead of seriously attempting to reach an agreement by substantively engaging with the Respondent's proposals, the Union chose to be intransigent and belligerent, repeatedly uttering profane and offensive comments.[22]

The Respondent, for its part, considered the counterproposals put forward by the Union, demonstrated its willingness to move from its positions on more than one occasion, and withdrew its No Strikes and No Lockouts proposal entirely. To be sure, the Respondent also stood firm on a number of positions that differed substantially from terms contained in the expired CBA, and this was a sea change in the parties' bargaining relationship. As Section 8(d) makes clear, however, the Respondent's unwillingness to make concessions on these matters was not inconsistent with the duty to bargain in good faith. Moreover, the record contains no evidence of conduct away from the bargaining table that tends to support an inference of bad-faith bargaining.[23]

Contrary to the dissent, it is not bad-faith bargaining to begin negotiations by presenting "a 'wish list,' 'throw-in-the-kitchen-sink' kind of proposal that one frequently sees in a party's first proposal." *Target Rock*, 324 NLRB at 385. It is not bad-faith bargaining to advance a specific proposal that would leave the union with fewer rights than it would have without a contract, since every management-rights proposal does exactly that, and management-rights proposals are lawful under Supreme Court precedent dating back nearly 70 years. See *NLRB v. American National Insurance Co.*, 343 U.S. at 407–409. It is not bad-faith bargaining for an employer to decline to bargain against itself when its negotiating partner fails to test its

[22] Our colleague contends that the Union's oral counterproposals were sufficient to communicate its position. The problem with the Union's counterproposals was not that they were oral. It was that they lacked detail and only reiterated the Union's insistence that the Respondent just roll over and agree to language from the expired contract without modification. The dissent also faults us for noticing the way Godoff behaved at the bargaining table and essentially accuses us of being the politeness police. To be clear, we could care less about Godoff's penchant for profanity. What matters is what the Union did *not* say. Godoff said "no" and "REJECT," dismissed proposals as "bullshit" and "nothing burgers," and generally gave the Respondent's proposals the back of his hand *instead* of seriously engaging with the Respondent's initial proposals to try to find common ground. This left the Respondent to choose between standing firm and bargaining against itself, and it is not bad-faith bargaining to decline to do the latter.

[23] The dissent conflates cases in which an employer engaged in conduct designed to impede the bargaining process both at the bargaining table and away from it with this case, in which the Respondent is alleged to have engaged in bad-faith bargaining based solely on its initial bargaining proposals. For instance, in *Radisson Plaza Minneapolis*, quoted by our colleague, the Board stated that the employer's "dealings with the [u]nion both at the bargaining table and away from it were clearly calculated to impede bargaining and weaken the [u]nion with a view to having it removed as the employees' collective-bargaining representative, rather than to reach agreement." 307 NLRB 94, 94 (1992) (internal footnote omitted), enfd. 987 F.2d 1376 (8th Cir. 1993). In *Radisson Plaza Minneapolis*, the employer insisted on a perpetual reopener clause that would permit the employer to alter or discontinue any benefits or other policies contained in the agreement, and it pressed proposals regarding the union-ratification vote and to require annual proof of the union's majority support. Id. at 95–96. The employer also rebuffed the union's request to discuss certain changes to employees' job assignments, unilaterally implemented wage increases, stalled in responding to the union's request for basic information about the unit employees, and briefly reneged at the outset on its voluntary recognition of the union—while its chief negotiator wasted time by indulging in long-winded discourses on irrelevant topics. Id.

In *Target Rock Corp.*, also cited by the dissent, the finding of bad-faith bargaining was driven as much by the timing of the employer's proposals as by their substance. Five months after the commencement of negotiations, and on the same day of a union meeting to vote on whether to continue or end a strike that the union was clearly losing, the employer proposed terms that sparked outrage among the strikers and that would "have left the [u]nion members better off without the [u]nion and without a contract," including an unlawful "yellow dog" provision that would prohibit employees from joining the union during their first year of employment. 324 NLRB 373, 384–387 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998). The Board adopted the judge's reasonable conclusion that the employer's aim was not to reach an agreement but rather to prolong the strike. Id. at 373, 387. Significantly, the Board in *Target Rock* also adopted the judge's distinguishing of cases in which employers were found *not* to have bargained in bad faith where they advanced restrictive proposals early in the negotiations. Id. at 386–387. The judge in *Target Rock* referred to such a lawful proposal as "a 'wish list,' 'throw-in-the-kitchen-sink' kind of proposal *that one frequently sees in a party's first proposal*." Id. at 385 (emphasis added). That pretty well describes the Respondent's initial proposal. Fairly read, then, *Target Rock* supports our position, not the dissent's.

In *Prentice-Hall, Inc.*, cited by the dissent, the Board found that the totality of the evidence indicated that the employer never intended to reach an agreement because the evidence showed that the employer counted on the passage of the certification year without any real prospect of a contract causing sufficient employee dissatisfaction to enable it to eventually withdraw recognition. 290 NLRB 646, 646 (1988). The Board's inference of bad-faith bargaining in that case was strengthened by the employer's tactic of pretending to concede on a particular matter objected to by the union only to reincorporate its original proposal in another clause. Id. In this case, the Respondent never employed such deceptiveness in its negotiations with the Union by saying one thing and doing another. To the contrary, it was always forthright with the Union and expressed its willingness to seriously entertain the Union's concerns and proposals.

Finally, in *San Isabel Electric Services, Inc.*, also cited by our colleague, the Board found that the employer engaged in bad-faith bargaining by refusing even to discuss safety and work rules with the union—a crucially important issue, given the dangers faced by employees who work on power lines—and its insistence on its management-rights proposal was a smokescreen to conceal an effort to exclude the union from having any involvement in establishing safety and work rules. 225 NLRB 1073, 1080 (1976). Here, in contrast, the Respondent never refused to discuss any mandatory subject of bargaining.

willingness to modify its positions by offering counterproposals. *Audio Visual Services Group*, above, slip op. at 8. And it is not bad-faith bargaining to stand firm on proposals that are even predictably onerous to a union where, as here, the employer "reasonably believes . . . that [it] has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB at 1603.

The Respondent met with the Union for 30 bargaining sessions, made many of its initial proposals at the outset of the negotiations, solicited counterproposals from the Union, made concessions in response to the Union's bargaining positions, and never refused to bargain over any mandatory bargaining subject—and all the while it calmly answered the Union's bellicose conduct by continuing to bargain. Ultimately, because of the Respondent's active participation in the bargaining process, the General Counsel could only fault the Respondent for the substance of its proposals. However, the Board does not sit in judgment of a party's bargaining proposals. And the Respondent's initial proposals did not evince an intent to frustrate the reaching of an agreement when they were not presented as final offers, and the Respondent always remained willing to move from its position. Accordingly, in considering the totality of the Respondent's conduct, including its bargaining proposals, we find that the General Counsel did not establish that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1).

Because the Respondent did not engage in surface bargaining during the negotiations, we also reverse the judge and find that the Respondent did not violate Section 8(a)(5) and (1) when it withdrew recognition from, and refused to bargain with, the Union after receiving objective evidence that the Union had, in fact, lost the support of a majority of the unit employees, and when it subsequently implemented unilateral changes to the unit employees' terms and conditions of employment.[24]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 30, 2021

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

As the Board has recently pointed out, the "'essence of bad-faith bargaining is a purpose to frustrate the possibility of arriving at any agreement,'" and sometimes that bad purpose is revealed by the content of an employer's bargaining proposals, considered in the "totality of [the] employer's conduct" both at and away from the bargaining table.[1] This is clearly such a case, although my colleagues do not see it that way.

For more than 20 years, the Union represented about 150 employees at the Hospital, the respondent here. During that time, the parties' collective-bargaining relationship was, by all accounts, harmonious. Employees enjoyed the fruits of a collective-bargaining agreement that provided them with workplace rights and benefits that are typical of a union contract: compensation with fixed annual wage increases and benefits established by the contract, the ability to grieve and arbitrate disputes, a just-cause standard for discipline, job security, and the protection of unit work. All that changed when the contract expired in 2016, and the Hospital decided to chart a different course—a course designed to frustrate reaching an agreement and, it seems, to oust the Union altogether.[2]

At the start of the bargaining over a successor contract and for the nearly 2 years that followed, the Hospital withheld employees' annual wage increases and, as part of a campaign against the Union, used the withheld wage increases to sow disillusionment among employees. All the while, the Hospital's bargaining position—reflected in a package of proposals—was that it would only accept the unconditional surrender of employees' contractual and statutory rights. When the Union, unsurprisingly, refused to capitulate, the Hospital exploited employees' disillusionment with the delay to withdraw recognition from the Union.

[24] We find that the Respondent properly relied on the disaffection petition signed by a majority of the unit employees in withdrawing recognition from the Union. In doing so, we do not rely on the employees' testimony regarding their subjective reasons for signing the disaffection petition, which was considered by the judge. See *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 12 & fn. 56 (2019).

[1] *Altura Communication Solutions, LLC*, 369 NLRB No. 85, slip op. at 1 (2020), quoting *Phillips 66*, 369 NLRB No. 13, slip op. at 4 (2020).

[2] Under the Board's contract-bar doctrine, a collective-bargaining agreement insulates a union from challenge for up to three years, creating an incentive for antiunion employers *not* to reach agreement, apart from the desire to avoid creating contractual obligations to employees. See generally *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (discussing contract-bar doctrine).

As Board precedent illustrates, the Hospital's conduct here amounted to a textbook case of bad-faith bargaining. The majority, however, essentially faults the Union and its lead negotiator for the outcome here. The majority's painfully detailed discussion of the union bargaining representative's intemperate language suggests that the tone of the union counsel's communications is somehow relevant to the reasonableness of the *employer's* bargaining proposals. It is not. The Board's job here is to apply our law on surface bargaining, not give out points for politeness.

In my view, the record reveals not only the Hospital's bad purpose, but also the Union's recognition of what was unfolding and its understandable, if unpleasant, anger. Frustrating agreement makes for frustrated negotiators. For the reasons that follow, the Board should adopt (not reverse) the administrative law judge's conclusion that the Hospital bargained in bad faith.[3]

I.

There is basic agreement on the legal principles that govern this case, as well as on the essential facts here. We differ, and differ sharply, on how to apply the law to the facts presented. A recent unanimous Board decision finding bad-faith bargaining, *Altura Communication*, supra, should guide us today. Explaining the principles of the duty to bargain in good faith created by Section 8(d) of the National Labor Relations Act, the *Altura* Board observed that although employers and unions are entitled "to bargain hard for a contract each side perceives as desirable," and the Board does not "sit in judgment of the substantive terms of bargaining," it *is* the Board's "role . . . to oversee the process to ascertain that the parties are making a sincere effort to reach agreement," and so the Board "will examine [bargaining] proposals and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract."[4] The Board's "examination of the [employer]'s proposals is undertaken to determine, not their merits, but 'whether in combination and by the manner proposed they evidence an intent not to reach agreement.'"[5]

In *Altura*, the Board examined employer proposals that would have given the employer substantial discretion to raise or lower employees' wages, complete discretion over work hours, and the ability to alter or eliminate employee benefits.[6] The employer also proposed a broad management-rights clause, coupled with a broad no-strike clause and a grievance procedure that would have excluded many discretionary employer actions from coverage—including elimination of the bargaining-unit altogether.[7] Drawing on extensive Board and judicial precedent stretching back to the 1970's, the *Altura* Board concluded that "[c]onsidered in their entirety, the [employer]'s proposals would have required the [u]nion 'to cede substantially all of its representational function, and would have so damaged the [u]nion's ability to function as the employees' bargaining representative that the [employer] could not seriously have expected meaningful collective bargaining.'"[8]

Altura Communication is only the most recent in a line of Board cases involving what by now is a familiar employer strategy to avoid reaching a collective-bargaining agreement and to undermine an incumbent union. This case illustrates the same, unlawful employer approach, but here, the majority allows the employer to get away with it. That is more than just unfortunate for the Union. As the Board has observed, the "fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals, which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative."[9]

[3] I would also affirm the judge's conclusion that the Hospital's withdrawal of recognition was unlawful, because an employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), affd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997). In turn, the Hospital's unilateral changes to employees' terms and conditions of employment, made after the unlawful withdrawal of recognition, were also unlawful. *Flying Foods*, 345 NLRB 101, 104 (2005) enfd. 471 F.3d 178 (D.C. Cir. 2006).

[4] *Altura Communication*, supra, 369 NLRB No. 85, slip op. at 1 (internal quotation marks and citations omitted). As the Supreme Court has observed, "there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486 (1960).

[5] *Altura Communication*, supra, 369 NLRB No. 85, slip op. at 4, quoting *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

[6] Id. at 4–5.

[7] Id. at 5.

[8] Id. at 6, quoting *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003). Among the decisions cited by the *Altura* Board are *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (2018); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) enfd. 987 F.2d 1376 (8th Cir. 1993); *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984); *Eastern Maine Medical Center*, 253 NLRB 224 (1980), enfd. 658 F.2d 1 (1st Cir. 1981); and *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976).

[9] *Reichhold Chemicals, Inc.*, 288 NLRB 69, 70 (1988), enfd. in part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

II.

The administrative law judge's opinion comprehensively describes the parties' bargaining and the Hospital's actions. A brief review of the key facts is helpful. For more than 20 years, the Hospital and the Union had successive collective-bargaining agreements. The most recent agreement expired in December 2016. Bargaining for a new contract began in November 2016 and lasted nearly *two years*, until October 2018. From the beginning, the Hospital made no secret of its aim to make radical changes. The Hospital called this effort "modernizing" the agreement. It amounted to eliminating crucial guarantees and protections for employees, stripping the Union of its function, and giving the Hospital free rein to determine employment terms and conditions. In short, a traditional contract, and a traditional role for the Union, were to be treated as things of the past. The most significant changes that the Hospital proposed were:

- an expansive management-rights clause that (among other things) gave the Hospital the right to unilaterally reassign bargaining unit work, to discipline employees without cause, and to change employees' health insurance and benefits at any time;[10]
- a dispute resolution proposal that replaced arbitration with non-binding mediation;
- a sweeping no-strike provision prohibiting employee picketing and use of economic weapons in response to violations of the collective-bargaining agreement or federal law;
- the elimination of check-off for union dues and the union security clause;[11] and
- a wage proposal that placed employees on hospital-wide pay scales where the Hospital had the unfettered discretion to determine wage increases.

With only some small modifications, the Hospital never budged from these proposals.

There was another important component to the Hospital's strategy: withhold employee wage increases and publicly blame the Union. Under the expired contract, employees had received annual wage increases, the last in January 2016. Once the contract expired, employees would not receive another increase until October 2018 – after the Hospital withdrew recognition from the Union. Throughout the bargaining process, the Hospital required supervisors to read and distribute bargaining briefs to employees at pre-shift meetings. The administrative law judge found that the "bargaining briefs continually disparaged the Union during bargaining, misrepresented the parties' bargaining positions, including its wage proposals, … blamed the Union for the lack of a pay raise," and "served to undercut unit employees' support for the Union."[12]

As to wages, the Hospital consistently maintained that it would not bargain over economics until all non-economic proposals were resolved, which, according to the Union, involved Hospital proposals to alter 19 out of 20 non-economic provisions in the contract. Instead, at the Hospital's insistence, the focus remained on its demands for significant concessions. The Hospital finally made its wage proposal in May 2018, over a year and a half into bargaining -- and more than a year after the Union had submitted a wage proposal. The wage-structure in the Hospital's proposal was unprecedented for the parties. Bargaining-unit employees would be placed on hospital-wide wage scales, at the Hospital's discretion, with the same wage rates for union and non-union employees. Any

[10] Under the management-rights proposal, the Hospital reserved the right to: (1) assign any amount of bargaining-unit work to supervisors; (2) use contractors and contract personnel to perform bargaining-unit work; (3) engage in searches of unit employees without limit; (4) discipline employees without cause; (5) change employees' health insurance and other benefits at any time; (6) determine what positions were part of the unit; (7) determine the existence of bargaining-unit work; and (8) determine the extent to which bargaining-unit work could be performed at all. The Hospital also proposed a "zipper" clause nullifying all past practices and reaffirming the Hospital's right, without limitation, "to make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job."

With respect to discipline, the Hospital's proposal departed from longstanding contract language by: (1) eliminating the requirement that employees be disciplined for "just cause;" (2) excluding any discipline short of discharge from "the full grievance and arbitration procedure;" (3) placing limits on employees' right to union representation at investigatory interviews; and (4) weakening the progressive discipline system.

[11] The Hospital contemporaneously stated that the proposal reflected its belief "that employees should have a choice as to whether or not to pay union dues, and should not be fired, as the union is insisting, if they choose not to pay dues."

[12] My colleagues, citing the judge's finding that the Hospital's bargaining briefs were lawful under Sec. 8(c) of the Act, refuse to consider them in assessing whether the Hospital bargained in good faith. But if, for instance, we want to understand why the Hospital opposed a union security clause, looking at the totality of the circumstances, we can surely look to the bargaining briefs that communicate the Hospital's motivation without running afoul of Sec. 8(c). This is consistent with the longstanding principle that simply because conduct is not unlawful does not mean the Board is "precluded from considering such conduct, in the totality of circumstances, as evidence of the actual state of mind of the actor." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 506, (1960) (Frankfurter, J., concurring). See also *American Meat Packing Co.*, 301 NLRB 835, 839 (1991) (ad hominem attacks and attempts to denigrate the union in the eyes of the employees support an inference of bad-faith bargaining); *General Electric*, 150 NLRB 192, 274 (1964) enfd. *NLRB v. General Electric*, 418 F.2d 736, 757 (2nd Cir. 1969) (employer's bargaining briefs publishing its take-it-or-leave-it bargaining proposals support a finding of bad-faith bargaining).

wage increases during the contract term would be discretionary, based on the Hospital's evaluations of employees. The Hospital informed the Union that its wage proposal was non-negotiable.[13]

Repeatedly during the course of negotiations, the Union's lead, Stephan Godoff, expressed his frustration with the pace of bargaining and the substance of the Hospital's proposals. As early as February and March 2017, Godoff and his fellow bargaining team members complained that the Hospital was slow-walking the negotiations. Of particular concern, the Hospital refused to agree to more than two sessions a month. At the same time, the Union and Godoff were growing increasingly alarmed by the dramatic—and often unexplained—concessions being demanded by the Hospital. To be sure, Godoff did not hold back in expressing himself. At various points during the negotiations Godoff characterized the Hospital's proposals as "disgusting," "bull shit," "nastiness," and a "disgrace," and made clear that he had no interest in discussing such unacceptable proposals. As observed by the administrative law judge, however, Godoff was not alone in making such colorful comments. Indeed, there were raised voices and interruptions all around the table throughout the parties' contentious negotiations.

In March 2018, the Union set this case in motion by filing an unfair labor practice charge against the Hospital, alleging that it was bargaining in bad faith by "maintaining a restrictive grievance/arbitration provision and no strike provision, while at the same time an expansive management rights clause in its contract proposal." At this point, the Hospital had maintained its combination of proposals a full year. (It would do so until June 2018, when it finally withdrew its proposed no-strike provision.)

About the time that the Union filed its charge with the Board, a bargaining-unit employee began circulating a petition expressing disaffection from the Union. In October 25, 2018, the employee submitted the petition to the Hospital's chief executive officer. The administrative law judge found that "[m]ost [employees] who signed the petition did so because they were disappointed with the Union's inability to get a new contract and the resulting wage increases."

The next day, after determining that 81 out of 156 bargaining-unit employees had signed the petition, the Hospital withdrew recognition from the Union, revoked the Union's access rights, and stopped bargaining. A 20-year bargaining relationship was terminated. On November 1, 2018, the Hospital told employees that it was "delighted to welcome [them] to the GW Hospital team of non-union employees" and that the Hospital was making across-the-board changes to working conditions—including granting significant pay increases. There was nothing unforeseeable about this result, and nothing surprising about the Hospital's expressed delight.[14]

III.

Examined in light of Board precedent, the record evidence is more than enough to establish, as the administrative law judge found, that the Hospital engaged in bad-faith bargaining. The Hospital's demonstrated purpose was, in the words of the *Altura Communication* Board, "to frustrate the possibility of arriving at any agreement." That purpose is reflected in the combination of bargaining proposals that the Hospital made and adhered to, even apart from its campaign to undermine the Union. Following an approach by now familiar to the Board, the Hospital's "dealings with the Union . . . were clearly calculated to impede bargaining and weaken the Union with a view to having it removed as the employees' collective-bargaining representative, rather than to reach agreement."[15]

A.

To begin, as *Altura Communication* illustrates, the Board has long held, with court approval, that employer proposals which, taken as a whole, would leave employees with fewer rights than they would have *without* a contract are clearly designed to frustrate the collective-bargaining process.[16] The most prominent example is when an employer simultaneously insists on a broad management-rights clause, a no-strike provision, and no effective grievance-and-arbitration procedure.[17] This would require

[13] The Union countered with a proposal guaranteeing certain wage increases where employees at least met expectations, but the Hospital did not agree.

[14] As the Supreme Court has observed, employers are presumed to intend the foreseeable consequences of the actions, under the National Labor Relations Act as in other areas of the law. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963), citing *Radio Officers' Union of Commercial Telegraphers Union v. National Labor Relations Board*, 347 U.S. 17, 45 (1954).

[15] *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993).

[16] When no collective-bargaining agreement is in place, an employer remains subject to the duty to bargain established by Sec. 8(d) of the Act. The employer may not change any term and condition of employment without first giving the union notice and opportunity to bargain. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). Employees, in turn, retain all of the Sec. 7 rights that might be given up in an agreement, including the right to strike. Id. at 199.

[17] See e.g., *Target Rock*, 324 NLRB 373, 386 (1997) ("An employer acts in bad faith when, during negotiations, it simultaneously insists on a broad management-rights clause, a no strike provision, and no effective grievance-and-arbitration procedure."), citing *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn. 7 (1976) ("We have consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure.") (collecting cases). My colleagues claim it was the timing rather than the substance of the proposals in *Target Rock*

employees to sacrifice their statutory right to strike, while offering few, if any, contractual guarantees in return. The employer would be free to change many terms and conditions of employment unilaterally, and there would be no simple way to enforce what rights the contract did give employees.

Here—in making a radical, so-called "modernizing" break with prior agreements—the Hospital advanced and adhered to precisely the combination of proposals that the Board has consistently condemned. As discussed, the Hospital pursued a management-rights clause that would have allowed the Hospital to alter, eliminate, or subcontract unit work and to alter health insurance and other benefits during the term of the contract.[18] Similarly, it proposed to retain unfettered discretion to determine any wage increases and sought the unlimited power to "make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job." The Hospital also pursued a no-strike provision that required employees to give up their statutory rights to engage in picketing and to use economic weapons, such as a strike, in response not only to violations of the collective-bargaining agreement, but also to violations of federal law.[19] Finally, the Hospital proposed a dispute resolution system that culminated not in binding arbitration, but rather in non-binding mediation.

The Hospital's adherence to the poison-pill combination of the management-rights clause, no-strike clause, and absence of a grievance-arbitration clause is enough to establish bad-faith bargaining by itself, but there is more here, as I will explain.

B.

The Hospital's approach to bargaining over wages also supports a finding of bad-faith bargaining.

First, the Hospital presented its wage proposal as nonnegotiable.[20] That approach is obviously contrary to the statutory duty to bargain in good faith.[21] Thus, the Board has long held that a "party who enters into bargaining negotiations with a 'take-it-or-leave-it' attitude violates its duty to bargain."[22] Here, the Hospital "unlawfully sought agreement on its own terms and none other."[23] Whatever small accommodations the Hospital made with respect to its proposal, its key position—that bargaining-unit employees would be placed on a hospital-wide pay scale,

that was unlawful. But that is at odds with the decision itself, which states that the employer's position exceeded the bounds of lawful hard bargaining because they proposals would "have left the Union members better off without the Union and without a contract." 324 NLRB at 386. That is precisely what the judge found in this case.

The majority's observation that an employer is free to engage in hard bargaining, and may lawfully seek a management-rights clause, has no application here. Management-rights clauses that give the employer "unilateral control over virtually all significant terms and conditions of employment" are examples of bad-faith bargaining. *Altura Communication Solutions*, supra, 369 NLRB No. 85, slip op. at 3–4, quoting *Public Service Co. of Oklahoma* (PSO), 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

The majority cites *Rescar, Inc*., 274 NLRB 1, 2 (1985), for the proposition that a broad management-rights proposal with a no-strike clause and a limited grievance and arbitration mechanism is not evidence of bad faith. But the *Rescar* Board explicitly relied on the fact that—in contrast to this case—the employer did not simultaneously maintain this combination of proposals as a package. Notwithstanding the majority's claims, the Hospital did maintain this unlawful combination of proposals for 15 months, and under extant law, it makes no difference that the majority never presented its proposals as all-or-nothing. In further contrast to this case, the *Rescar* employer (1) did not propose to eliminate the just-cause standard and arbitration for discipline or discharge; (2) did not seek the power to change benefits at any time; and (3) did not propose to maintain unfettered discretion to determine wage increases.

[18] The Board has observed that a management-rights clause that permits the employer to alter or discontinue any benefit at any time is "at odds with the basic concept of a collective-bargaining agreement." *Radisson Plaza Minneapolis*, supra, 307 NLRB at 95. The majority concedes that the Hospital proposed to retain the authority to unilaterally change the unit members' terms and conditions of employment at any time but claims that *Radisson Plaza Minneapolis* is inapposite because that case also involved additional away-from-the-table misconduct. As discussed, I believe that the Hospital's away-from-the-table conduct supports an inference of bad faith. Moreover, the overarching principle that certain proposals demonstrate bad faith applies regardless. See e.g., *Prentice-Hall Inc*., 290 NLRB 646, 646 (1988) (employer demand for sweeping waivers of employees' statutory rights, while offering little in return, with no away-from-the-table evidence of bad-faith bargaining, was simply "not the behavior of an employer who is trying to achieve a collective-bargaining agreement."); *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir.1979) ("Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to.")

[19] The majority credits the Hospital for making a "significant concession" by eventually withdrawing the no-strike proposal. But the Hospital maintained this unlawful combination of proposals for 24 bargaining sessions over 14 months, which was more than enough time to frustrate the bargaining process. The Hospital only withdrew the no-strike proposal after the Union filed an unfair labor practice charge with the Board.

[20] My colleagues state that the judge was incorrect in finding that the Hospital refused to negotiate over the wage proposal. The Hospital, they say, invited a counter proposal, and the Union failed to test the Hospital's willingness to bargain. Even assuming, contrary to the judge's factual findings, that the Hospital invited a counteroffer and the Union did not make one, the Union was in no position to counter the Hospital's proposal. The Hospital's long-delayed initial wage proposal presented 18 months into bargaining and 12 months after the Union's wage proposal, was incomplete. Despite repeated requests from the Union, the Hospital refused to tell the Union where unit members would be placed on the pay scales until October 11, 2018, 2 weeks before it withdrew recognition. Thus, the Union, without sufficient information to formulate a counter proposal, did not have the realistic opportunity to test the Hospital's willingness to negotiate.

[21] As Justice Frankfurter observed, good faith bargaining "is inconsistent with a predetermined resolve not to budge from an initial position." *NLRB v. Truitt Mfg*., 351 U.S. 149, 154 (1956) (concurring opinion).

[22] *General Electric*, 150 NLRB 192, 194 (1964).

[23] *Regency Service Carts*, 345 NLRB 671, 672 (2005), citing *American Meat Packing Corp*., 301 NLRB 835, 836 (1991).

with each employee's placement within that scale and any wage increases during the contract left entirely up to management—was "take it or leave it."[24]

Second, of course, the terms of the Hospital's proposal—which gave management near-unfettered discretion over wage increases—are evidence of bad-faith bargaining, as long-standing Board precedent demonstrates. The Hospital's proposal was strikingly similar to the proposal in *A-1 King Size Sandwiches*, supra, where the employer sought to determine wage increases on the basis of semi-annual wage reviews, where it would make the final decision and had the exclusive right to evaluate, reward, promote and demote employees, leaving the union's participation in the process "meaningless."[25] The prolonged adherence to such a proposal, as happened here, is compelling evidence of bad faith by itself, but even more so when viewed in the full context of the Hospital's proposals, which together reflect an intent to subvert the bargaining process.

C.

Yet another illustration of the Hospital's subversive approach was its proposal to eliminate the contract's longstanding union security and dues-checkoff clauses—based on nothing more than a newfound philosophical opposition to such clauses.

For decades, the Board has held that "[w]hile the Act does not require that an employer grant a union's bargaining proposals for union-security and dues-checkoff provisions, the assertion of 'philosophical' objections does not satisfy the statutory obligation to bargain in good faith concerning these matters."[26] Consistent with well-established Board law, the judge correctly found that the Hospital's proposal reflected bad faith.

The judge considered and rejected the Hospital's claim that the union security clause interfered with the Hospital's recruitment of employees, determining that it was unsubstantiated. Indeed, the judge's finding is consistent with the Hospital's own characterization of its position. In its bargaining briefs, the Hospital touted the fact that its opposition to union security reflected its belief that "employees should have a choice as to whether or not to pay union dues" and asserted that "it's not fair to force employees to pay dues to keep their jobs at [the Hospital.]" In other words, by its own admission, the Hospital's bargaining position was based on philosophical opposition to union security. Such a position does not satisfy the duty to bargain in good faith. Reversing the judge, the majority insists that the Hospital's proposal was not exclusively based on its philosophical opposition to union security clauses. Citing evidence that the trier of fact found unpersuasive, the majority references testimony that the Hospital had received complaints about the union security clause. The Hospital's own repeated statements—that it was opposed to dues checkoff because it believed employees should not be required to pay union dues or fair share fees—are far more believable. The record simply does not support the majority's attempt to dismiss this evidence of bad-faith bargaining.

D.

There is a final example of the Hospital's approach to bargaining that while relatively small in comparison to its other conduct, neatly illustrates its bad-faith desire to frustrate agreement: its regressive bargaining over whether disputes over employee discharges would be resolved through arbitration.

The Board will find that a regressive bargaining proposal—a less favorable proposal than one made earlier—is evidence of bad-faith bargaining when it is made without explanation or when the stated reason for the step

[24] Even if the Hospital eventually agreed to an initial flat wage increase upon contract ratification, any such increase was presented as contingent. The Union was required to accept a system that granted exclusively merit-based wage increases. Critically, the Hospital never wavered from its position that the Union would be excluded from any participation in determining wage increases during the life of the contract.

[25] 265 NLRB at 859. See also *Kitsap Tenant Support Services*, supra, 366 NLRB No. 98, slip op. at 8 (employer "sought to deny the [u]nion any role in establishing wage rates during the life of the contract").

In reversing the judge, the majority cites the principle that an employer is free to propose to retain discretion over wage increases. *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996), enfd. in relevant part 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). That principle has no application here. As the *McClatchy Newspapers* Board explained, an employer is free to negotiate objective procedures and criteria establishing discretionary wage increases. But the Board found the employer proposal there *unlawful* because the employer proposed open-ended wage increases based on no objective criteria and bypassing the union's role as bargaining representative. The Board found that such a proposal was "antithetical to our statutory system of collective-bargaining meant to promote industrial stability." Id. The Hospital's proposal here, with its reservation of unlimited managerial discretion to determine any wage increase during the life of contract, falls into this category.

[26] *Hospitality Motor Inn, Inc*., 249 NLRB 1036, 1040 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982). The Board has recently found evidence of bad-faith bargaining where an employer, "[t]hroughout negotiations … consistently maintained proposals to eliminate the union security clause without advancing any business justification, let alone a legitimate business justification," but instead "simply argued that people could voluntarily pay union dues, but that it should not be a condition of employment." *Kalthia Group Hotels, Inc. and Manas Hospitality LLC d/b/a Holiday Inn Express Sacramento*, 366 NLRB No. 118, slip op. at 19–20 (2018). See also *CJC Holdings,* 320 NLRB 1041, 1047 (1996), affd. 110 F.3d 794 (5th Cir. 1997)*; Chester County Hospital,* 320 NLRB 604, 622 (1995), enfd. 116 F.3d 469 (3d Cir. 1997); *Carolina Paper Board Co.*, 183 NLRB 544, 551 (1970). The majority assumes without deciding that it is unlawful for an employer to oppose union security and dues checkoff for philosophical reasons, but that proposition is unassailable under the Board's decisions.

backward appears dubious.[27] That is the case here. There is no dispute here that the Hospital engaged in regressive bargaining. It first made a discipline proposal providing that the parties would arbitrate disputes over discharges, as had been the case. Then, four months later, it made a dispute-resolution proposal under which discharge disputes would be addressed only through non-binding mediation. The Hospital's only explanation for this shift—that it was not aware of the terms of its discipline proposal when it made its dispute-resolution proposal—is both implausible and woefully inadequate. Grievance and arbitration provisions are a cornerstone of collective-bargaining agreements. A party seeking, in good faith, to eliminate an existing procedure would surely understand its own prior proposals, exercising due diligence. Here, in the context of the Hospital's overall conduct, it is not entitled to the benefit of the doubt.

Nevertheless, the majority credits the Hospital's explanation that the regressive proposal was made simply to resolve a discrepancy in its overall package of proposals.[28] Of course, the Hospital could just as easily have reconciled the two proposals by choosing to preserve binding arbitration for discharge disputes. Nothing compelled the Hospital to move backward, in other words, not even a supposedly inadvertent mistake. The Hospital's choice, consistent with its other bargaining proposals, evidences its desire to avoid an agreement, not reach one.

IV.

The obvious conclusion here, in light of Board precedent and the record evidence, is that the Hospital engaged in bad-faith bargaining, succeeding in its goal to frustrate agreement and to oust the Union. The majority offers a series of excuses for the Hospital's conduct, but none are persuasive. They amount to blaming the victim for the crime.

First, without giving proper weight to the nature of the Hospital's proposals and its apparent aim in making them, the majority insists that the Union failed to test the Hospital's willingness to bargain. The facts are to the contrary. As discussed, over the course of 30 bargaining sessions spanning almost 2 years, the Union repeatedly attempted to persuade the Hospital to abandon or modify its proposals. The Hospital, however, steadfastly refused to seriously consider making any significant concessions.

Second, the majority argues the Hospital's proposals did not evidence bad faith because they supposedly were not final offers. Of course, the fact that the Board has found that an employer engaged in bad-faith bargaining by presenting unreasonable final offers does not mean that *only* final offers can demonstrate bad faith.[29] Indeed, the Board, with judicial approval, has previously rejected the argument that a union faced with unreasonable employer proposals needs to await a final offer before it can successfully demonstrate that the employer is violating its statutory duty to bargain in good faith.[30] A union is not "compelled to continue [a] charade."[31] Unfortunately, a charade is precisely what the Union confronted here.

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[27] See *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), enfd. sub nom. *NLRB v. Hardesty Co., Inc.,* 308 F.3d 859 (8th Cir. 2002); *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987). "Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose frustrating the possibility of agreement." *U.S. Ecology Corp*., 331 NLRB 223, 225 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001).

[28] The majority obscures the realities of the situation when it accuses the *Union* of regressive bargaining. Eighteen months into bargaining, the Union offered to accept a management-rights clause from a different contract between the parent company and the union. By that point, the parties had reached tentative agreement on aspects of the Hospital's proposed management-rights clause, a reflection of the Union's willingness to make reasonable concessions. But the parties were still in fierce dispute over significant provisions in the management-rights clause because the Hospital refused to step back from using the clause to eviscerate the contract. After months of the Hospital's recalcitrance, the Union proposed a new management-rights clause as a clear attempt to move the negotiations forward. This is not an example, then, of the Union withdrawing from a tentative agreement without good cause.

[29] For that reason, my colleagues attempt to distinguish *Altura Communication,* supra, based on whether the offers were final is unpersuasive. It is, in fact, the commonalities between this case and *Altura Communication* that are striking. Both cases involve employers' prolonged adherence to a combination of proposals that would leave employees with fewer rights than they would have had without a contract. Both cases involve employer proposals to retain the right to unilaterally change almost every significant terms and conditions of employment, including the existence of bargaining unit work. In both cases, any wage increase during the term of the contract would be at management's discretion. And in both cases, the employer sought absolute control over terms of employment coupled with no-strike provisions. My colleagues contend that there are meaningful distinctions between the no-strike provisions, but the no-strike provision at issue here was sweeping: it prohibited employees from participating in any strike or any picketing for any reason, including any violation of the contract or of the law.

[30] See e.g., *Wright Motors*, 237 NLRB 570 (1978), enfd. *NLRB v. Wright Motors*, 603 F.2d 604, 609–610 (7th Cir. 1979). In *Wright Motors*, the Board and circuit court rejected the employer's argument that a bad-faith finding was premature because the parties had only held three bargaining sessions over 6 months. See also *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991) (rejecting the employer's contention that its proposals were not unlawful because it was deprived of an opportunity to reveal its willingness to compromise by the union's filing of unfair labor practice charges).

[31] In *Wright Motors*, supra, the Seventh Circuit explained that if "the negotiations were not progressing because of the employer's insistence on unreasonable provisions, the Union should not be compelled to continue the charade for more sessions before asserting its statutorily protected right." 603 F.2d at 608.

My colleagues seek to distinguish *Wright Motors* because the no-strike proposal there was more punitive. Contrary to the majority's

Third, the majority finds fault in the Union's counterproposals, particularly where the Union orally rejected some of the Hospital's contract proposals. The record is clear, though, that the Union made written and oral counterproposals on many of the Hospital's proposals, and that the Union made concessions to the Hospital's demands.[32] In the majority's version of events, the Hospital simply exploited its superior bargaining position to force concessions from the Union, which failed to appreciate its weakness and to make the appropriate concessions. Collective bargaining, though, "is not a cutthroat death match," *AFGE v. Trump,* 318 F. Supp. 3d 370, 432 (D.D.C. 2018) rev'd on other grounds, 929 F.3d 748 (D.C. Cir. 2019), and it does not serve the policies of the Act for us to treat it as such. What the evidence shows is that the Hospital sought to use its leverage not to seek more favorable contract terms, but to destroy the collective-bargaining relationship. That is not bargaining in good faith, nor was the Union required to capitulate to save itself. It was permitted to propose adherence to the existing contract that embodied a 20-year relationship. There is no allegation here that the Union violated its own duty to bargain in good faith.

Fourth, the majority asserts that the Respondent did not engage in bad-faith bargaining because it offered concessions from its original proposals. But the majority vastly overstates the significance of those concessions.[33] The only meaningful concession was the withdrawal of the no-strike proposal, which the Hospital maintained for 15 months and which was withdrawn only in response to the Union's unfair labor practice charge. Otherwise, as explained, the Hospital maintained fundamentally the same position throughout the negotiations.

Fifth, the majority places great emphasis on the conduct of Union negotiator Godoff. Boorish as Godoff might have been, his behavior does somehow not excuse the Hospital's bargaining approach—an approach that may well have provoked Godoff to begin with. The Board has rejected the proposition that a negotiator's offensive behavior (short of conduct that itself constitutes bad-faith bargaining) excuses a party from meeting face-to-face, much less that it justifies engaging in surface bargaining.[34]

Finally, the majority also implies that the Union should have tried harder to bargain over the Hospital's proposals, rather than filing unfair labor practice charges. Of course, if those charges have merit, that is all that matters. Here, in any case, the Union did not simply file charges and stop bargaining. It continued to bargain for 7 months until the Hospital withdrew recognition, walked away from the bargaining table, and welcomed employees to the "team of non-union employees."

V.

The Supreme Court has observed that the "object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers."[35] The result here does not help achieve that object. The Hospital's conduct was not just bad-faith bargaining, it was egregious bad-faith bargaining. It was the Hospital, not the statute, that it achieved its object in this case: avoiding a new agreement and ousting the Union, after 20 years. Neither Board law, nor the record evidence support the majority's decision today. Accordingly, I dissent.

Dated, Washington, D.C. April 30, 2021

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

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Tammie Rattray and *Paul Beshears, Esqs. (Ford Harrison LLP),* of Tampa, Florida and Atlanta, Georgia,
Steven Bernstein, Esq. (Fisher & Phillips,) of Tampa, Florida, for the Respondent.
Stephen Godoff, Esq., (Abato, Rubenstein & Abato, PA), of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, District of Columbia on June 18–20, 2019. The complaint alleges that District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner (the Hospital or

suggestion, it makes no difference that the proposals here and in *Wright Motors* are unlawful in different ways.

[32] The majority cites no case supporting the position that the Board requires any party to submit written counterproposals. Nor do the facts here support an inference that the bargaining process was hampered by the Union's oral counteroffers. Indeed, when, as here, an employer proposes radical changes in an existing agreement, and the union wants to retain current contract language, oral proposals are surely enough to communicate the union's position.

[33] *NLRB v. Wright Motors*, supra, 603 F.2d at 609 (observing that the employer did not make "bona fide concessions on substantial issues.").

[34] *Success Village*, 347 NLRB 1065, 1067 & 1081 (2006). The Board has explained that the "obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior." *Victoria Packing Corp*, 332 NLRB 597, 600 (2000).

[35] *Auciello Iron Works v. NLRB*, supra, 517 U.S. at 785.

Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] by failing and refusing to bargain in good faith and with no intention of reaching an agreement for a successor collective-bargaining agreement with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) as the exclusive collective-bargaining representative of its employees. The complaint further alleges that the Hospital improperly withdrew recognition from the Union after nearly 2 years of bad faith and regressive bargaining, subsequently rejected the Union's request to continue bargaining and immediately proceeded to implement unilateral changes to employees terms and conditions of employment.

At hearing, the General Counsel moved to amend the complaint to further allege that Hospital representatives improperly interrogated potential employee witnesses.

The Hospital disputes the allegations and contends that it engaged in hard, but good faith, bargaining over the course of 30 bargaining sessions. It contends that it withdrew recognition from the Union only after it received objective evidence from a majority of employees in the bargaining unit that they no longer wished to be represented by the Union for purposes of collective bargaining. Even if it did engage in any unfair labor practices during bargaining, the Hospital avers that none caused the disaffection that eventually developed among a majority of the bargaining unit. Since the withdrawal was proper, the Hospital contends that it was then entitled to implement unilateral changes to employees' terms and conditions of employment, as well as notify employees that the changes were related to the Union's shortcomings and their newfound status as nonunion employees. Finally, the Hospital denies that its counsel coercively interrogated employees in preparation for hearing and that they properly advised the employees of their rights, including the right to decline to give testimony without threat of reprisal.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel, the Hospital and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Hospital, a limited partnership, is engaged in providing short-term acute medical care to the general public from its health care facility in Washington, D.C. In conducting such business operations, the Hospital annually derives gross revenues in excess of $250,000 and receives goods and materials valued in excess of $5,000 directly from points outside of Washington, D.C. Additionally, the Hospital's business operations within the District of Columbia are encompassed by the National Labor Relations Board's (the Board) plenary jurisdiction over enterprises in that jurisdiction. The Hospital admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has a been a healthcare institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties' Collective Bargaining History

The Hospital is jointly owned by George Washington University and District Hospital Partners, L.P. District Hospital Partners, L.P. is a subsidiary of Universal Health Services, Inc. (UHS). The Union represents a bargaining unit of about 150 regular full-time and regular part-time employees in the Environmental Services (EVS), Linen Services, Ambulatory Care Center, and Food Services (Dietary) departments of George Washington University Hospital (the bargaining unit).

The Hospital's recognition of the Union has been embodied in successive collective-bargaining agreements spanning more than 20 years.[4] The most recent agreement was effective from December 20, 2012 through December 19, 2016 (the CBA). That agreement, as well as the one before it, were negotiated within a week and without the assistance of counsel. The CBA defines the bargaining unit, in pertinent part, as follows:

Article 1 – Recognition

Section 1.1 The Employer recognizes the Union as the exclusive bargaining agent for a unit of all regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital. The job classifications are named in Section 2 below, but excluding, all executive, professional, technical, clerical, and supervisory employees (including foreman), temporary employees, guards, employees not regularly scheduled for a standard workweek of twenty (20) or more hours, and all other employees in job classifications not specifically named in Section 1.2 below.

Section 1.2

Crew Leader, Environmental Services
Service Worker
Service Worker Trainee
Senior Service Worker
Linen Service Worker Trainee
Linen Service Worker

Cook I
Cook II
Utility Worker
Food Service Worker

[1] 29 U.S.C. §§ 151-169.

[2] The parties' joint motion to correct the record, dated July 31, 2019, is granted.

[3] There were very few credibility issues in this case. An unidentified hospital employee took notes of the sessions. The General Counsel introduced selected portions of those bargaining notes, while the Hospital moved at the conclusion of the hearing to admit the notes for all 30 bargaining sessions. I received all of the notes over objection of the General Counsel. The notes did not always capture the detailed exchanges between the parties. They did, however, cover the topics covered at the meetings and were corroborated in most instances by witness testimony, subsequent correspondence, and exchanged proposals and counterproposals. (R. Exh. 3.)

[4] GC Exh. 30.

Nutrition Associate

Section 1.3 For purposes of this Agreement, the following terms have the meanings stated below:

(a) "regular full-time employee(s)" means employee(s) in a bargaining unit who hold regular full-time positions and who are regularly scheduled to work forty (40) hours per week;

(b) "regular part-time-employee(s)" means employee(s) in a bargaining unit who hold regular part-time positions and who are regularly scheduled to work twenty (20) or more hours per week; any regular part-time employee working over 35 hours a week shall receive an additional twenty cents (20) an hour to his or her straight-time hourly rate for each hour worked from 36 to 40. If an employee works in excess of 40 hours per week[,] such additional amount will not be paid;

(c) "temporary employee(s)," excluded from bargaining units, means employees who are identified as temporary employees on Employer records and are hired for a period of no longer than six (6) months, or whose temporary status is subsequently renewed for periods not to exceed three (3) months, or who are hired to replace one or more employees who are absent on leave from work, even if for longer than (6) months;

(d) "employee(s)" as hereinafter used means both regular full-time employees and regular part-time employees as defined above, unless a provision applies only to one of these categories of employees, in which case the term shall include only the category of employee to which the provision applies.

Other provisions that figured prominently in the bargaining at issue include the following relating to union security, wages and the grievance/arbitration process:

Article 2 – Union Security

Section 2.1 The Employer agrees that as a condition of continued employment, all employees who are presently members of the Union shall maintain said membership, and all employees who are not presently members of the Union and all new employees shall become members on the first day of the first full calendar month which follows completion of sixty (60) days of employment, or the thirtieth day following the effective date of this Agreement, whichever is later. The Employer agrees to provide the Union with a quarterly report of new members, their addresses and job titles.

Section 2.2 Membership in the Union, insofar as this Agreement is concerned, shall mean that an employee tenders the periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership therein.

Section 2.3 The Employer further agrees that upon request of the Union it will discharge any employee who in accordance with the above, fails to tender the periodic dues and initiation fees uniformly required to obtain and maintain membership in said Union.

Section 2.4 The Union agrees to indemnify and hold the Employer harmless from any and all claims, suits, judgments, attachments, and any other liability resulting from the Employer's actions in accordance with this Article.

Article 7 – Wage Rates

Section 7.1(a) Effective January 1, 2013, employees on the payroll as of that date shall Receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2014, employees on the payroll as of that date shall receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2015, employees on the payroll as o that date shall receive a pay increase of two percent (2%) of their present straight time hourly rate.

Effective January 1, 2016, employees on the payroll as of that date shall receive a pay increase of one percent (1 %) of their present straight-time hourly rate.

(b) If any employee's straight-time hourly rate of pay, upon being increased as provided above, is less than the straight-time hourly rate for his/her job classification as listed in the relevant column of Exhibit 3, the employee's straight-time hourly rate will be the higher rate, and whichever straight time hourly rate is higher will be used as the basis for computing all paid leave and other benefits provided under this Agreement.

Section 7.2 Employees who are hired on or after the date of execution of this Agreement or who transfer to a new job classification on or after the date of execution of this Agreement will be hired or transferred in accordance with the hourly rates of pay set forth in Exhibit 3; provided that in the case of a transfer to a job classification in the same or a higher pay grade, the employee may retain his/her former hourly rate of pay, if higher.

Section 7.3 An employee shall receive a shift differential forty ($.40) cents per hour over his/her straight-time hourly rate for hours worked between 7:00PM and 5:00AM. No shift differential will be paid for any hours for which an employee is paid at a time-and-a-half (1½) or greater rate.

Section 7.4 An employee shall receive a weekend differential thirty ($.30) cents per hour-over his/her straight-time hourly rate for hours worked between 12:00 AM Saturday and 12:00 AM Monday. No shift differential will be paid for any hours for which an employee is paid at a time-and-a-half (1 ½) or greater rate.

Section 7.5 It is understood and agreed that an employee from a lower classification assigned to perform one (1) hour or more per day in a classification paying a higher rate Section 8.1 of pay per hour as set forth in Exhibit 3 shall receive the higher rate of pay for all hours worked in the higher classification. Nothing in this Agreement, however, shall be construed to prohibit the employee from performing tasks as a trainee for a higher paid classification at his/her regular rate for a period not to exceed 2 months. An employee may be assigned to perform work in a lower classification when emergencies or unpredictable events occur which prevent the normal operational schedule to be followed, but in such temporary instances will retain his or her regular rate of pay per hour.

Article 18 – Grievance and Arbitration

Section 18.1 General. A grievance is defined as a complaint

by the Union over an alleged violation of any specific provision of this Agreement that occurs during its term. A grievance shall be in written form, signed and dated by an authorized union representative.

Section 18.2 Time Limits, "Working days" as used in this Article means Monday through Friday, excluding observed holidays. Unless the parties have agreed in advance in writing to a specific extension of time, any grievance or demand for arbitration which is not filed by the Union at each step within the time limits contained herein is waived and the grievance is deemed to be concluded in accordance with the Employer's decision, and there shall be no further processing of the grievance or any arbitration delivery in writing by person or by mail, and if filing is by mail, the date of the official U.S. Postal Service postmark shall be the date of filing.

Section 18.3 Meetings. If the authorized Union representative or the aggrieved employee fails to attend a scheduled grievance meeting without prior notification to the Employer, the grievance shall be deemed concluded in accordance with the Employer's decision and there shall be no further processing of the grievance or any arbitration thereon.

Section 18.4 Steps 1. 2 and 3. Except as provided in Section 18.4 (d) below, Steps 1, 2 and 3 are as follows:

(a) Step 1. A grievance shall be filed at Step 1 with the supervisor within ten (10) working days after the action on which the grievance is based. The parties may agree to hold a meeting at this Step. If the grievance is not settled or denied by the supervisor or his/her designee within five (5) working days after it is filed at Step 1, the grievance shall be deemed denied at the expiration of such five (5) working days and the Union may, proceed to file the grievance at Step 2 as provided below.

(b) Step 2. A grievance shall be filed at Step 2 with the department head, within five (5) working days after the grievance is denied at Step 1. A meeting for the purpose of attempting to resolve the grievance shall be held at this Step. If the grievance is not settled or denied by the depat1ment head or his designee within ten (10) working days after it is filed at Step 2, however, the grievance shall be deemed denied at the expiration of such ten (10) working days and the Union may proceed to file the grievance at Step 3 as provided below,

(c) Step 3. Within five (5) working days after the grievance is denied at Step 2 a grievance shall be filed at Step 3 with the Director of Human Resources. A meeting for the purpose of attempting to resolve the grievance shall be held at this Step. If the grievance is not settled or denied by the Director of Human Resources or his/her designee within ten (10) working days after it is filed at Step 3, however, the grievance shall be deemed denied at the expiration of such ten (10) working days and the Union may proceed to invoke the arbitration procedure as provided in Section 18.5 below.

(d) Discharges: Discipline Imposed by Department Head. A grievance which arises from a discharge or from disciplinary action imposed directly by the department head shall start at Step II instead of Step I and shall be filed within ten (10) working days after the action on which the grievance is based. All other provisions of Section 18.4 shall apply.

Section 18.5 (a) Demand for Arbitration. A written demand for arbitration shall be filed by the Union with the Director of Human Resources within thirty (30) working days after the grievance is denied at Step 3. At the same time, the Union will request the Federal Mediation and Conciliation Service (with a copy to the Employer) to furnish a list of not less than nine (9) arbitrators. Selection shall be made by the Union and then the Employer representatives alternatively striking any name from the list until only one name remains. The final name remaining shall be the arbitrator of the grievance.

(b) Authority of Arbitrator. The arbitrator shall have no authority to hear and determine any case that has not been processed and submitted to him/her in accordance with the time and procedural requirements of the Article unless the parties have specifically agreed in writing to a waiver of the particular requirements. The arbitrator's authority and his/her opinion and award shall be confined exclusively to the specific provision or provisions of this Agreement at issue between the Union and Employer. The arbitrator shall have no authority to add to, alter, amend, Ot! modify any provision of this Agreement. The arbitrator shall not hear ot· decide more than one grievance without the mutual consent of the Employer and the Union. The arbitrator shall render a decision as expeditiously as possible, and no later than thirty (30) working days after the close of the hearing, unless otherwise agreed to. The award in writing of the arbitrator within the proper jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee, the Union and the Employer. Before either party flies an action in court to enforce or vacate an arbitrator's award, the

(c) Expenses. The Union and the Employer shall each beat its own expenses in any arbitration proceedings, except that they shall share equally the fee and other expenses of the arbitrator in connection with the grievance submitted.

B. Overview of the Bargaining Period

The Hospital and the Union met for 30 sessions between November 2016 and October 2018. The Hospital's bargaining team was led by outside counsel Steven Bernstein and Jeanne Schmid, the Hospital's vice president of labor relations. Both were new to the bargaining relationship, although Bernstein had represented the Hospital since 2014 during the decertification of the Hospital security officers' union. Other Hospital negotiators included supervisors Rhonda Evans, Eric McGee, Makita Miller and Robert Trump. The Union's lead bargainers included outside counsel Stephen Godoff[5] and Brian Esders, Union representatives Lisa Wallace,[6] Antoinette Turner and Yahnae Barner, and unit employees Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith.

[5] Godoff admitted he used profanity on numerous occasions during the bargaining sessions and never heard that type of language from Bernstein or Schmid. (Tr. 80–91.)

[6] Although not clarified in the record, I find that Lisa Wallace subsequently changed her name to Lisa Barnes.

The parties met at the Hospital's administrative offices, some distance from the medical center, on K Street in Washington, D.C. for negotiations on the following dates:

1. November 21, 2016	2. November 22, 2016
3. December 6, 2016	4. December 7, 2016
5. December 21, 2016	6. December 22, 2016
7. January 17, 2017	8. January 31, 2017
9. February 1, 2017	10. February 22, 2017
11. February 23, 2017	12. March 28, 2017
13. March 29, 2017	14. April 5, 2017
15. April 6, 2017	16. May 16, 2017
17. June 12, 2017	18. July 12, 2017
19. July 31, 2017	20. October 6, 2017
21. January 17, 2018	22. February 13, 2018
23. May 18, 2018	24. May 21, 2018
25. July 31, 2018	26. August 1, 2018
27. September 5, 2018	28. September 6, 2018
29. October 10, 2018	30. October 11, 2018

C. The Bargaining Sessions

1. November 21 and 22, 2016 Bargaining Sessions

At the first bargaining session on November 21, 2016, the parties discussed the scheduling of bargaining sessions and time allocated to each, whether employee negotiators would be compensated by the Hospital for their time at bargaining, and various other "housekeeping" items. From the outset and on numerous occasions thereafter, Bernstein and Schmid stressed that they sought to substantially alter many of the CBA provisions on the grounds that they were antiquated and ambiguous in various respects.[7]

The second day of negotiations on November 22, 2016 focused on weather related transportation issues, the usage of cots, proposed changes to Articles 25 (union announcements & conferences) and 28 (personnel folders), and a new article on restricted access to hospital and patient care areas. The Union gave verbal counter-offers to the recognition and nondiscrimination clauses.[8] The contentiousness of the negotiations due to a previous labor/management committee dispute surfaced in several snide comments by Turner.[9]

Following those bargaining sessions, the Hospital issued its first "Bargaining Brief" (bargaining brief) to supervisors on December 1, 2016, which included the following "talking points:" the union has communicated with hostility and has not provided any proposals or responses to the proposals introduced by the hospital. They have not been prepared; as a result, the meetings have been unproductive unfortunately; This is the first time GWUH is presenting a bargaining brief and we do not believe the union will be happy with us doing so. Therefore, please be vigilant as union presence may increase as soon as today."[10]

2. The December 6 and 7, 2016 Bargaining Sessions

With the CBA about to expire on December 19, 2016, the parties resumed bargaining on December 6 and 7. On December 6, Bernstein presented the Union with proposed sweeping changes to Article 30, the management rights clause, which had been embedded in all of the predecessor agreements between the parties.[11] The proposal reserved the Hospital's rights to: (1) assign any amount of bargaining unit work to supervisors; (2) use contractors and contract personnel to perform bargaining unit work; (3) engage in searches of unit employees without limit; (4) discipline employees without cause; (5) change employees' health insurance and other benefits at any time; (6) determine what positions are and are not part of the unit; (7) determine the existence of bargaining unit work; and (8) determine the extent to which bargaining unit work could be performed at all. Along with its management rights proposal, the Hospital also proposed to nullify past practices:

> The parties further agree that all past practices, side agreements of understandings, verbal or written, of every kind and nature which may have developed or existed prior to the effective date of this Agreement are superseded and extinguished by this Agreement and, effective with execution of this Agreement, shall be wholly void and without force and effect. Nothing contained in this Article shall be construed as impairing or limiting the Hospital's Management Rights . . . including, without limitation, the Hospital's right to make, change and enforce rules, regulations and policies governing employment and conduct of employees on the job.

After the Hospital began posting contentious bargaining briefs, the Union brought Godoff into the negotiations on December 7, 2016. Godoff started off with a bang, accusing the Hospital of creating an atmosphere that was very difficult to negotiate in and questioning its interest in arriving at a new contract.[12] At one point, he also referred to the Hospital's personnel folders proposal as "a nothing burger" and "an absolute waste of everyone's time."[13]

By the end of bargaining on December 7, the Union had tendered counteroffers for the recognition clause, non-discrimination clause and personnel folders.[14] It rejected the distribution and solicitation proposal, while the Hospital rejected the hostile environment side letter and proposed a job posting provision.

On December 9, 2016, Schmid distributed the Hospital's second bargaining brief asserting, in pertinent part, that the Union had a different negotiator each day, did not bring a computer or

[7] Godoff confirmed that the CBA could use some updating, but not to the drastic extent that the Hospital's negotiators sought. (Tr. 77; R. Exh. 3 at 6, 50, 85, 177.)

[8] R. Exh. 5.

[9] R. Exh. 3 at 24–26.

[10] Following nearly every bargaining session, the Hospital required supervisors to read and distribute bargaining briefs to unit employees at pre-shift meetings. Along with some of the bargaining briefs were "talking points" for supervisors to share with bargaining unit employees. (GC Exh. 40.)

[11] The Hospital's rationale for the proposal was that the management rights language in the current and earlier contracts was outdated and required clarification. (GC Exh. 2; R. Exh. 1 at 3542–3543.)

[12] Godoff conceded that he used profane language at various times but noted that the voices were raised on both sides. (Tr. 80–81; R. Exh. 3 at 45.) Indeed, the Hospital's bargaining notes reflected numerous instances in which Wallace and Schmid interrupted each other.

[13] R. Exh. 3 at 49.

[14] R. Exh. 5.

printer and objected to the bargaining brief posted after the last meeting. The brief concluded with a reminder that Hospital management was available to answer any questions about bargaining. Schmid's subsequent email on December 11 also reminded supervisors not to "review, discuss or sign any petition, or anything that looks like a petition with anyone," since "doing so will disrupt the integrity of the process."[15]

3. The December 21 and 22, 2016 Bargaining Sessions

By the December 21, 2016 session, the proposed ground rules from the November 21 session had still not been agreed upon. As he sought to do at the outset of every session, Bernstein reviewed the status of all of the proposals during every session, which Godoff found useful because of the infrequency of the bargaining sessions. Negotiations began with discussion of changes to job postings, visitation and bulletin boards. The Union presented language that was used in a contract with Georgetown Hospital, which the Hospital rejected. Godoff mentioned that the Union had a good relationship with Georgetown Hospital. Schmid responded that "we're not Georgetown."[16]

On December 22, 2016, the parties discussed the Hospital's proposals to modify Article 6 (hours for employees), specifically, procedures for calling out late and absences. The parties did not agree on any terms; Godoff characterized the Hospital's proposal to authorize termination based on a few absences as draconian and unprecedented. Bernstein's proposal to meld Articles 15 (layoff and recall) and 23 (seniority) was also rejected. The Union opposed these changes as well because they diminished seniority by authorizing layoffs based on performance evaluations rather than seniority. Godoff expressed the Union's dismay to such a proposal: "If you're hell bent on these kinds of things we will end up with a fight. Some things are so important will wind up being at war. War with SEIU."[17]

4. The January 17, 2017 Bargaining Session

On January 17, 2017, the Hospital provided the Union with a proposal to replace Article 22 (Suspension and Discharge) with a draft entitled "Discipline."[18] Among the substantial departures from the longstanding language appearing in Article 22 were provisions: (1) deleting "just cause" language; (2) excluding any discipline short of discharge from "the full grievance and arbitration procedure;" (3) placing limits on employees' right to union representation at investigatory interviews; (4) allowing the Hospital to rely on final written warnings for four years; and (5) permitting the Hospital to apply progressive discipline "where appropriate," and to skip steps for certain enumerated infractions, as well as "any other incident [or event] that the Hospital deems as a major [or egregious] infraction of employee conduct or work rules." During the ensuing discussion, the Hospital took the position that discipline, with the exception of termination, should be grieved and not arbitrated.[19]

The parties also resumed discussion over the Hospital's proposal to replace Articles 15 and 23 relating to seniority, layoff and recall. The expired CBA did not contain a time limit on recall rights; however, the Hospital proposed limiting the time period for recall to 2 months from the date of layoff. The Hospital also proposed eliminating 2 weeks of severance pay; the Union countered verbally, which Schmid found to make the negotiations very difficult. Godoff called the proposal "disgusting . . . Gratuitous bull shit and nastiness I have no interest in [discussing]. Proposal is so mean spirited it is a disgrace . . . Management flexibility my ass." Notwithstanding the emotional response, Godoff signaled a willingness to counter the proposal. In the meantime, he countered with a proposal that the Hospital agree to restoration of Article 15.4 which provides for 2 weeks of severance pay to laid-off employees with at least 6 months of service.[20]

Two days later, the Hospital circulated a bargaining brief summarizing the topics discussed and pointing out that "[d]uring these sessions the union formally proposed: Nothing." The brief also denounced the Union's conduct during the sessions and limited availability:

> • Starting with these January bargaining sessions, the union has refused to continue tomeet with the Hospital's bargaining team during working hours. The union is insisting on meeting in the evenings because the Hospital agreed to pay the union's bargaining committee members for their time at the table only through the end of the-last year. The Hospital has maintained that the union should pay their own bargaining committee, since the committee is bargaining on behalf of the union, not the Hospital. The union, however, refuses to do so.
> • Instead the union now wants to meet in the evenings for half of the time we had previously spent in bargaining each day. Instead of meeting for approximately 7 hours from 10 am to 5 pm each day, the union wants to meet from 4pm to 7:30 pm – with a break for dinner. The union acknowledged that this is likely to slow down the pace of bargaining significantly.
> • Yesterday afternoon, we were in bargaining for 30 minutes when the union took a 45 minute break for dinner. We met together for 45 more minutes after their dinner, and then we ended for the evening. In the short time that we were together at the bargaining table:
> • The union's chief negotiator spent the first twenty minutes of valuable time cursing and yelling at the Hospital's bargaining team;
> • The Hospital's chief negotiator made clear that its committee was prepared to walk out if that continued;
> • The union informed the Hospital that it is no longer able to negotiate on any Fridays, forcing us to change an already agreed-upon date to accommodate that new restriction.
> • Despite the fact that the Hospital's counsel has repeatedly asked for written counter-proposals, the union

[15] GC Exh. 36.

[16] R. Exh. 3 at 66.

[17] R. Exh. 3 at 90–93.

[18] GC Exh. 4; R. Exh. 1 at 3561–3563.

[19] Bernstein initially asserted on direct examination that the arbitration provision in the Hospital's discipline proposal was a mistake or "error" and "inaccurate," but when pressed on cross-examination he admitted that it was in fact not a mistake and the parties actually discussed the arbitration provision when the Hospital introduced the disciplinary proposal. (Tr. 42–44, 118–119, 188–190, 554–556, 597–599, 608–609; GC Exh. 46; R. Exh. 3 at 98–109.)

[20] R. Exh. 3 at 100–105.

provided none and informed the Hospital that it would not be able to provide any written counters in the evening because there was no one in their offices in Baltimore to type the proposals at that time. But, it is the union that is insisting on meeting in the evening.

The brief concluded with the dates of the next sessions and a reminder that "your leadership and the senior leadership team" were available to answer any questions about bargaining.[21]

5. The January 31 and February 1, 2017 Bargaining Sessions

At the January 31, 2017 bargaining session, the Union provided a written counterproposal to the Hospital's proposed disciplinary proposal to replace Article 22.[22] The Union proposed, among other things: (1) that employees be notified within a certain period of time of discipline; (2) that the Hospital produce the work rules it referenced in its discipline proposal; and (3) for final written warnings to be added to the list of arbitrable actions. The Hospital countered in writing and agreed to some notification to employees of the discipline; to a deadline by which discharged employees must be paid; that employees would not be disciplined in public; and to strike the catch-all provisions regarding conduct exempt from progressive discipline.[23] The parties also discussed several outstanding items, including personnel files, non-discrimination, recognition clause, solicitation, job postings and seniority/layoff and recall.

When the parties met on February 1, 2017, the Union tendered a counterproposal to the Hospital's management rights proposal by accepting 22 of its 26 subsections. The Union also agreed to the Hospital's introductory language, with the exception of a portion permitting the Hospital to subcontract services or products.

The bargaining brief issued by the Hospital on February 2 listed the pending proposals by the Hospital and the Union, as well as a detailed summary of the positions of the parties during bargaining, and accused the Union of dragging out negotiations:

> The evening sessions are much shorter than the sessions we were attending during the day. We now typically begin after 4:00 and end at 7:30 pm, with a break for the union's dinner. The amount of actual time spent in bargaining is now less than 2 hours per day.Unfortunately, at this pace, it could take longer to work through the process.[24]

6. The February 22 and 23, 2017 Afternoon Bargaining Sessions

During the February 22 session, the parties exchanged proposals relating to discipline, solicitation and notification of job postings, and discussed revisions to the bargaining unit, probationary periods and eligibility for benefits, and minimum work hours for full-time employees. The Hospital also tendered a proposal to revise Article 28 (personnel folders). The parties tentatively agreed to the proposals regarding discipline. On several occasions during these sessions, the Union's negotiators expressed a sense of urgency about the need to move to the economic issues.

At the conclusion of the session, Turner noted that "[w]e have to start economics why can't you give a non-economic proposals. Your strategy is to prolong. You won't want to pay these employees and pay retro." Bernstein ignored her comment and went on to discuss the need to revise the arbitration language.

At the outset of the February 23 bargaining session, Godoff expressed frustration with the pace of negotiations and insisted that the parties agree to on more than 2 half-days per month. Bernstein replied that the Hospital was only willing to schedule two full days of bargaining per month. Godoff responded by threatening to file charges. Bernstein invited the Union to propose dates and Turner replied with twelve dates in March and April. Bernstein immediately replied by agreeing to schedule two dates for bargaining – April 5 and 6, 2017. Turner replied that members had been limited to the afternoon/evening sessions, which Bernstein recognized was due to the fact that the Hospital refused to compensate unit employees for time spent attending collective bargaining after the CBA expired.[25]

Bernstein handed out proposals relating to uniforms (Article 16), job postings and filling vacancies. He requested a written counter to the Hospital's discipline proposal (Article 22) and the parties resumed bargaining over Articles 1 (recognition) and 26 (classifications).

7. The March 28 and 29, 2017 Bargaining Sessions

At the March 28 and 29, 2017 sessions, the Hospital tendered counterproposals on discipline and job postings, and the parties reached tentative agreements on uniforms. Bernstein also introduced four proposals: a counterproposal for managerial duties and rights, a new proposal for union security (Article 2), grievance and mediation (Article 18) and no-strikes or lockouts (Article 21).[26]

The Hospital's March 28 management rights proposal countered the Union's February 1 proposal. However, it was virtually identical to the Hospital's December 6 proposal, with the exception that the Hospital agreed "to receive from the Union constructive suggestions, which the Hospital shall consider in its sole discretion."[27] Godoff, hardly impressed, told Bernstein to "Get the fuck out of here. Put it in the bargaining notes keep going with your proposal."[28]

Three new Hospital proposals were tendered on March 29. Its union security proposal sought to delete that provision, as well as the dues remittance authorization.[29] That proposal was not discussed. However, the no-strike proposal, which would have precluded picketing and the use of "economic weapons" in response to contract violations or violation of federal law, evoked a strong response from Godoff:

[21] GC Exh. 5.

[22] GC Exh. 6; R. Exh. 2.

[23] GC Exh. 7.

[24] GC Exh. 8.

[25] R. Exh. 3 at 149–152.

[26] GC Exh. 9–12; R. Exh. 1 at 3601–3603, 3610–3611, 3614, 3627–3630.

[27] Schmid's testimony confirmed that the Hospital's proposal did not change from its December 6 proposal. (Tr. 248.)

[28] Contrary to the Hospital's representation in the bargaining brief that followed, Godoff's vulgar reference was obviously a rejection of the proposal and not a directive to Bernstein to leave. (Tr. 168.)

[29] R. Exh. 1 3598–3600.

> Want to be clear at this point. We'll take a look at this document; not sure if we are prepared to bargain. Now into the end of March after months of negotiations on innumerable contract provisions that have taken a tremendous amount of time to go through and only TA[30] 1 or 2 of those documents. To submit on 3/29 a brand (sic) document that requires more time and effort. These negotiations have been extremely protracted and we have only 2 days and now into May before were (sic) even able to consider language non-economic matters. Make clear now that we fully expect on the 6th of April to present economic proposals and begin to bargain over them. Not walking away from stuff we bargaining but will tell you under no circumstance not accept any new proposals into April, not accepted at that point. Again I don't know, it may simply clarify responsibilities, we can't make this a forever negotiation and have to hear from you on issues on retroactivity on wage increases before going into 5–6 months on a contract that's been around for 20 years or more. Reinventing a brand new contract with less than 1 arbitration a year; never been any job action in 20 years so there's nothing I see in the present contract that has been problematic for either party. No complaints from mgmt., they have been 3 day off. [No]w talking 5 months at a minimum. That's where we are. Want to make sure we are bargaining toward a contract not spinning wheels. People not had a raise, contract already 3 months old. Serious concern of ours, not making progressing fast enough, think we ought to lock in dates in [M]ay so we can at least make sure we are done by May. Concern [we'll] be here.[31]

Bernstein agreed to schedule bargaining dates for May but insisted the parties bargain over the new proposals, insisting they were all urgent. In response to Schmid's comment that the Union had not fully responded to the Hospital's proposals, Godoff replied:

> You're full of shit . . . we've given you everything. You don't know what the hell is going on. By sticking out month after month these people are going without a raise. Paying without 12 an hour. She pisses me off and you ruin these negotiations.[32]

After a brief exchange, Bernstein asked if it was the Union's position that it would no longer discuss non-economic proposals. Godoff replied:

> Reaching point you are not bargaining in good faith, becoming the suspicion. Not agreed on employee wants to look at personnel file for a union rep to help them go through the file. What's happening is people are becoming concerned, this is a continuing, [we're] going to get [to] new. We're not into [M]ay. Takes us hours to go through non-economic.

The Hospital's negotiators then noted the need to tighten or clarify language because numerous contract interpretation issues had arisen over the years. Godoff replied:

> We've all been in negotiations; there have been issues with management and union about interpretation. For [management] to come and change and clarify position but to come in and say on provisions never been a dispute and spend hours and hours raises red flag for the union. What you're doing is dragging out a process with no intention on getting to a process in the end. If we're going to have a fight not sure if we want to wait to have a fight. I'll be candid, with certain exceptions members of your committee, really did want to get to a contract and I've assured the union this is difficult and time consuming but intentions are honest. Also some that raises a red flag. After months of negotiations new proposal on a strike clause with no labor dispute in 20 years, never had a picket line, never had anything but health positive labor mgmt. relations. Why all of a sudden is the no strike clause a significant concern that would postpone a raise, for wages by July below minimum wage for DC? We're concerned about that.[33]

As bargaining continued, Bernstein tendered a proposal to replace Article 18 (grievance and arbitration) with a grievance and non-binding mediation provision, and amended its previous disciplinary proposal. The proposal curtailed the Union's ability to file lawsuits alleging violations of the CBA unless the breach involved a provision subject to mediation. Construed in conjunction with the disciplinary proposal, the proposed process essentially relegated discipline short of discharge to the grievance process and foreclosed access to mediation and further litigation. Godoff took exception, noting that "[t]his is potentially goodbye to this session. We won't have time to read through this today."

Bernstein then distributed a proposal to replace Article 3 (dues check-off). Godoff replied that "[t]his is bullshit . . .Come on [give] us the other things. [We're] out of here." As the Union negotiators were leaving, Godoff said that they would take the rest of the afternoon to "look at what you gave us."[34]

This was a pivotal development in the negotiations, as the proposals stymied the Union's objective of advancing to bargaining over economic terms. In fact, Godoff advised the Union's bargaining team after this session that the proposals were "a clear announcement by management that they would never enter into an agreement with [the Union]."[35]

The Hospital's March 30, 2017 bargaining brief focused on the more raucous aspects of the March 28–29 sessions and completely omitted any reference to the concessions made by the Union in its February 1 counterproposal on management rights, as well as the Hospital's refusal to change its position between December 6 and March 29.[36] In addition, the brief highlighted the Union's refusal to "allow supervisory employees to perform bargaining unit work. We don't see how that helps staff members

[30] TA is shorthand for tentative agreement.

[31] R. Exh. 3 at 175–176.

[32] Godoff conceded that he lost his temper at this particular session and "threw [Hospital's counsel] out of the room." (Tr. 51–52). After that session, Godoff told the Union "that in my view you are never going to get a contract." (Tr. 124.)

[33] R. Exh. 3 at 175–178.

[34] R. Exh. 3 at 179–180.

[35] Godoff's testimony that the Union asserted on March 29 that the proposals would remove the Union's ability to enforce employees' rights was not reflected in the bargaining notes. (Tr. 51, 126). He did contend at that time, however, that the proposals were not justified based on the excellent labor relations history between the parties—no strikes or labor disputes, with the exception of one arbitration proceeding—during the past 20 years. (R. Exh. 3 at 176–178, 185.)

[36] GC Exh, 13.

who would like to be able to rely on their directors' managers' and supervisors' help when facing a difficult task or call-outs[.]" The brief also stated that the "union's negotiator was dismissive of the Hospital's March 28 proposal and told the Hospital they needed to 'Get the F*** Out!! and that they would not be willing to consider further Hospital proposals on the subject." The remainder of the brief was also critical of the Union's conduct:

> As the Hospital's VP of Labor Relations [Ms. Schmid] attempted to explain the Hospital's position, the union's attorney [Mr. Godoff] cut her off before shouting, "She pisses me off!" Then, turning directly to her he added, "You've ruined these negotiations!" The Hospital's VP of Labor Relations replied, "You don't intimidate me." At that point the attorney said, "If I wanted to intimidate you, I could have."
>
> Mr. Andrews then chimed in by repeating the lawyer's statement that, "This is bullshit!" The Hospital's chief negotiator [Mr. Bernstein] replied, "Just so I capture that clearly, is 'bullshit' one word or two?" In the presence of the entire room, including several female members of both committees, Mr. Andrews (who was apparently sitting in for the union's lead negotiator), replied, "There are three things that I don't tolerate—Bullshit, Bigotry, and Bitches." Many participants were disgusted by that remark which seemed to be directed at a number of people in the room.
>
> The Hospital's negotiator made one more effort to redirect the union's attorney to the Hospital's proposals, only to have him respond, "Kiss my ass!" Mr. Andrews added, "Capture that!" Unfortunately, the meeting adjourned on that note at 1:00pm, with the union's attorney making clear that he was unwilling to continue the meeting or return to the negotiating room despite the fact that negotiations were scheduled to continue for the balance of the afternoon.

8. The April 5 and 6, 2017 Bargaining Sessions

After Bernstein opened the April 5, 2017 bargaining session by proposing to go resume bargaining over the Hospital's March 29 proposals, Godoff stated that the Union no longer believed that the Hospital was interested in reaching an agreement but would continue to bargain in good faith.[37] Bargaining proceeded with the Hospital's presentation of a counterproposal on discipline in which it agreed to timely notify employees.[38] The Union noted several discrepancies in the proposal with respect to arbitration versus the mediation of grievances as it was presented by the Hospital on March 29. The Union also orally countered by proposing that the longstanding grievance and arbitration procedure remain unchanged.[39] The Hospital did not budge on this issue, attributing the justification for the procedural change to a previous arbitration ruling. Nor did Bernstein attempt to reconcile the noted discrepancies at this meeting.

The Hospital presented its last noneconomic proposal at this session—the replacement of the safety clause (Article 20) with a safe harbor for safety concerns provision.[40] Once again, Godoff responded crudely, "Do you guys give a shit? It's a disgusting proposal," and when Bernstein suggested the Union put more time in countering instead of critiquing, Godoff replied, "Here's the counter—no."[41]

At the April 6, 2017 bargaining session, the Union countered with a rejection of the Hospital's proposals to delete the union security and dues check-off provisions.[42] It then presented its initial wage proposal—a five percent increase for all unit employees—consistent with the amounts in the expired CBA.[43]

In the bargaining brief that followed, the Hospital reported that the parties had reached tentative agreement on two proposals—the preamble and uniforms. The Hospital also continued its pattern of reporting on the bargaining derelictions of the Union negotiators: their arrival to bargaining 2 hours late and then bargaining for about four of the scheduled 12 hours; and failure to provide the Hospital with responses to 13 proposals while the Hospital needed to respond to three proposals. The Hospital also claimed that its objection to the union security clause was based on its belief "that employees should have a choice as to whether or not to pay union dues, and should not be fired, as the union is insisting, if they choose not to pay dues."[44]

9. The May 16, 2017 Bargaining Session

The parties started the May 16, 2017 session by reviewing the Union's most recent proposals relating to recognition and classification, restricted access, attendance policy, seniority layoff, union presence during employees' reviews of personnel files, nondiscrimination and no-striking. In particular, Godoff asserted that Bernstein's combined proposals for a no-strike clause, very broad management rights and non-binding labor arbitration constituted unfair labor practices. Bernstein simply plowed ahead with the next item on the list, grievance and mediation. He also brought up pending proposals relating to Articles 2, 24 and 25 on the solicitation and distribution of literature, bulletin boards and discipline. Finally, Bernstein stated that the he would be tendering a proposal to amend Article 6 (hours for employees), which the Hospital viewed as an economic item.[45] Godoff replied that Bernstein could send the proposals but the Union was not going to agree, adding that the parties had been bargaining for 6 months and the Union was no longer accepting new noneconomic proposals.

Bernstein tendered the new proposals and Godoff replied that there were 20 noneconomic provisions in the expired CBA and the Hospital had proposed to completely overhaul 19 of them. He added that the CBA language had been in effect for decades and the Hospital insisted on renegotiating every provision. As examples, he referred to Bernstein's insistence on revising the arbitration process when there had been a lack of arbitration, insistence on bargaining over layoff language when there had not been any layoffs, and bargaining over strike language when there had never been a picket line. Schmid insisted that the contract language was out of date. Godoff replied that parties normally

[37] R. Exh. 3 at 181.
[38] GC Exh. 14.
[39] R. Exh. 3 at 181–203.
[40] R. Exh. 3 at 193–195.
[41] R. Exh. 1 at 3617–3618; R. Exh. 3 at 193–195.
[42] R. Exh. 2 at 3771.
[43] R. Exh. 2 at 3780–3782.
[44] GC Exh. 16.
[45] Ultimately, the Hospital never proposed such a policy. (Tr. 85–86; R. Exh. 3 at 222.)

negotiate when they are having difficulties with provisions they are working on and asked Bernstein to point to issues with any of the provisions.

Godoff mentioned that before concluding for the day, the Union wanted to add to its economic proposal and start discussing it. Bernstein replied that the Hospital did not want to move forward on economic issues because many noneconomic items were still pending. There was brief discussion over pay increases relating to specific job classifications before the parties broke for lunch. When they resumed, the parties bargained over recognition and classification, attendance and absence, union activity/visitation and discipline.[46]

10. The Hospital's May 25, 2017 Revised Disciplinary Proposal

On May 25, 2017, Bernstein emailed Godoff a revised version of the Hospital's disciplinary and grievance-mediation proposals:

> Good afternoon Steve, I hope that all is well with you. My apologies for the delay, but per our discussion at the bargaining table this past week, I've gone ahead and attached Hospital proposals pertaining to both Discipline and Grievance and Mediation, which have been revised in an effort to reconcile some of the discrepancies that you had pointed out in prior sessions. For ease of convenience, I chose to highlight the substantive changes in the Discipline proposal to distinguish them from the other revisions reflected in show changes mode. As always, please do not hesitate to call with any questions. In the meantime, I look forward to seeing you and your team next month. Thanks.[47]

11. The June 12, 2017 Bargaining Session

The June 12, 2017 session opened with argument over the Hospital's continued refusal to pay employees on the bargaining committee for time spent in bargaining and their need to use paid time off to attend. Godoff noted that the Union agreed to have employee negotiators attend during scheduled days off on the assumption that bargaining would last a few sessions. He added that "the way you have bargained have led us into a lengthy process." Bernstein explained that his travel commitments precluded him from working past 6 p m. and required that the next day's bargaining session be cancelled. Godoff replied that the Hospital still had not provided any response to its economic proposals, the parties had not been making any progress toward an agreement, and the employees had been working for months without a pay increase. Bernstein acknowledged receipt of the Union's most recent economic proposals, including a five percent pay increase shortly before the meeting and then passed out its proposal. The parties, however, spent the rest of the session updating a list of employees and their classifications.[48]

12. The July 12, 2017 Bargaining Session

After reviewing the Hospital's previous revisions to its arbitration and discipline proposals, the parties started the July 12, 2017 session with a discussion of the Hospital's spreadsheet of employees and issues with the incorrect wage rates paid to certain unit employees. After a lunch break, Bernstein asked for more time to review the Union's economic proposal and turned the focus to the Hospital's revised discipline and grievance proposals, which changed "documented" to "verbal" and "arbitration" to "mediation." Bernstein also said he was waiting for a counter to the Hospital's proposed changes to recognition and classification and management rights. He then discussed the job postings proposal that the parties were close to agreeing on. Godoff said the Union would consider it.

Bernstein acknowledged that the Hospital owed a proposal on safe harbor and then referred to its November 21 proposals and the Union's December 6 counterproposal on recognition and classification. The parties were apart on the Hospital's proposal to exclude crew leaders but agreed to other proposals. Bernstein then moved to probationary employees, proposing a 90-day probationary period, while the Union proposed 60 days with a potential 30-day extension. Discussion ensued regarding per diem, temporary and agency employees.[49]

13. The July 31, 2017 Bargaining Session

Bernstein opened the July 31, 2017 session by reporting that the Hospital was still processing employees' names to ensure compliance with the expired CBA. He then proposed bargaining over the recognition and classification issues, and the Union's December 6 counterproposal. The only issue there remained crew leaders. Godoff emphasized the Union's opposition to any proposal that would modify the definition of a full-time employee from 40 to 32 hours. Bernstein replied that such a change would have the effect of adding a lot more union dues payers. With respect to the parties' probationary period proposals, he said there was room for compromise. The Union proposed to agree to the Hospital's job postings proposal if the Hospital agreed to Union's last proposal regarding employee requests for a union representative and non-discrimination. Bernstein said the Hospital would consider it.[50]

After a break, the Union proposed to eliminate a contract provision entitling any person working over 35 hours per week to receive an additional 30 cents per hour. Bernstein characterized that as an economic item and deflected to the issue of crew leaders. He asserted that there was no classification for crew leaders and referred to them as lead employees. Godoff replied that crew leaders were non-supervisory and should be in the unit.

After another break, Godoff brought up discipline and insisted that the Union would not agree to a contract that did not provide just cause for disciplinary or provide for arbitration. He also requested a counterproposal with respect to the length of time for notices of discharge. The meeting ended with the Union's resistance to the Hospital's proposal to replace Article 25 (union announcements and conferences). Before concluding, the parties agreed to resume bargaining on September 7 and 8.[51]

14. The October 6, 2017 Bargaining Session

The October 6, 2017 session began with Bernstein proposing that the parties discuss wages. Godoff requested information for

[46] R. Exh. 3 at 220–225.
[47] GC Exh. 17.
[48] R. Exh. 3 at 231–237.
[49] R. Exh. 3 at 238–254.
[50] R. Exh. 2 at 3805-3807, R. Exh. 3 at 255–257.
[51] R. Exh. 3 at 255–262.

the previous six months of hours worked. Then there was discussion over the applicable wage rate, with Bernstein focusing on the "practice" rate and Godoff noting that the contract rate was applicable and that the time taking to get a handle on underpayment was for naught. He insisted that the printout demonstrated that employees were not being paid at the contract rates. After a 1-hour break, Bernstein agreed to have the Hospital look at the list again.

After an hour and a half lunch break, the Hospital maintained its position on whether a union representative could be present during review of a personnel file. Godoff said that the Hospital's refusal to move on non-discrimination constituted an unfair labor practice. Bernstein moved to the crew leader issue which remained in dispute. Regarding probationary periods, Godoff proposed 60 days with an additional 30 days if a manager needed more time to assess employee performance. The Union remained opposed to the Hospital's proposal to allow it to reduce full time employees' hours from 40 to 32 per week. Bernstein replied that the current language eroded the Hospital's rights under the management rights clause. Lisa Brown noted that this was the same conversation that the parties had months earlier. Bernstein replied that there had been "movement on other things on both sides." After Schmid asserted that the "vast majority of lack of counters has come from the other side of the table," Brown referred to the two economic proposals tendered by the Union. After Godoff insisted the only sticking point was the Union's insistence on allowing employees to have Union representatives present when they look at their files, Bernstein replied: "By my counts the employer has submitted 19 proposals, the union has submitted 19 proposals the ball is in the [Union's] court on some and it's in ours on some and my sense is that we're getting close to final statements."

The discussion then moved to per diem employees converting to full time if they work 60 straight days. As the discussion continued, the Union raised issues over employee training by other employees instead of supervisors. If that was going to continue to happen, however, the Union believed that employee trainers should at least be compensated. The Union also asked for an explanation as to why non-unit personnel were receiving a transportation benefit, but unit employees were not.

Toward the end of the session, Bernstein asked if the Union had heard anything to that point that would alter its initial wage proposal in advance of the Hospital's initial wage proposal. Bernstein said, "I think your proposal is pretty straightforward just a straight bump, I just want to be sure you're not going to change it." After Godoff explained stated the reasons behind the Union's wage proposal, Bernstein said "it shouldn't surprise anyone that we're going to propose a new [structure]." Godoff conceded that the previous wage scheme was problematic because of discrepancies among departments, to which Bernstein replied, "I think we all owe it to whomever comes after us to be clear and make it easier to figure out." The meeting ended without an agreed upon resumption date.[52]

15. The January 17, 2018 Bargaining Session

Esders replaced Godoff, who recently underwent surgery, at the January 17, 2018 bargaining session. Bernstein reported that the Hospital had not yet paid any of the back wages owed unit employees. However, he did provide a revised spreadsheet previously sent to Godoff listing the back wages owed.

Bernstein proposed in writing a notice of dues checkoff going forward and the Hospital's intention to suspend dues checkoff effective February 1, 2018. He stressed that the Hospital's position was not negotiable: "Union can secure from other means." Esders replied that the Hospital was refusing to bargain over this implementation for the reasons stated in its letter. Bernstein confirmed that assertion.

Bernstein then summarized where the proposals stood up to that point. After a brief break, Bernstein proposed starting with the recognition clause. There was discussion of the minimum number of hours for full-time versus part-time, as well as per diem, temporary and agency employees. The Hospital proposed that part-timers stay at 20 hours per week. There was renewed discussion over the Hospital's request to eliminate the crew leader position, which led to the Union renewing its assertion that some performed supervisory duties but did not get compensated. As for the applicable probationary period, the Hospital did not budge from its position of 90 days, while the Union continued to push for 60 days plus an additional 30.

After a nearly 3-hour break, Esders charged that the Hospital engaged in unfair labor practices during the morning session, while Bernstein tried to restart the discussion of the dues check off notice. However, Esders commented that discussions were breaking down and the Union walked out at 3:18 p m.[53]

16. The February 13, 2018 Bargaining Session

The February 13, 2018 bargaining session had numerous caucusing breaks. Bargaining started with discussion of a spreadsheet analysis of employees' wages in attempting to determine the underpayment amounts, as well as negotiating over the applicable interest rate. The Hospital agreed to forego repayment of overpayments. The parties broke after an hour, resumed an hour later with continued discussion and broke for lunch 10 minutes later at 12:45 p.m. with no agreement reached on repayment.

The parties resumed at 3:17 p m. and continued discussion of repayment issues. They broke at 3:35 p.m. When they resumed at 4:01 p.m., the Union agreed to the repayment of identified underpayments with interest at the Hospital's proposed 4 percent rate—all contingent on a final agreement. Bernstein wanted to have the issue fully resolved on behalf of all unit employees, while Esders wanted to reserve their individual rights to arbitrate. They broke at 4:10 and resumed at 4:29 p m. There was still disagreement on the 90-day timeframe for challenges to the repayment amounts. The Union offered to reduce that to 60 days. They broke at 4:37 and resumed at 4:45 p.m. at which time Bernstein countered with a demand that underpayment claims be resolved at bargaining. They broke at 4:49 and resumed at 4:56 p m. The Union remained steadfast in its demand for employees to have recourse and the focus turned to the scheduling of 30-minute sessions on February 27 for each employee to meet with

[52] R. Exh. 3 at 263–275.

[53] R. Exh. 3 at 276–285.

management regarding their specific underpayment claims. The meeting adjourned at 5:36 p.m. with no future date set.[54]

17. The May 18 and 21, 2018 Bargaining Sessions

The Hospital finally presented a wage proposal at the May 18, 2018 bargaining session.[55] The proposal included shift differential changes, and lump sum bonuses for quality performance and high attendance that were agreeable to the Union. The salary structure, however, was dissimilar to any of the wage components in the previous agreements between the parties.[56] It provided for a new compensation structure starting August 2019 that incorporated a market-based adjustment for each employee and merit wage increases for employees the Hospital deemed worthy. The proposal also based wage rates on employees' overall experience and not solely on their tenure with the Hospital. In addition, the Hospital retained sole discretion for evaluating employees, and its decisions would not subject to the grievance process; if a review resulted in termination, however, the employee could grieve or mediate the decision.[57]

When the parties returned to bargain on May 21, 2018, Godoff asked for Appendix B to the Hospital's wage proposal. Bernstein replied that it would be provided in the afternoon. Upon being provided with Appendix B, Godoff explained that he was unable to evaluate the proposal because it lacked specificity as to the overall range for the various classifications. It provided only the lowest and highest rates for each classification with no indication as to the specific wage rate for each unit employee. He requested further documentation in that regard, but Schmid insisted that she could only give "examples" based on her "knowledge of the market" for specific classifications.

The Union opposed to this proposal on several grounds: the delayed raises, the use of performance evaluations upon which to base merit-based increases starting August 2019, and the timeline and calculation of market-based increases. When Godoff expressed concern "that these employees haven't had a raise since January 2015," Bernstein replied, "Yes, it's an unfortunate side effect to bargaining." Bernstein and Schmid told the Union that this proposal was not negotiable. When Godoff asked whether the Hospital was going to at least negotiate the ranges from year to year, Schmid said, "No, the ranges are set for the hospital as a whole, it will be the same range for nonunion employees and applied exactly the same way, people are going to be rewarded based on their individual merit." The Hospital's representations were consistent with the proposal's language that "[t]he evaluation process and merit increase awards for bargaining unit employees shall follow and be incorporated into the same general merit criteria and process used for all non-bargaining unit employees at the Hospital."[58]

The Union countered the Hospital's wage proposal by proposing the guarantee of merit increases based on performance evaluations where employees meet expectations or higher, but the Hospital rejected that proposal. The Hospital countered with a second wage proposal, but the Union found no substantial concessions in the document.[59]

On May 21, 2018, the Hospital issued a bargaining brief blaming the Union for shortening the March 18 meeting when its bargaining team left because the Company had not returned from the lunch break by 1:50 p m., insisting that it previously told the Union that the Hospital's negotiators had a telephone call at 1:30 p m.

On June 7, 2018, Mr. Bernstein emailed the Union confirming that the Hospital was withdrawing its no-strike proposal and reinstating its proposal from March 29, 2017.[60]

18. The July 31, 2018 Bargaining Session

Bernstein started the July 31, 2018 session by reviewing the outstanding proposals and Lisa Brown asked Bernstein if he had the "back wage proposal that we asked for 4 times, that you said you would have prior to this session?" Bernstein replied that he still did not have the information because of a change in personnel requiring that the Hospital "redo some of that work." When asked by Brown as to how that changed the data, Bernstein clarified that it "changed the progress we were making on that data. Pressed by Brown for a date, Bernstein did not know. Godoff said that was "unacceptable performance on your part, it's been 3 or 4 months." Brown said the Union gave the Hospital a formula with the accurate calculations at the last session and it seemed like the Hospital was dragging out the back-wage issue. Bernstein replied that the change in personnel changed the progress that the Hospital was making in compiling the data. Brown asked for a date that the information would be provided by. Bernstein did not know and changed the subject to the Union's last proposal.

After a lunch break, Brown asked Bernstein to discuss the Hospital's wage proposal information in Appendix B. He explained the pay ranges, which were based on years of experience for new hires. As the discussion progressed, Brown and Schmid disagreed on the Hospital's proposal to link future pay increases to merit or performance. Schmid argued that high performing employees were not being recognized under the current pay system, while Brown replied that the Hospital could always pay them more, and that workers doing the same work should receive the same pay, and the employer has disciplinary alternatives available to them for unsatisfactory work. Bernstein remarked that there were several open proposals. Brown replied that the Hospital needed to agree to more than the 2 days previously agreed to (September 5 and 6).

At the conclusion of that discussion, Bernstein commented that the parties "made good progress today," but Schmid started an argument over whether the Union had countered any of the Hospital's proposals. Bernstein mentioned fifteen Hospital proposals that had not drawn a counterproposal and two Union

[54] R. Exh. 3 at 286–300.

[55] The proposal referenced specific wage ranges in Appendix B, which was not provided at that time. (GC Exh. 18; R. Exh. 1 at 3640–3643.)

[56] This finding is based on the credible and undisputed testimony of Godoff, Schmid and Bernstein. (Tr. 60–62, 203–205, 580–582.)

[57] The parties took a lunch break at 12:22 p.m. with the Union negotiators expecting that the Hospital's negotiators would be right back. When they took longer than expected the Union warned that they would leave if the Hospital's negotiators did not return by 1:50 p.m. They did not return by that time and the Union negotiators left. (GC Exh. 18; R. Exh. 3 at 301–304.)

[58] R. Exh. 3 at 305–310.

[59] GC Exh. 19.

[60] GC Exh. 21; R. Exh. 1 at 3655–3658.

proposals that the Hospital had not countered. Lisa Brown replied that the back-wage issue needed to be resolved before moving on to other issues. Schmid disputed that assertion but they both agreed that the back wages needed to be resolved and an economic proposal from the Hospital if the non-economic issues were not resolved. Schmid disputed that assertion and Bernstein noted that the parties had never agreed to ground rules. Brown urged that the parties move quicker and stated that if the parties did not get the non-economics resolved, the Union would come back with a package, but needed the documents on back wages and the Hospital's economic proposal. After an explanation by Bernstein of what was not countered by the Union, Godoff remarked that the Hospital had moved away from the contract that was in place for 20 years. Brown added that the Hospital took an aggressive nonunion position and there were not enough days scheduled to move bargaining forward. She added that a month in between meetings disrupted any flow that might have been generated from previous meetings.[61]

19. The August 1, 2018 Bargaining Session

At the August 1, 2018 session, Bernstein acknowledged receiving the Union's counterproposal the previous day relating to availability of service (absences in excess of 3 days) and referred to the applicability of FMLA guidelines and extended leave banks. They also discussed clocking in procedures. Bernstein then proposed a disciplinary schedule of up to 24 months. The Union broke to consider the proposal and the Hospital needed additional time to meet with the payroll department to review the back-wage data.

When they resumed 2 hours later, the Union raised questions about emergency situations excusing justifiable lateness and absences and agreed to submit a counterproposal. The discussion then turned to the Hospital's proposal to reduce official time for grievances from 1 hour per week per delegate to a total of 300 hours per year.

The Hospital's yearly break-down of the market-wage rate proposal reflected an increase in base pay to $13.75 and a range of pay based on experience increased by a minimum of 2 percent, but was contingent on the Union agreeing to a performance merit system. Godoff said the Union would have to review the data. Bernstein also acknowledged that employees needed to be made whole for back wages.

The parties then haggled over the Hospital's proposed merit increases starting in 2021. The meeting ended with Godoff acknowledging that the Union owed a counter on availability of service. The parties concluded with a discussion of available dates in September.[62]

After the session, the Hospital issued a bargaining brief blaming the Union for still not having responded to 15 hospital proposals, wasting time by switching negotiators at the bargaining table, and criticized the Union for rejecting the hospital's merit pay proposal:

> The union made it clear that "the union does not agree to merit pay." When asked shouldn't it be the employees who decide whether they want merit pay increases, the union said, "not every decision has to go to the members, in here [the bargaining team] – a this is the union."

The Brief concluded with a summary of the Hospital's merit wage proposal and criticism of the Union's position as inimical to the notion of rewarding "good performers."[63]

20. The September 5 and 6, 2018 Bargaining Sessions

At the September 5 session, the Union provided several counter proposals. The Union agreed to the Hospital's April 5 proposal to delete Article 24. The Union provided written counter proposals to the Hospital's March 28–29 proposals regarding Article 18 (grievance procedures),[64] Article 2 (union security),[65] Article 3 (dues check off), and Article 30 (management rights).[66]

Bernstein summarized the outstanding proposals. The Hospital had not yet countered the Union's visitation proposal, but Bernstein noted that the Hospital had a competing proposal from November 22, 2016. With respect to the Union's safe harbor proposal of April 6 and 7, the Hospital submitted a counterproposal. Others outstanding proposals included Hospital proposals to supplement the integration clause (Article 29), seniority layoff and recall, solicitation and distribution, and personnel files revision of Article 28. The parties were also apart on management rights, grievances, dues check off, union security and non-discrimination, discipline, recognition and classification, and wages. Bernstein added that the parties were confirmed for further bargaining on October 31 and November 1.

Esders began discussion of backpay and the back-wage spreadsheet. The Union disagreed with the Hospital's proposed four percent interest rate. The Hospital tendered its safe harbor proposal again, which it said was the last noneconomic item on its list.

After an hour break, the Union countered by rejecting a portion of the safe harbor proposal and proposing minor language changes. The Union then moved to the backpay spreadsheet. Esders noted, however, that the information was incomplete, and the Union needed specific amounts to be inserted and would then need to review that information.

Bernstein discussed into the four Union proposals. With respect to the management rights and dues check off proposals, Bernstein said they were substantially different from the CBA and asked where they came from. He added that there had been no counter to the Hospital's wage proposal. After the lunch break, Esders explained that the revised proposals were from other agreements. The union security proposal was copied from the Union's agreement with a Boston hospital owned and managed by UHS; the management rights, grievance and arbitration proposals were copied from agreements between the Union and a group of New York hospitals. The Hospital negotiators took issue with those proposals and Esders agreed that they needed revision.

The parties tentatively agreed to the Hospital's nondiscrimination proposal. Other proposals tentatively agreed to included job postings, uniforms and the preamble. The parties also agreed

[61] R. Exh. 3 at 326–345.
[62] R. Exh. 3 at 346–354.
[63] GC Exh. 22.
[64] GC Exh. 23; R. Exh. 2 at 3813–3815.
[65] GC Exh. 24; R. Exh. 2 at 3818.
[66] GC Exh. 25; R. Exh. 2 at 3816.

to compromise language replacing Article 25 (union announcements). With respect to the Hospital's May 2018 recognition and classification proposals, the Union argued in favor of keeping the crew leader classification because the position still existed. The Hospital pushed for a 90-day probationary period and the Union countered with a proposal that any extension beyond 90 days required Union consent. The Hospital countered the personnel files proposal (Article 28) by proposing that any Union representative present be limited to an "internal union delegate." Schmid reiterated the Hospital's counterproposal to eliminate the Union security clause. The Union insisted that the backpay issue be resolved instantly, but Bernstein disagreed. Schmid again conceded the wage underpayments and Bernstein said that the Hospital wanted to make unit employees whole but wanted to ensure that it was done correctly.[67]

At the September 6 session, Bernstein went through five tentative agreements—the preamble, uniforms, job postings, nondiscrimination and deletion of Article 24 (union-management conferences). Outstanding were Hospital proposals regarding restricted access, layoff and recall, solicitation and distribution and management rights. Argument ensued when Godoff said that the Union accepted the Hospital's solicitation and distribution proposal with the exception of one word. Schmid insisted that the Union put that in writing so the changes could be tracked. Godoff pushed back, maintaining that there was nothing to track since the Union essentially agreed to the proposal.

Contentious discussion ensued regarding the Hospital's safe harbor proposal with Godoff insisting that the section simply mirror OSHA protections while Schmid maintained that it was the employee's decision. Godoff took exception, asking "what is the problem with stating what the federal protection (sic) are, you have to post the fucking thing in your building anyways (sic) you're proposing to put in a contract that that this is an agreement they no longer have their rights under federal law." Schmid disagreed.

The parties discussed the Union's grievance and arbitration counterproposals but did not reach an agreement. With respect to the Union security proposal from the day before, the Hospital wanted to keep it at 60 days, while the Union still proposed 30 days. Godoff also asserted that the Hospital's continued insistence on "language to do away with forced dues" was unacceptable.

After a lunch break, the parties bargained over the dues check off proposal. Schmid repeated the Hospital's desire to eliminate forced dues check off. She then added that "it's also an issue for us that we don't want it" and "it's not fair to force employees to pay dues to keep their jobs at [the Hospital." Godoff replied that employees made that decision when they voted in favor of union representation. Schmid replied, "Decades ago." After Schmid added that the Union has never given unit employees the choice of whether or not to pay dues, Godoff replied that Schmid "[did] not understand how it works." Wallace then implied that Hospital pushed for decertification. Godoff followed with a remark that the Hospital did not like unions. Bernstein replied that "[w]e do like choice." After noting that that the Hospital had discontinued dues check off deductions, Schmid attributed it to the fact that the CBA expired.

There was further discussion over the Hospital's management rights and solicitation and distribution proposals. In addition, the Hospital proposed a different approach to educational benefits and training. The Union agreed to review that proposal and the session ended.

The September 7, 2018 bargaining brief following those sessions was entitled, **"We are going to have blacken your name - the name of this institution – SEIU Negotiator, threatening that the union will damage the reputation of the Hospital because the Hospital has proposed giving employees CHOICE about whether they wish to pay dues to the union."** (emphasis in original) The brief criticized the Union latest proposals as emanated from "a very old contract involving hospitals and nursing homes in New York, with language dating back to 1968." The bargaining brief further stated that the proposals did not respond to any of the Hospital's proposals or reflect any of the Union's prior proposals and were not based on the current contract language. Those assertions then led into criticism of the Union's competency:

> The Hospital, at this point, expressed frustration that nothing the union had put across the table showed ANY effort or work on the union's part for the employees who they say they represent. How, the hospital asked, could the union be so intent on forcing employees to pay dues when this was the kind of slipshod work the union continues to bring to the table. It seemed to be yet another union grab for money, with no effort being made on behalf of the employees. The Hospital directly asked the union whether it believed that employees should have the freedom to choose whether on not they want to pay dues to the union. The Hospital proposed that employees should NOT be forced to pay dues – they should have a choice. **The union told the Hospital, "you can stick those proposals up your ass."** The Union said they would never agree to allow employees to have that choice. In fact, the union said that employees already made their choice about dues – back at the time the union was voted in over 20 years ago. Seriously?? (emphasis in original)
>
> The Hospital also questioned the union's misleading language which makes it appear that employees must be members of the union. The law says that no one can be forced to be a member of the union, (even though they may be forced to pay dues if the union negotiates a forced dues clause). The union did not want to change the language, even though they know it is misleading, saying "membership" does not mean "membership." That is completely nonsensical.
>
> Instead, the union continued, accusing the Hospital of "hating the union" when all the Hospital was doing was fighting for the freedom for employees to choose dues and choose membership. When the Hospital wouldn't back down, the union then threatened to blacken the name of the Hospital – in the city and with the mayor. The Hospital asked how that would help GWUH employees? The union had no answer.

The bargaining brief further stated that the Hospital proposed

[67] R. Exh. 3 at 355–369.

giving tuition reimbursement to unit employees instead of contributing to the Union's "completely ineffective" education fund. It also criticized the Union for spending hours talking about "old, recycled proposals for nursing homes" that had no relevance to unit employees instead of discussing the Hospital's July 2018 wage proposal.[68]

21. The October 10 and 11, 2018 Bargaining Sessions

At the October 10, 2018 session, the Hospital finally produced a completed backpay spreadsheet and stated its intention to issue payments to unit employees. Bernstein then went over a list of noneconomic items—bulletin board postings, union security, dues check off and grievances. The bulletin board issue was close to being resolved but culminated with an argument between Schmid, who insisted that the Hospital see fliers before they were posted to ensure they did not contain political statements, and Godoff's insistence that the Union was entitled to educate unit members on their right to vote.

After the lunch break, the parties discussed but still did not come to agreement on numerous noneconomic issues, including management rights, discipline, dispute resolution, union security, and employee's personnel file reviews in the presence of a Union representative. The discussion then moved to the Hospital's wage proposal. Schmid commented that the Union had not replied to the Hospital's wage proposal. Godoff replied that the Union's failure to respond to the wage proposal was due to the time wasted time bargaining on the noneconomic issues. At Godoff's request, Bernstein and Schmid explained again how the merit wage-based process was going to work. The Hospital's position was unchanged.[69]

At the October 11, 2018 session, the parties discussed proposals relating to the preamble, uniforms, job postings, bulletin board posting, nondiscrimination, union management conference and personnel files. They tentatively agreed to the personnel files proposal, but did not reach agreements on any of the other noneconomic issues. The parties then discussed the Hospital's wage proposal. Schmid explained that all employees would receive a wage increase of at least 2 percent immediately upon contract ratification.[70]

The Hospital's October 12, 2018 final bargaining brief was entitled, "Round 20 and still no decision. We aren't even close. Why?" After criticizing the Union's negotiators for wasting time, the brief described the Hospital's version of the bargaining over its wage proposal:

> Most importantly, the Hospital informed the union that it has completed the dietary back-wage analysis. The Hospital provided the payout calculations and back up to the union. The Hospital let the union know that the Hospital plans to distribute the checks for these back wages to all affected employees, to make them whole, in a special payroll check to be run on Friday, October 19th.
>
> After months of silence on the Hospital's wage proposal, the union finally asked for further information about it. The union could have had this information three months ago and they could have had a counter proposal ready to give the Hospital. Instead, we have still not moved forward on wages because the union is just beginning to look at them. We advised the Union that, had they taken the time to review our wage proposal when we initially gave it to them FIVE months ago, then we would be much further along by this point.
>
> The Hospital expressed concern to the union that there is a rumor circulating that the Hospital is not offering even a dollar per hour increase to employees after all this time. This is very far from the truth. **We showed the union that the Hospital's proposal would provide immediate increases upon ratification of the contract to all staff.** These increases in many cases are very significant and reflect what the Hospital believes to be competitive wages for our jobs here in D.C. (emphasis in original)
>
> We explained to the union that –
>
> Under the Hospital's proposal:
>
> • EVERYONE would **receive an increase immediately** upon ratification of the contract;
> • Many employees would see **significant increases** – the highest being a 33% increase, with many individuals' increases being in the double digits;
> • The increases taken all together average approximately 9.7%;
> • The least anyone would receive would be 2%, and most of the employees in this category are those who have been hired in the last year with little or no experience and who have not been waiting years for an increase;
> • Additionally, the Hospital's proposal provides for an additional increase in 6 months (July 2019) based on merit, as well as additional lump sum bonuses based on department performance measures.
>
> Under the Union's proposal:
>
> • The vast majority of employees would receive less than a one dollar raise. Only those making $20/hour or more would see a one dollar or more raise;
> • The union's proposal does not provide for any reward for personal performance or for any bonuses. (emphasis in original)[71]

D. Withdrawal of Recognition

1. Disaffection petition is circulated

Sometime in March 2018, EVS employee Eugene Smith began circulating a disaffection petition among other unit employees. While soliciting coworkers to sign the petition, Smith lauded Kim Russo, the Hospital's chief executive officer, and told them that they would get a pay raise and travel stipend if they got rid

[68] GC Exh. 26.
[69] R. Exh. 3 at 391–404.
[70] R. Exh. 3 at 405–412.
[71] GC Exh. 27.

of the Union.[72] Smith was assisted by another EVS employee, Hardie Cooper.[73]

Some individuals, like EVS probationary employee Angelica Claros, signed the petition because they did not want union representation. She had been employed for about three months at the time she signed the petition on October 12, 2018. At the time, she was approached by an unknown individual who told her "you are a new hire, yes. You don't want a union." She replied, "No, I don't want it." Claros was unaware up to that point that she was even represented by the Union.[74] Others, like EVS employee William Barnes, did not have a problem with the Union but he still signed the petition on April 5, 2018 and again on August 23, 2018.[75]

Most who signed the petition, however, did so because they were disappointed with the Union's inability to get a new contract and the resulting wage increases. Freddie Ard, an EVS employee, signed the petition on April 2, 2018 because he wanted "to get a better benefit" and was concerned about his wage rate not increasing during bargaining.[76] Tsedale Benti, an EVS employee, signed the petition on April 25, 2018 had several concerns about the Union, including the fact that she had not received a raise.[77] Vivian Otchere, an EVS employee, signed the petition on June 22, 2018 after being told by an unknown individual that she might get a pay raise if she signed the petition.[78] Noel Reyes, a dietary employee, signed the petition on July 3, 2018 because the Union was unable to secure a contract and pay raise for the past 2 years.[79] Lewis Bellamy, an EVS employee, signed the petition on August 29, 2018 because the Union was not getting results from bargaining over 2 years, specifically pay raises.[80] Mary Collins, an EVS employee, signed the petition on October 13, 2018 because the Union was unable to get a contract and a wage increase.[81]

Schmid was well aware of the petition by July 2018.[82] As of September 11, 2018, however, the petition had been signed by only one-third of the bargaining unit. A total of 37 signatures were from employees who were hired after the expiration of the previous contract. Over the next month, no employees signed the petition.[83] During the next 2 weeks following the Hospital's issuance of the October 12, 2018 bargaining brief, which included the Hospital's issuance of backpay checks to dietary employees seven days later, 27 more employees signed the petition. Of those 27 employees, 14 had been hired within the previous 2 months; six of those 14 employees had been employed less than 2 weeks.

Based on instructions from the Hospital's security department, which had experience with the prior withdrawal of recognition of its union, Smith delivered the petition to Russo during his shift at about 3:30 p.m. on October 25, 2018. She congratulated him, shook his hand and thanked him shook his hand, thanked and congratulated him. Russo also told him that she knew "it wasn't easy to do" and concluded the discussion by telling Smith that she needed to get the petition to human resources.[84]

2. The Hospital Withdraws Recognition

On October 24, 2018, Evans informed Schmid that the disaffection petition was going to be delivered to management on October 25, 2018. Schmid, who is based at UHS in Pennsylvania, and Bernstein, who is based out in Florida, traveled to the Hospital the next day in order to await the disaffection petition. Shortly after receiving it, Russo handed it off to Schmid. Within

[72] Smith was not a very credible witness and, as such, I do not credit his testimony that "everybody wanted to sign" the petition. Many of his responses were vague, evasive and non-responsive. He assumed the leadership role in circulating the petition but was extremely vague and lacked recollection about the circumstances by which he allegedly received the blank petition from an unnamed kitchen employee. Smith's motivation for opposing the Union was simply unclear. He expressed strong sentiment about the Union's positions in bargaining but professed ignorance of the Union's wage proposals. I find that highly unlikely. (Tr. 398–419.)

[73] Cooper was also not a credible witness. He provided vague testimony about being unable to get ahold of the Union and his displeasure with his wage rate. Like Smith, he provided ambiguous and contradictory explanations as to who started the petition, who collected which signatures, including the signatures after October 12, 2018. (Tr. 374–376, 383, 387, 390–391, 395–397.)

[74] Claros' equivocation when asked to explain the circumstances when she signed the petition indicated that she felt pressured as a new employee to sign it: I - - really I don't read, because when they just sign this and the Union, I say I don't want it. . . . (Tr. 312–314, 318–323.)

[75] Barnes did not credibly explain why he signed the petition after testifying that he no problem with the Union. He also professed ignorance when shown specific bargaining briefs but conceded that similar documents were mailed to his home. (Tr. 280–281, 288–290.)

[76] Ard had returned to work at the Hospital in October 2016 and was told by the Union that he would get a pay raise after 90 days but was not aware that the CBA had expired. (Tr. 467–468, 476–477.)

[77] Benti was displeased with the Union's response to a disciplinary matter but conceded that she was primarily concerned with the fact that the raises had stopped as a result of bargaining. (Tr. 447–557.)

[78] Otchere testified that she signed the disaffection petition because the Union did not answer her questions, but it was clear that her frustration was attributable to the Union inability to procure a pay raise (Tr. 345, 359–360.)

[79] Reyes testified that he signed because he felt that his department did not need a union. However, when asked for further explanation he testified that he felt that the Union did not do anything because he had not had a raise for 2 years. (Tr. 331–341.)

[80] Bellamy did not attend any of the bargaining sessions but was given the impression from others that the Union's wages were less than the amounts in the expired CBA. (Tr. 366–371.)

[81] Collins testified that she did not want to pay union dues but, in fact, she was not paying dues at the time that she signed the petition. (Tr. 298–299, 304–305.) Moreover, she conceded on cross-examination that she actually signed the petition because she was frustrated over the Union's inability to get the Hospital to agree to a new contract and a pay increase. (Tr. 310–311.)

[82] Schmid's vague recollection that she only learned of the petition from EVS assistant director Rhonda Evans sometime around "July, August, September" of 2018 was not credible based on her December 11, 2016 email and her recollection of other salient facts. (Tr. 224, 228–230; GC Exh. 36.)

[83] R. Exh. 7.

[84] Although Smith was on the clock, he had received supervisory permission to take the petition to Russo's office, where he had to "wait a while" before meeting with Russo. (Tr. 414, 422–423.)

the next several hours, Schmid, with the assistance of supervisors and human resource staff, validated or dismissed all of the signatures on the petition based on a review of personnel and payroll records. The Hospital determined that 156 employees were members of the bargaining unit as of that date and that the disaffection petition had been signed by 81 of them.[85]

By email during the morning of October 26, the Hospital withdrew its recognition of the Union as the exclusive collective-bargaining representative of the bargaining unit and revoked its access rights. The Union replied that it was still willing and able to bargain on the previously scheduled dates of October 31 and November 1, 2018. The Hospital rejected the Union's overture almost immediately and since that time refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit on the grounds that the Union no longer enjoyed the support of a majority of members in the bargaining unit.[86]

E. Unilateral Changes

Following its withdrawal of recognition from the Union, on November 1, 2018 the Hospital unilaterally implemented the following changes, including wage rates, compensation structure and transit benefits of EVS and dietary employees:

> **Welcome EVS and Dietary Teams!**
>
> We are delighted to welcome you to the GW Hospital team of non-union employees.

We are proud to have you as part of our dedicated team here at GW Hospital. Each of you contributes greatly to the care of our patients, employees and visitors every single day. The vital role that you play is so important to our hospital. We are looking forward to working with you directly and supporting you in your development and growth.

> **FIRST, WE WANT TO GIVE YOU AN UPDATE ABOUT THE ROLLOUT OF THE NEW PAY RATES AND BENEFITS YOU WILL NOW HAVE AS A NON-UNION EMPLOYEE:**
>
> **Monthly Commuter Subsidy**
> This benefit is added onto your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it. Moving forward, you will receive this benefit as follows, **starting with the pay period beginning November 11, 2018:**
> **Full-time: $100 per month**
> **Part-time: $50 per month**
>
> **Employee Engagement Activities**
> We are thrilled to also have you join our other non-union employees in the following activities:
> • **Coffee with Kim** – Kim will be scheduling special EVS/Dietary only coffees in the next few weeks; then, going forward, all other GW employees in the regularly scheduled Coffees with Kim.
> • **Staff Rounding.**
> • **New hire Check-In Interviews** with supervisors after 30 and 60 days. **Stay Interview** with your supervisor at 6 months and annually. These provide additional opportunity to talk about what is going well, your career goals, and any concerns you may have.
> have. out w at Is going well, your career goals, and any concerns you may have.
> • Opportunity to serve on **Hospital employee committees.**
> • **Participation in action planning for GW Hospital engagement surveys.**
>
> **Pay**
> • In the next few weeks, we will be transitioning you **to market-based pay rates** (which take into account your years of experience) for your job classifications. **Many of you will see significant increases, and everyone will receive at least a 3% increase in their pay.**
> • Additionally, in July, all former bargaining unit members will also be eligible for an **additional increase – a merit based pay increase** determined by your performance evaluation.
> • We will also implement a **lump sum bonus program** in 2019 for all former bargaining unit employees in each department contingent on departmental scores.
>
> **Benefits**
> We will be transitioning everyone to our non-union benefit programs including PTO, Holidays and Leave Banks. We will share more information regarding these programs in the coming weeks.[87]

The memorandum went on to "clear up a few rumors," asserting that the withdrawal of recognition was not illegal and referred to the October 26 letter to the Union. In addition, the Hospital said the Union put out a flyer that the Union's assertion that the Hospital engaged in bad faith bargaining and would be contesting that charge before the Board. The Hospital reiterated that there is no "union contract still in place" and concluded with the following advisory: "If you don't want the union spending some other poor union person's dues fighting your rightful and legal decision to become non-union, you have every right to tell it so. **If the union really cares about what you think and want, as it says it does, it should respect your decision."** (emphasis in original)

As predicted in the memorandum, EVS and dietary department employees received wage increases in November or December 2018. The Hospital implemented the changes unilaterally and without affording the Union an opportunity to bargain over them at any time after the withdrawal of recognition on October 26, 2018.

F. The Hospital's Attorneys Meet with Prospective Witnesses

Prior to the hearing, the Hospital's attorneys, Tammie Rattray and Paul Beshears, accompanied by Schmid, arranged to meet

[85] The General Counsel notes that the Hospital neither struck probationary employees from the petition nor determined whether each signatory was part of the unit at the time they signed the petition. (Tr. 229–236, 510, 517, 521–523, 526; R. Exh. 8–10.) It does not argue, however, that any of the signatories should have been excluded from those counted as unit employees.

[86] GC Exh. 28.

[87] GC Exh. 29.

with unit employees who signed the disaffection petition.[88] All were instructed by managers or supervisors to leave their work areas to meet with counsel in a Hospital administration office.

Once they arrived to meet with the attorneys, either Rattray or Beshears explained the purpose of the interviews as preparation for testimony in this proceeding, and explained that their participation was voluntary and they were free to refrain from any or all of the interview without recrimination. Their explanations to four of those employees—William Barnes,[89] Angelica Claros, Noel Reyes[90] and Vivian Otchere[91]—was followed up by reading or explaining the following printed statement to them, and then having each employee sign, print their names and date the form on June 6:

> JOHHNIE'S POULTRY STATEMENT[92]
>
> 1. I have given this statement at the request of [Tammie Rattray or Paul Beshears], who introduced [herself or himself] as an attorney who represents George Washington University Hospital ("GWUH") with regard to labor matters.
> 2. [Ms. Rattray or Mr. Beshears] informed me [she or he] is conducting an investigation in order to help GWUH to determine how to respond to an unfair labor practice case and that [she or he] would like to ask questions in order to obtain factual information which may be relevant to these issues.
> 3. [Ms. Rattray or Mr. Beshears] informed me my participation in this interview is entirely voluntary and that at any time I can decide that I do not want to participate in the interview. In that case, I would be free to stop speaking with [her or him].
> 4. [Ms. Rattray or Mr. Beshears] informed me that absolutely no action will be taken against me if I decline to be interviewed or if I decline to answer a particular question or any questions at all.
> 5. [Ms. Rattray or Mr. Beshears] informed me I will not in any way be disadvantaged or rewarded by GWUH based on whether my answer to any question is consistent or inconsistent with GWUH's position.
>
> I have read the above statement and I understand it. I have not been told anything which contradicts what is stated above.[93]

Legal Analysis

I. THE HOSPITAL'S ALLEGED FAILURE OR REFUSAL TO BARGAIN IN GOOD FAITH

A. The Surface Bargaining Allegations

The General Counsel alleges that the Hospital engaged in surface bargaining by: (1) proposing and adhering to contract terms that would have left unit employees with fewer rights than they would have in the absence of a collective-bargaining agreement: (2) its unlawful combination of proposals–no arbitration and no work stoppages; (3) its unlawful combination of proposals–unfettered wage discretion, broad management rights, no arbitration, and no just cause for discipline; (4) engaging in regressive bargaining when it withdrew a proposal providing for arbitration of grievances based on employee discharges; and (5) failing to establish legitimate justifications for its insistence on drastic changes to contract language over which the parties previously had little to no dispute**.**

The Hospital denies the surface bargaining allegations and contends that it bargained in good faith and with the intention of reaching a contract. It avers that (1) there is no evidence that it maintained and adhered to initial proposals that were never countered by the Union; (2) a mistake is not regressive bargaining; (3) it was entitled to negotiate union security and its initial proposal was not unlawful; and (4) its initial wage proposal did not grant it unfettered discretion.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." In relevant part, Section 8(d) of the Act defines the phrase "to bargain collectively" as "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 . . ." (emphasis added). The Board recently reiterated this statutory mandate in *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 5 (2018), citing *J. H. Rutter-Rex Manufacturing Co., Inc.,* 86 NLRB 470, 506 (1949):

> [t]he obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

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[88] Rattray and Beshears credibly explained the circumstances of their interviews with the witnesses, provided assurances as to the voluntary nature of their cooperation, and discussed and read each of the forms before having them sign them. (Tr. 485–488.)

[89] The General Counsel argues that Barnes' initial testimony—that he was not given the requisite assurances at the outset of the interview—stands in contrast with his signed statement. However, I credited the testimony of Rattray and Beshears that they provided the assurances at the beginning of each encounter and, in Barnes' case, he did testify on redirect when presented with the signed statement that he was given certain assurances. (Tr. 282–283, 294–295; R. Exh. 11.)

[90] Reyes also testified that he was not given any assurances that he would not be retaliated against when the attorneys questioned him prior to the hearing. (Tr. 335–336.) However, he was presented with the written form by one of the attorneys and signed it. Based on my observation of his testimony, I find that Reyes was articulate and likely understood the contents of the statement that he signed. (Tr. 342–343; R. Exh. 13.)

[91] Otchere's conflicting testimony indicated that she signed the document after speaking with counsel for ten to fifteen minutes about the petition. Again, I credit the testimony of counsel that Otchere, like the other witnesses, were provided with the requisite assurances. (Tr. 351–364; R. Exh. 14.)

[92] *Johnnie's Poultry*, 146 NLRB 770 (1964) (Board established conditions under which an employer may interrogate an employee about Section 7 matters).

[93] R. Exh. 11–14.

On March 29, 2017, the Hospital tendered no-strike and grievance and mediation proposals, along with a management rights proposal substantially identical to its December 6, 2016 proposal. The Hospital contends, however, that it never indicated that any of its proposals were its "last and final offer" and that it eventually withdrew its no-strike proposal. It also cites the Union's 18-month delay in responding to the Hospital's grievance and mediation proposal and failure to respond to its no-strike/no-lockout proposal. With respect to the Union's grievance and mediation counterproposal on September 5, 2018, the Hospital notes that it was copied from another hospital group's agreement and bore no resemblance to the expired CBA.

The Hospital essentially concedes the unlawfulness of its March 29, 2017 no-strike proposal, which it repeatedly attempted to tie-in with a non-binding mediation clause in lieu of arbitration. However, it asserts that it eventually withdrew the proposal over 14 months later on June 7, 2018.[94] The Hospital's initial January 17, 2017 disciplinary proposal unlawfully sought to eliminate the just cause requirement and proposed to exclude arbitration for all discipline except for discharge. See *Kitsap Tenant Support Services, Inc.*, 366 NLRB at 9 (employer's unlawful proposals included the unfettered right to administer discipline and discharge).

The Hospital's December 6, 2016 management rights proposal, which hardly budged over nearly 2 years of bargaining, unlawfully combined with its wage proposals to give it unfettered discretion to change virtually all aspects of bargaining unit operations, including wages, benefits, hiring, promotion and transfer, disciplinary action without just cause, job classifications, work schedules, supervisors performing unit work, the use of part-time, per diem, agency and temporary employees, and work rules. See *Kitsap Tenant Support Services, Inc.*, supra at 8 (bad faith proposal would have given employer the exclusive rights to determine wages, benefits, discipline, promotion, demotion, discipline, layoff, discharge, rules and regulations and operational functions, and an ineffective grievance procedure); *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996) (proposal to give employer unrestricted control over wages constituted bad faith bargaining); *Woodland Clinic*, 331 NLRB 735, 740 (2000) (same).

The Hospital notes that the Union took a long time in countering many of its proposals. However, the failure of the parties to move forward in an efficient manner is also attributable to the Union's resistance to the aforementioned bad faith proposals by the Hospital, which precipitated a seemingly perpetual humdrum of counterproposals that merely nicked along the surface. The Hospital also alludes to Godoff's offensive language during several bargaining sessions, but as the Board noted in *Victoria Packing Corp:*

> There can be no doubt that [the Union's representative] is a confrontational person, and that he approached the negotiations without the diplomacy of a foreign ambassador. However, no one expects labor negotiations to be conducted in the sitting room of the Harvard Club by persons having a gracious, gentle manner. 'For better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior.'

332 NLRB 597, 600 (2000). See also *Success Village*, 347 NLRB 1065, 1081(2006) (employer improperly declared impasse during contentious negotiations based on the union's reference to employer's representative as an "asshole"); *Long Island Jewish Medical Center,* 296 NLRB 51, 71–72 (1989) (same).

The Hospital's prolonged adherence to no-strike, grievance and mediation, and management rights proposals, along with its unrestricted, ambiguous and unpredictable merit or market-based wage proposals, constituted bad faith surface bargaining in violation of Section 8(a)(5) and (1) of the Act. See *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005) (unlawful employer bargaining proposals included management rights clause granting it unfettered discretion over workplace rules, discipline and wages, a broad no-strike clause, and excluded arbitration to any challenges to employer's application of management rights); *A-1 King Size Sandwiches*, 265 NLRB 850 (1982) enfd 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1034 (1984)(unlawful proposals included unfettered discretion over merit increases, scheduling and hours, layoff, recall, granting and denying leave, promotions, demotions, discipline, assignment of work outside the unit and changes to past practices, a broad no-strike clause, and exclusion of disciplinary decisions from the grievance-arbitration procedure).

In making and adhering to such a combination of proposals, the Hospital unlawfully endeavored to strip the Union of its role in representing bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act. See *Target Rock*, 324 NLRB 373, 386–387 (1997) enf'd. 172 F.3d 921 (D.C. Cir 1998) (simultaneous proposal and maintenance of no-strike provision, broad management rights clause, and ineffective grievance and arbitration procedure found unlawful); *Public Service of Oklahoma*, 334 NLRB 487, 488–489 (2001) (employer engaged in bad faith bargaining when it "insisted on unilateral control to change virtually all significant terms and conditions of employment of unit employees during the life of the contract)."

Moreover, the Hospital unlawfully insisted on eliminating the parties' longstanding union-security, basing its position on philosophical grounds—i.e., the belief that its employees should have the freedom of choice as to whether or not to join the Union and pay dues—without laying out a legitimate business justification. Schmid testified that the Hospital was impeded in its employee recruitment efforts due to its relationship with the Union, but that allegation was not substantiated. Under the circumstances, the Hospital's insistence on eliminating the union security clause violated Section 8(a)(5) and (1). See *Kalthia Group Hotels, Inc.,* 366 NLRB No. 118 (2018) (employer unlawfully refused to consider any union-security provision on philosophical grounds and without advancing any legitimate business justification).

Finally, on April 5, 2017, the Hospital unlawfully regressed from its January 17, 2017 discipline proposal by tendering a

[94] R. Exh. 3 at 175–176.

grievance-mediation proposal that still undermined the effectiveness of the arbitration process. The Union noted the discrepancy and, on May 16, 2017, the Hospital conceded that its April 5 proposal conflicted with its January 17 proposal. Bernstein informed the Union that the Hospital would reconcile the proposals but never did and, on May 25, 2017, informed the Union that arbitration was out of the equation. See *Management & Training Corporation*, 366 NLRB No. 134, slip op. at 4 (2018) (regressive proposals are unlawful when "made in bad faith or are intended to frustrate agreement"); *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) (unexplained, dubious regressive proposal suggests bad-faith bargaining).

B. The Bargaining Briefs

"[A]n employer's free speech right to communicate [its] views to [its] employees is firmly established, and cannot be infringed by a union or the Board. Thus, [Section 8(c) of the Act] merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be 'evidence of an unfair labor practice,' so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1)." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). That right also extends to non-coercive communication between an employer and its employees in the context of the collective-bargaining process. *United Technologies Corp.*, 274 NLRB 609, 610 (1985) (as the Board has recognized, "permitting the fullest freedom of expression by each party" nurtures a "healthy and stable bargaining process." It is not for the Board to "police or censor propaganda.") *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966); see also *Long Island College Hosp.*, 327 NLRB 944, 947 (1999) (overenthusiastic rhetoric is protected speech unless it is knowingly false or made with reckless disregard for the truth).

As previously mentioned, the bargaining briefs continually disparaged the Union during bargaining, misrepresented the parties' bargaining positions, including its wage proposals, and blamed the Union for the lack of a pay raise. Taken in context with the Hospital's unlawful surface bargaining tactics over a 2-year period, the bargaining briefs served to undercut unit employees' support for the Union. See *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011) (in the context of additional unlawful conduct, denigration of union conveyed implicit threat that union representation would be futile and employees would have to rely on employer to protect their interests); *General Electric*, 150 NLRB 192 (1964) (bargaining briefs compounded the effects of employer's bad-faith conduct during bargaining and at the table and, predictably, fueled employees' dissatisfaction with the union). See *Miller Waste Mills, Inc.*, 334 NLRB 466, 467 (2001) (Board upheld finding that employees became alienated from the union due to belief that it prevented a wage increase).

Although the bargaining briefs were the vehicles by which the effects of the Hospital's unlawful conduct was conveyed to unit employees, they did not convey any objective "threat of reprisal or force or promise of benefit." See *Children's Center*, 347 NLRB 35, 36 (2006) (employer "lawfully expressed an unfavorable opinion about the union, its positions, and its actions."); *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 135 (2d Cir. 1986) (employer lawfully asserted that the union was on "a collision course," their preparation was 'thoughtless and irresponsible," and that their offers were "unrealistic"); *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) (employer lawfully issued bulletins criticizing the Union's demands and tactics and setting forth its version of the negotiations).

II. THE HOSPITAL'S WITHDRAWAL OF RECOGNITION

Pursuant to Section 8(a)(5) of the Act, an employer has a continuing obligation to recognize and bargain with an incumbent union. Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to enjoy majority support among unit employees, and an employer may withdraw recognition only on the basis of objective evidence showing that the union has actually lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001) (withdrawal of recognition lawful if employer proves that at the time of withdrawal the union was not supported by a majority of unit employees). The obligation to recognize and bargain with a union ends, however, if the union no longer enjoys majority support. Id. at 720.

As of October 25, 2018, the Hospital's employee roster listed 151 bargaining unit employees on the payroll. On that date, the Hospital was presented with a union disaffection petition containing 81 valid signatures of bargaining unit employees obtained between March 16 and October 25, 2018—a majority of the bargaining unit.[95] The General Counsel contends, however, that the Hospital's surface and regressive bargaining, accompanied by the bargaining briefs, warrants a presumption that such conduct tainted the disaffection petition on which the Hospital based its withdrawal of recognition. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd. in part*, 117 F.3d 1454 (D.C. Cir. 1997) (a causal relationship is presumed between unremedied bargaining violation and a subsequent showing of disaffection).

The Hospital argues that the *Lee Lumber* presumption does not apply because that case involved a general refusal to both recognize and bargain with the incumbent union. Instead, the Hospital relies on *Levitz Furniture Co.,* Id. at 725, to support its contention that its withdrawal of recognition was lawful because it submitted a disaffection petition signed by 53.6 percent of bargaining unit employees. Notwithstanding its disavowal of *Lee Lumber,* the Hospital relies on that decision for the proposition that "[n]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber,* 322 NLRB at 177. Finally, the Hospital contends that analysis of the facts reveals that they fall short of the standard set forth in *Master Slack*, 271 NLRB 78, 84 (1984) for establishing a tainted petition:

[95] The General Counsel does not dispute the authenticity of the 81 signatures or the inclusion of those witnesses on list.

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Regardless as to whether one applies *Lee Lumber* or *Master Slack*,[96] both decisions require proof of a causal connection between the petition and the Hospital's bad faith surface and regressive bargaining, compounded by its dissemination of bargaining briefs to employees lampooning the Union's frustrations and resistance to its unlawful conduct. Analyzing the case under the *Lee Lumber,* the Hospital's unlawful failure to bargain in good faith with the Union is presumed to have caused the subsequent employee disaffection. From the unit employees' viewpoint, the Hospital's surface and regressive bargaining, compounded by the bargaining briefs, clearly discredited the Union, conveyed a sense of futility in union representation and prompted many unit employees to sign the disaffection petition.

Analysis of the case under *Master Slack* produces the same result. The timing of the unfair labor practices was clearly connected to the withdrawal of recognition. The signature collection began in March 2018, after 16 months of bargaining, most of it precipitated by the Hospital's bad faith bargaining. A total of 81 eligible unit employees signed the disaffection petition. Thirty of those employees signed the petition between during the period that the Hospital adhered to its unlawful no-strike proposal (March 29 to June 7, 2018). The most striking development is that, while 54, or two-thirds, of those employees signed during the period from March to early October 2018, the remaining one-third—27 employees—signed the petition during the 2 weeks following the Hospital's issuance of the October 12 bargaining brief blaming the Union for blocking pay raises and leading up to the delivery of the petition to Russo on October 25, 2018.

The timing of those signatures strongly suggests a causal connection. See, e.g., *Gene's Bus Co.*, 357 NLRB 1009 (2011) (approximately seven months passed between manager's public denigration of and physical assault on the shop steward, and five to 6 months passed between direct-dealing incidents and the circulation of the decertification petition); *Bunting Bearings Corp.* 349 NLRB 1070 (2007) (month-long lockout ended just eight days before the employees executed the May 29 petition and fifteen days before the employer withdrew recognition); *AT Systems West*, 341 NLRB 57, 60 (2004) (nine months between unlawful direct dealing and circulation of decertification petition); *RTP Co*., 334 NLRB 466, 468 (2001) (finding "close temporal proximity" between the employer's unfair labor practices and its withdrawal of recognition where the unfair labor practices occurred 2 to 6 weeks prior to the antiunion petition on which the employer based its withdrawal of recognition).

The evidence establishes that the Hospital's conduct meets the other *Master Slack* factors as well. The Hospital consistently adhered to a consistent course of surface and regressive bargaining that prolonged bargaining and it followed those actions with bargaining briefs blaming the Union for the delays. After 16 months of protracted bargaining and no raise on the horizon, employees understandably became disillusioned with the Union. Twenty-six employees expressed their disaffection with the Union after the Hospital misrepresented on October 12, 2018 that the Union's wage proposal was inimical to their interests and they would be better off without union representation. See *Miller Waste Mills, Inc.*, 334 NLRB 466, 468–469 (2001) (employees became alienated from Union after employer misrepresented union's bargaining positions and blamed it for preventing employees from receiving their customary annual wage increase); *Detroit Edison*, 310 NLRB 564, 566 (1993) (employer's unfair labor practices "convey[ed] to employees the notion that they would receive more . . . without union representation. Such conduct improperly affects [the] bargaining relation-ship").

The last factor in a *Master Slack* analysis is whether the Hospital's surface and regressive bargaining had lasting effects on unit employees. The representative sample of employee sentiment produced by the Hospital demonstrated that most of those who signed the petition were displeased with the Union for failing to secure a new contract and wage increases during a lengthy period of bargaining. Two of the witnesses organized the disaffection effort and were clearly antiunion. Of the remaining eight employees, however, six conceded that the Union's inability to obtain pay raises from the Hospital for 2 years was a significant reason as to why they signed the disaffection petition.[97] First, the Hospital delayed in producing a wage proposal until May 2018. When it finally produced one, it tendered an unprecedented, radically different compensation system that spurred further rancor at the bargaining table. Its wage proposal was doomed on arrival. The proposal, which was presented as nonnegotiable, gave the Hospital unfettered discretion to set wage rates within a series of ambiguous ranges. Its October 12, 2018 misleading bargaining brief impugning the Union for hampering the issuance of pay raises triggered a stampede of disappointed unit employees to sign the petition over the course of the next 2 weeks. See *Mesker Door, Inc.*, 357 NLRB 591, 598 (2011) (unlawful statement that Board charges "would result in lost wage increases and lower bonus amounts" was so close in time to a flurry of petition signatures that it "appear[ed] to have directly affected employees' support for the Union").

Under the circumstances, the Hospital's October 26, 2018 withdrawal of recognition from the Union as the labor representative for unit employees violated Section 8(a)(5) and (1). In

[96] The General Counsel objected to the admission of subjective testimony regarding employee disaffection on the ground that analysis under the *Master Slack* test assesses only the likelihood that causation exists. See *SFO Good-Nite Inn*, 357 NLRB 79, 82–83 and fn. 26 (2011) (subjective employee testimony regarding their Union disaffection excluded due to "the inherent unreliability of such testimony). However, the Board recently left the door open on this issue in *Denton County,* 366 NLRB No. 103, slip op. at 3, fn. 10 (2018) (judge did not abuse his discretion in permitting the testimony of four employees who signed the disaffection petition). Moreover, the Board's administrative law judges, as expert fact finders in these labor relations disputes, are quite capable of assessing the reliability of subjective testimony in conjunction with the objective evidence.

[97] Mary Collins, Noel Reyes, Vivian Otchere, Lewis Bellamy, Tsedale Benti, and Freddie Ard.

addition, the circumstances also require that the ensuing remedy include a bargaining order ordering the Hospital to bargain with the Union for a reasonable period of time and at least twice per week. See *Lee Lumber & Building Material Corp.,* 334 NLRB 399, 399 fn. 7 (2001). These circumstances include the Hospital's prolonged and unlawful failure and refusal to bargain in good faith with the Union, the widespread disaffection caused by the Hospital's surface and regressive bargaining, as well as the compounding effect of those actions through bargaining briefs, and the fact that the Hospital has already proceeded unilaterally to change unit employees' terms and conditions of employment. Those changes adversely impacted unit employees' Section 7 rights as evidenced by the Hospital's newly acquired and unfettered discretion to determine their wages and the evisceration of critical due process rights that they had under the expired CBA relating to the disciplinary and grievance/arbitration processes.

III. THE NOVEMBER 1, 2018 MEMORANDUM

On November 1, 2018, the Hospital notified unit employees that it was unilaterally changing their terms and conditions of employment since they were now nonunion employees. The changes included a transition to market-based wage structure, lump sum bonuses, PTO, holiday and leave banks, and a monthly commuter subsidy. With respect to the transit benefit, the Hospital noted that "[t]his benefit is added to your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it."

Given that its withdrawal of recognition of the Union was unlawful, the parties were still in a bargaining relationship governed by the Act. Accordingly, the aforementioned unilateral changes, undertaken after rejecting the Union's offer to resume bargaining, also constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. See *Southern Bakeries, LLC*, 364 NLRB 804 (2016); *Narricort Industries, L.P.*, 353 NLRB 775, 776 fn. 11 (2009); *Northwest Graphics, Inc.,* 342 NLRB 1288, 1288 (2004); *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009). I disagree, however, with the General Counsel's contention that the Hospital's statement that the Union failed to negotiate a transit benefit on their behalf constituted either a separate coercive act under Section 8(a)(1) or a separate bargaining violation under Section 8(a)(5). See *Litton Systems*, 300 NLRB 324, 330 (1990), enfd., 949 F.2d 249 (8th Cir. 1991), cert denied, 503 U.S. 985 (1992) (the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table").

IV. THE HOSPITAL'S WITNESS INTERVIEWS

In preparation for the hearing, the Hospital's attorneys met separately with unit employees in an office to discuss giving their providing testimony at the hearing. At the hearing, the General Counsel moved to strike certain witness testimony on the ground that, during trial preparation, the Hospital's attorneys interviewed employees without first advising them of their rights under *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964). The General Counsel also moves to and amend the complaint to add an allegation that those interviews amounted to coercive interrogation in violation of Section 8(a)(1) of the Act; that motion is granted and the allegations are deemed denied by the Hospital.

The Hospital opposes both motions on the grounds that its attorneys advised the witnesses of their rights to cooperate with counsel during the hearing preparation and to choose whether or not to testify at the hearing. The Hospital also contends that the proposed amendment should not be allowed because no charge was filed raising these allegations, nor are they closely related to any of the multiple charges filed in this case. Moreover, if the amendment is allowed, it should nonetheless be dismissed as the credible record evidence demonstrates the Hospital did not violate Section 8(a)(1) by interviewing employees.

The Hospital's contention that the charge is barred as untimely pursuant to Section 10(b) or otherwise unrelated to timely filed charges overlooks the fact that the issue did not accrue until a few weeks before the hearing when the witnesses were interviewed by trial counsel. Timeliness is not the issue, but rather, the judge's decision of whether to permit an amendment at the hearing. Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See *Folsom Ready Mix, Inc*., 338 NLRB 1172 fn. 1 (2003). In this case, the issue of employee interrogation did not come to light until the Hospital's witnesses testified at the hearing a few weeks later and were crossed-examined by the General Counsel. Under the circumstances, there is no basis to deny the General Counsel's motion to amend the complaint to add allegations relating to coercive interrogation. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993) (judge abused her discretion by denying motion during the hearing to add a *Johnnie's Poultry* allegation, as respondent's counsel introduced the subject employee statement at trial, the allegation was fully litigated, and the respondent had therefore suffered no prejudice).

In *Johnnie's Poultry Co.,* the Board held that to safeguard against the possible coercion that may occur when employees are questioned about matters involving their Section 7 rights,

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Three of the employees interviewed—Barnes, Otchere and Reyes—provided conflicting testimony that they were either not advised about all of their rights under *Johnnie's Poultry* or received such advice after the interviews began. However, based on the credible evidence of the Hospital's experienced labor attorneys, Tammie Rattray and Paul Beshears, I found, in accordance with their custom and practice, that they read all of the witnesses their rights under *Johnnie's Poultry* from the preprinted forms and/or had them read and sign the forms further advising them of those rights at the outset of those interviews. Furthermore, the forms contained the requisite information—the purpose of the questioning, assured that no reprisal will take place

and obtained the employee's voluntary participation.

Under the circumstances, I find that the credible evidence establishes that the Hospital's attorneys provided the requisite assurances under *Johnnie's Poultry*. Accordingly, the General Counsel's motion to strike the testimony of witnesses called by the Hospital is denied and that allegation is dismissed.

CONCLUSIONS OF LAW

1. District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner (the Hospital) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has a been a healthcare institution within the meaning of Section 2(14) of the Act.

2. 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

4. The Hospital has violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith during negotiations with no intention of reaching a successor collective-bargaining agreement by:

(a) Adhering to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

(b) Engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.

(c) Maintaining and adhering to bargaining proposals that delete a longstanding union security provision.

(d) Maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.

(e) Unlawfully withdrawing recognition from the Union on October 26, 2018 after committing unfair labor practices that are likely to cause loss of union support among employees.

5. The Hospital further violated Section 8(a)(5) and (1) by: (a) refusing to bargain with the Union as the exclusive collective bargaining representative of employees in the aforementioned bargaining unit on or after October 26, 2018, and (b) unilaterally implementing changes to employees' terms and conditions of employment and refusing to bargain over such changes on November 1, 2018.

6. The Hospital's unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Hospital has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom. Under the circumstances, however, a cease-and-desist order alone would be inadequate to remedy the Hospital's withdrawal of recognition. Accordingly, the Hospital shall be ordered to take certain affirmative action designed to effectuate the policies of the Act, including the issuance of an affirmative bargaining order. An affirmative bargaining order is appropriate in these circumstances due to the Hospital's prolonged and unlawful failure and refusal to bargain in good faith with the Union, the extensive disaffection caused by the Hospital's surface and regressive bargaining, the compounding of the effect of those actions through bargaining briefs, and the Hospital's unilaterally change to unit employees' terms and conditions of employment. *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Caterair International*, 322 NLRB 64, 68 (1996). Those changes adversely impacted unit employees' Section 7 rights as evidenced by the Hospital's newly acquired and unfettered discretion to determine unit employees' wages and the evisceration of due process provided under the expired CBA relating to the disciplinary and grievance/arbitration processes.

Having found that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union, the Hospital shall be ordered to meet at reasonable times and in good faith with the Union as the exclusive bargaining representative of its employees in the above described bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody the understanding in a written agreement. Due to the Hospital counsel's refusal to meet more than twice per month during the bad-faith bargaining period, a bargaining schedule requiring the Hospital to meet and bargain with the Union on a regular and timely basis is appropriate and would effectuate the purposes of the Act. See *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), enfd. 540 Fed. Appx. 484 (6th Cir. 2013). Upon the Union's request, the Hospital shall be required to bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees. The Hospital shall also be required to submit written bargaining progress reports every 15 days to the compliance officer for Region 5, and to serve copies of those reports on the Union.

Finally, given the nature of the violations, the prolonged period of bad faith bargaining, and the previous practice between the parties, the Hospital shall be ordered to make the following employee negotiators whole for any earnings and/or leave lost while attending bargaining sessions: Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith. *Frontier Hotel & Casino*, 318 NLRB 857, 857 (1995) (employees reimbursed for expenses incurred during bargaining where employer engaged in "egregious and deliberate surface bargaining"). I decline, however, to issue such an order with respect to the costs of the Union representatives in attending two bargaining sessions per month.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[98]

ORDER

The Respondent, District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union as the certified exclusive collective-bargaining representative of employees in the following appropriate unit:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) Engaging in the following surface, regressive and bad-faith bargaining with the Union for a successor collective-bargaining agreement:

> (1) Adhering to bargaining proposals that provide the unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.
>
> (2) Engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.
>
> (3) Maintaining and adhering to bargaining proposals that delete a longstanding union security provision.
>
> (4) Maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.
>
> (5) Unlawfully withdrawing recognition from the Union on October 26, 2018 after committing unfair labor practices that are likely to cause loss of union support among employees.

(c) Unilaterally implementing changes to employees' terms and conditions of employment without giving the Union an opportunity to bargain over such changes in good faith.

(d) 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) Recognize, and upon request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time employees of the [Hospital] in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Department of George Washington University Hospital.

(b) Upon the Union's request, bargain for a minimum of 15 hours per week, or in the alternative in accordance with some other schedule to which the Union agrees.

(c) On the Union's request, rescind any or all of the unilaterally implemented changes made in the terms and conditions of employment of employees since November 1, 2018.

(d) Within 14 days from the Board's Order, make Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens and Arlene Smith whole for any loss of earnings and other benefits incurred during bargaining.

(e) Within 14 days from the Board's Order, compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

(f) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[99] in all places where notices to employees are customarily posted, including but not limited to the following locations at The George Washington University Hospital located at 900 23rd St N.W., Washington, D.C. 20037: the bulletin boards located in the Linen Services Department, the office of the Environmental Services department, and the kitchen located outside of the cafeteria in the Food Services department. The notices shall be posted by the Respondent and maintained for 60 consecutive days. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posted 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.

(g) Submit written bargaining progress reports every 15 days to the compliance officer for Region 5 and serve copies of those reports on the Union.

(h) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

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

[99] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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.

1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region, a/w Service Employees International Union (the Union), is the employees' representative in dealing with us regarding wages, hours, and other working conditions of our employees in the following appropriate unit (the Unit):

All regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Departments of George Washington University Hospital

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no strike provision, and an expansive management's right clause.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that delete a longstanding union security provision.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that give us unfettered discretion in your wages.

WE WILL NOT, during negotiations with the Union for a successor contract, engage in regressive bargaining, such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in nonbinding mediation.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT fail or refuse to continue negotiations for a successor contract with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT unilaterally make changes to the terms and conditions of employment of employees in the Unit without first giving notice to the Union and affording the Union an opportunity to bargain collectively with respect to such changes.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as your representative concerning wages, hours and working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL give the Union notice and an opportunity to bargain over any proposed changes to the wages, hours, and working conditions of employees in the Unit before putting such changes into effect.

WE WILL identify and, on the Union's request, rescind any changes that we have made unilaterally since November 1, 2018 to the wages, hours, and working conditions of employees in the Unit.

WE WILL compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

WE WILL pay the following employee bargaining committee members for any pay and/or leave they lost attending bargaining sessions: Cynthia Bey; Pamela Brooks; Aisha Brown; Marcia Hayes; Sonya Stevens; and Arlene Smith.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay award to the appropriate calendar year(s).

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER

The Administrative Law Judge's decision can be found at www nlrb.gov/case/05-CA-216482 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.