Garden Ridge Management, Inc. *and* General Drivers, Warehousemen and Helpers, Local Union 745, affiliated with the International Brotherhood of Teamsters.[1] Cases 16–CA–22275 and 16–CA–22756

May 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 19, 2003, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 and brief, and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.

The facts, which are set forth more fully in the judge's decision, are as follows. The Union was certified as the bargaining representative of the Respondent's employees on April 22, 2002.[4] The parties began negotiations for a collective-bargaining agreement on May 15. They negotiated on 20 occasions over 11 months, reaching tentative agreement on 28 articles.[5] During these negotiations, the Union asked on approximately eight occasions that the Respondent meet with it more frequently. The Respondent refused each of these requests without explaining to the Union why it did not wish to meet more often.[6] The final negotiation session occurred on April 7, 2003. In late April 2003, the Respondent received a petition from its employees indicating that a majority of unit employees no longer wanted the Union to represent them. Based on the employees' petition, the Respondent withdrew its recognition of the Union on April 25, 2003.

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to meet with the Union at reasonable times, by engaging in surface bargaining, and by withdrawing recognition from the Union. The Respondent has excepted to the judge's findings, arguing that it negotiated with the Union in good faith and that it lawfully withdrew recognition from the Union. As discussed below, we affirm only the judge's finding that the Respondent did not meet at reasonable times as required by Section 8(d), and we shall dismiss the remaining allegations of 8(a)(5) and (1) misconduct.

I.

We agree with the judge, for reasons stated in his decision, that the Respondent violated Section 8(a)(5) by refusing to meet with the Union at reasonable times. The parties met approximately every 3 weeks from the time negotiations began until the last bargaining session in April 2003, for a total of about 20 bargaining sessions. The Union repeatedly requested additional bargaining sessions based on its dissatisfaction with the pace of negotiations, but the Respondent failed to accommodate any of those requests. The Union first requested that the parties meet on a more frequent basis at the fourth bargaining session, held on June 27, when union negotiators stated their concern that the parties were "not getting anywhere" and asked if the Respondent would be willing to meet several days in a row. The Respondent's Chief Negotiator Christopher Antone told the Union that additional meetings would probably not be possible, but that he would check on it.

At the next bargaining session on July 18, union negotiators again asserted that things were moving along too slowly and suggested that the Respondent was stalling

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] 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). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent contends that the judge improperly denied its motion to strike the rebuttal testimony of David Shirk. Shirk testified on rebuttal that two managers made statements that are relevant to our inquiry of whether the Respondent bargained with an intent to avoid reaching agreement. The Respondent argues that Shirk's testimony should have been offered in the General Counsel's case-in-chief and was therefore improper rebuttal evidence. We find no merit in this argument. The Respondent's contention that it did not raise the issue of intent in its case-in-chief is not supported by the record. Attorney Christopher Antone, chief negotiator for the Respondent, testified on direct examination that the Respondent "[w]anted to get a contract. That was our direction." Thus, Shirk's testimony provided appropriate rebuttal evidence as to the Respondent's intent in bargaining. In any event, the admissibility of evidence on rebuttal is within the discretion of the judge, even if the evidence is not technically proper rebuttal evidence. See *Water's Edge*, 293 NLRB 465 fn. 2 (1989). We find no abuse of discretion here.

[4] All dates hereafter are in 2002 unless otherwise indicated.

[5] The parties reached tentative agreement on articles addressing military leave, contract duration, visitation rights, articles of agreement, recognition, new employees, bulletin boards, funeral/bereavement leave, arbitration, management rights, bonds, jury duty, legality/stability of agreement, grievance procedure, seniority, extra contract agreement, no oral or implied agreement, uniforms, examinations, wage classifications (but no wage rate), wash rooms and lunch rooms, attendance, automatic payroll deposit, election day leave, employee discount, intent and purpose, sick personnel, and substance abuse control.

[6] The Respondent's refusals occurred between July and December. Its final refusal occurred on December 6.

the negotiations. The Respondent denied the accusation. During the rest of 2002, the Union continued to press for more frequent bargaining sessions and to express its concern that the parties were not meeting frequently enough to make any progress toward an agreement. For example, in discussing future meeting dates during a meeting on August 15, union negotiator Douglas Ellison told the Respondent that the parties were not meeting enough. On October 29, union negotiator Robert Bridges asked the Respondent if they could "string meeting dates together" because they "were not getting anywhere in negotiations." In all, the Union made such statements to the Respondent during 8 of the 12 bargaining sessions conducted between July and December. The Respondent consistently refused the Union's requests without offering any explanation as to why it could not meet on a more frequent basis. The only comment made to the Union relative to this refusal came from Chief Negotiator Antone at the October 29 bargaining session, where he stated that he enjoyed taking time off between sessions to contemplate what had happened during negotiations. At the hearing, the Respondent proffered no reason for its refusal to meet more often with the Union.

Section 8(d) of the Act requires that an "employer and the representative of the employees . . . meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times. *Calex Corp.*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998) (examining respondent's "overall conduct"). Our inquiry is not limited to an examination of the number of bargaining sessions held. Here, on balance, we find that the Respondent violated its duty to meet at reasonable times.

We first acknowledge that the Respondent met with the Union on 20 occasions over 11 months and reached agreement on a host of issues. We also acknowledge that, as discussed below, the General Counsel failed to satisfy his burden of proving that the Respondent bargained in bad faith. However, despite the parties' progress in negotiations, significant issues remained outstanding, and the Union made repeated requests in 2002 for more frequent bargaining sessions. The Respondent summarily refused each of these requests without explaining its unwillingness to the Union or the Board.

Calex Corp., 322 NLRB 977, is instructive. In that case, the Board held that an employer violated its duty to meet at reasonable times even though it negotiated with the union on 19 occasions over 15 months. When negotiations started, the employer declared that it would meet only once per month. The union repeatedly requested more frequent bargaining sessions, but the employer refused. The Board relied heavily on the employer's repeated refusals in finding that the employer violated the Act. Consistent with *Calex Corp.*, we rely heavily on the Respondent's repeated, unexplained refusals in finding that the Respondent violated its duty under Section 8(d) to meet at reasonable times.[7]

II.

Contrary to the judge and our dissenting colleague, we do not find that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining. Recognizing that this is a close case, we nonetheless find that the General Counsel failed to prove by a preponderance of the evidence that the Respondent did not intend to reach agreement with the Union, an essential aspect of a surface-bargaining allegation.

As stated above, Section 8(d) defines the duty 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 . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960). "The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct." *Reichhold Chemicals,* 288 NLRB 69, 69 (1988), enf. denied in part on other grounds 906 F.2d 719 (D.C. Cir. 1990); *Flying Foods*, 345 NLRB 101, 108 (2005). "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bar-

[7] Under different circumstances, such a frequency of negotiations might satisfy a party's duty to meet at reasonable times. Cf. *Honaker*, 147 NLRB 1184 (1964) (finding that employer acted lawfully in meeting on 11 occasions over 5 months); *Boaz Carpet*, 280 NLRB 40 (1986) (finding that employer satisfied its duties under Sec. 8(d) where it met on 13 occasions over 12 months). *Honaker* and *Boaz Carpet* are distinguishable from this case, however. Neither case presented a situation where, as here, the employer refused the union's repeated requests for additional meetings with no apparent basis for the refusal. *Radiator Specialty Co. v. NLRB*, 336 F.2d 495 (4th Cir. 1964), also relied on by the Respondent, is likewise distinguishable. In that case the court overruled the Board's finding of a violation due to the *union's* conduct during negotiations. Id. at 500. Noting that the union had engaged in personal attacks on the employer's negotiator, and also had attempted to hinder production and break up meetings, the court found that the employer's continuance of bargaining in spite of the union's conduct demonstrated the employer's good faith. In contrast, there is no evidence or claim that the Union here has engaged in misconduct.

gaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of reaching agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

The General Counsel argues that he proved that the Respondent harbored an intent to avoid reaching agreement by introducing evidence of: (1) the content and timing of the Respondent's bargaining proposals; (2) the frequency of the bargaining sessions; and (3) certain precertification statements made by two of the Respondent's officials. We find that the General Counsel failed to satisfy his burden.

The sole proposal relied on by the judge to show unlawful intent was a proposal seeking the Union's agreement to refrain from organizing certain nonbargaining-unit employees. But, as acknowledged by the dissent, the Board has found such agreements are permissible. See *Lexington Health Care Group*, 328 NLRB 894 (1999). Thus, there is nothing unlawful about the Respondent's proposal on this issue and hence nothing which evidences an intent not to reach an agreement.

The General Counsel also argues that the Respondent's management-rights proposals demonstrate an intent to avoid reaching agreement. We disagree. The Respondent proposed a broad management-rights clause. The Union voiced its opposition to several features of the Respondent's proposal. In response, the Respondent modified its proposal to eliminate the objectionable features, while simultaneously informing the Union that it might propose the substance of those features in separate articles. The parties agreed on the language of the management-rights clause that day. Consistent with its notice, the Respondent did propose the separate articles at the next bargaining session. The language that had been objected to was changed. The Respondent's effort to secure agreement, where possible, while voicing its intent not to retreat from the substance of its bargaining position, is not inconsistent with an intent to reach agreement.

There is no basis in the record for our colleague's assertion that the withdrawal of the broader proposal and resubmission of more specific ones was a tactic calculated to stretch out bargaining by revisiting matters that had been resolved. To the contrary, the Union rejected the broad management-rights proposal when it was introduced. In response, the Respondent isolated provisions that the Union found objectionable and removed them, reserving the right to make additional proposals to the clause as negotiations progressed. The judge found that no inference of bad faith could be derived from the substance of the more specific proposals that the Respondent submitted at the next bargaining session.[8] These new proposals cannot fairly be compared, as our colleague suggests, to the tactics of "pretending to concede on some matter particularly objectionable to the Union, while retaining essentially the same provision in another clause in the Respondent's overall contract proposal (or transferring the provision to another clause)." *Prentice Hall, Inc.*, 290 NLRB 646, 646 (1988). With fair notice before its prompt submission of the more narrowly tailored proposals, no inference of slight-of-hand gamesmanship is warranted. Nor has it been shown that the change to the more narrowly tailored proposals created "additional challenges to reaching agreement." Our colleague can only assert that they "may well have" done so.

We decline to infer an intent to avoid reaching agreement from the Respondent's failure to meet more frequently. As stated above, the Respondent negotiated with the Union on 20 occasions over 11 months and reached agreement on significant issues. Though we found, above, that the Respondent's refusals to meet more frequently violated its duty to meet at reasonable times, we did so in large part because they were unexplained. We do not think that the frequency of bargaining sessions warrants an inference of unlawful motive in this case.

Section 8(d) requires a party to "meet at reasonable times" and to "confer in good faith." The former obligation refers to the frequency of meetings under the circumstances; the latter refers to the willingness to reach an accord on bargainable matters that are in dispute. Thus, the fact that a party does not meet with sufficient frequency does not necessarily mean that it does not wish to agree to a contract. In the instant case, the failure to meet is unexplained by the Respondent. Indeed, that is the principal basis on which the violation is premised. But, that is quite different from a finding that the failure to meet more frequently was for the unlawful purpose of avoiding an agreement.

The judge also relied on statements made by two of the Respondent's managers prior to the representation election, as evidence of bad-faith bargaining. Before the Union was certified, a manager asked Human Resources Vice President Kevin Rutherford what the environment would look like if the Union won the election. Rutherford replied that "we would basically tie the union up at the bargaining table and we would not come to an agreement." On a separate occasion before the election, Senior Vice President Dan Ferguson told a manager that,

[8] There are no exceptions to the judge's finding that nothing in the substance of the proposals shows bad faith.

if the Union was voted in, "there's all kinds of things that we could do, and . . . the bargaining would go on and the union is not going to get anything that we don't want to give them." We interpret Ferguson's statement, made to a manager, as indicating nothing more than the fact that the law does not require a party to make concessions or to agree to particular proposals.[9] Rutherford's statement is more troublesome. Ultimately, however, we conclude that Rutherford's statement does not demonstrate that the Respondent simply went through the motions of bargaining, rather than seeking, through bargaining, to reach an agreement. We emphasize that these statements were made during an election campaign, *before* the Union was certified. We also note that the judge found that Ferguson, not Rutherford, "called the shots" during negotiations.[10] Further, agreement was reached during negotiations on many substantive contract provisions. In these circumstances, while we do not condone Rutherford's isolated comment, it is insufficient to satisfy the General Counsel's burden of proof when considered in light of all of the evidence regarding the parties' negotiations.

III.

In view of our finding that the Respondent did not engage in surface bargaining, we also reverse the judge's finding that the Respondent's withdrawal of recognition from the Union violated the Act. As explained below, we find no specific proof that the Respondent's unlawful refusal to meet at reasonable times caused the Union's loss of majority support.

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). However, not every unfair labor practice committed by an employer will taint evidence of a union's subsequent loss of majority support. In cases such as this one, where the unfair labor practice does not involve a general refusal to recognize and bargain with the union, "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." Id.

In determining whether a causal relationship exists between unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). Considering these factors, we cannot conclude that the Respondent's refusal to schedule additional bargaining sessions had a meaningful impact on employee disaffection.[11]

First, the 5-month period between the Respondent's last refusal to hold additional bargaining sessions and the time the petition was presented to the Respondent weighs against finding that the unfair labor practice caused employee sentiment against the Union. The evidence shows that the Respondent last refused a Union request for additional meetings in early December, but that the employee petition was not presented to the Respondent until early April 2003. During the final 4 months of negotiations, there is no evidence that the Respondent was asked, or that it refused, to meet with the Union on a more frequent basis.

Second, we do not find that the nature of the violation (an unexplained refusal to meet at sufficiently reasonable times unaccompanied by other bad faith bargaining in negotiations), supports a finding of taint. As discussed above, the Respondent bargained with the Union for almost a year before employees indicated that they no longer wished to be represented by the Union. While we have found the Respondent's unexplained refusal during the earlier portion of that year to schedule more sessions was unreasonable, the fact remains that the parties met on 20 occasions over 11 months and achieved agreement on a significant number of subjects. Negotiations were ongoing throughout the period. Third, there is no showing that the scheduling disputes had a tendency to cause employee disaffection toward the Union. Finally, there is no evidence that the scheduling disputes had an effect on employee morale, organizational activity or membership in the Union. Under these circumstances, we cannot conclude that the Respondent's earlier refusal to schedule additional bargaining sessions with the Union had a tendency to affect employees' morale or cause their disaffection with the Union. Consequently, we reverse the judge and find that the Respondent's withdrawal of recognition from the Union was lawful.

[9] The single remark made by the Respondent's negotiator Antone during the negotiations, that he enjoyed taking time off between meetings to contemplate what had occurred during negotiations, is subject to several different interpretations and is not necessarily reflective of an intent to engage in surface bargaining.

[10] The Respondent's chief negotiator (Antone) made no unlawful comments.

[11] It is uncontested that the Union had lost majority support at the time the employees presented their petition to the Respondent.

ORDER

The National Labor Relations Board orders that the Respondent, Garden Ridge Management, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union, Teamsters Local 745, by refusing to meet with it at reasonable times, as required by Section 8(d) of the Act, at a time when the Respondent is obligated to bargain in good faith with the Union.

(b) 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) At a time when a bargaining obligation exists, meet with the Union at reasonable times to engage in collective bargaining as required by Section 8(d) of the Act.

(b) Within 14 days after service by the Region, post at its facilities in Dallas, Texas, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 16, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2002.

(c) 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.

MEMBER LIEBMAN, dissenting in part.

Because this case involves a new bargaining relationship and negotiations for a first contract, the Board should "exercise special care in monitoring the . . . bargaining process and closely scrutinize behavior which 'reflects a cast of mind against reaching agreement.'"[1] Good-faith bargaining, of course, "presupposes a desire . . . to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Union,* 361 U.S. 477, 485 (1960). Even before the union election had occurred, the Respondent had expressed its intent to engage in surface bargaining. The Respondent followed through on this intent by deliberately frustrating the bargaining process: introducing proposals that were likely to prolong negotiations, while at the same time failing to devote sufficient time to bargaining. Predictably, the Union, which had failed to produce a contract, lost majority support—and by then the Union's certification year, which insulated it from challenges to its representative status, had run out. Failing to grasp the significance of the Respondent's conduct as a whole, the majority finds only that the Respondent unlawfully refused to meet with the Union at reasonable times.[2] While this violation of Section 8(a)(5) was enough, by itself, to taint the Respondent's withdrawal of recognition from the Union (contrary to the majority), the record also demonstrates that the Respondent engaged in surface bargaining.

I.

The Board has recently summarized the test to be applied in surface-bargaining cases like this one:

> In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. . . .
>
> The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include *delaying tactics*, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, *withdrawal of already-agreed-upon provisions*, and arbitrary scheduling of meetings. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. . . . [R]ather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.

[12] 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."

[1] *APT Medical Transportation*, 333 NLRB 760, 760 (2001) (Member Liebman, concurring), quoting *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In first-contract negotiations, "parties sit for the fist time across the table from each other, often with residual bad feelings from acrimonious organizing campaigns and without significant experience in collective bargaining or any history to guide them." Id. at 761.

[2] I agree with the majority that the Respondent violated Sec. 8(a)(5) and (1) by refusing to meet with the Union at reasonable times.

Regency Service Carts, 345 NLRB No. 44, slip op. at 1–2 (2005) (citations and footnote omitted; emphasis added). The record here, considered in its entirety, establishes that the Respondent never intended to reach an overall agreement with the Union.

A.

Statements made by two of the Respondent's high-ranking managers prior to the representation election provide explicit evidence supporting this conclusion. According to the evidence credited by the judge, during a meeting that was held shortly before the election, the Respondent's managers discussed what would happen if the Union won the upcoming election. Human Resources Vice President Kevin Rutherford stated that the Respondent "would basically tie the union up at the bargaining table and would not come to an agreement."[3] Senior Vice President Dan Ferguson, asserted that "there's all kinds of things that we could do, and . . . the bargaining would go on and the union is not going to get anything that we don't want to give them."

Both of these individuals played a key role in negotiations. The Respondent's chief negotiator, Christopher Antone, specifically testified that both Rutherford and Ferguson consulted with him about bargaining strategy during the negotiations. The majority down-plays Rutherford's role in negotiations, but Rutherford represented the Respondent and assisted Antone at the bargaining table. Ferguson set the goals for negotiations and gave directions to Antone. Given the actual involvement of these officials in the negotiation process, their expressions of intent presumably reflect the Respondent's objectives during negotiations.

B.

The evidence further shows that, beginning early in the bargaining process, the Respondent advanced a number of proposals that were likely to require protracted discussions between the parties in order to reach an initial agreement. Although these proposals are not themselves evidence of an intent to frustrate bargaining, they are relevant to the surface bargaining allegations, particularly given the Respondent's concurrent refusal to meet at reasonable times.

For example, at the parties' third bargaining session on June 14, the Respondent proposed an "Intent of Agreement" provision that would restrict the Union's right to seek to organize other employees of the Respondent during the term of the contract.[4] The Union initially objected to the proposal as a restriction on the rights of employees to join a union. The Respondent submitted a revised version of the proposal that retained the objectionable language a month later, and resubmitted the same proposal in January 2003. The parties did not reach agreement on this issue until March 7, 2003.

Also on June 14, the Respondent presented a "Management Rights" proposal to the Union, detailing a number of areas in which the Respondent would retain exclusive authority, including contracting out work, relocating its operations, and laying off employees in connection with the relocation. The parties discussed the proposal on September 4, and the Union presented the Respondent with its objections. At the next bargaining session on September 19, the Respondent agreed to drop all of the provisions that the Union found to be objectionable, and the parties signed off on the revised proposal. At that time, Respondent's negotiator Antone suggested that the Union might see some of the deleted language again. Antone did not provide further details, but later reintroduced some of the deleted provisions as separate proposals at the very next bargaining session on October 1.

Throughout this period, the Union continually expressed its frustration with the pace of negotiations and lack of progress, and repeatedly requested that additional bargaining sessions be scheduled. The Union made its initial request for more sessions at the end of June, shortly after the Respondent submitted the proposals discussed, and continued to press for additional sessions from July through December. For no apparent reason, the Respondent persistently refused all of the Union's requests—an unfair labor practice, we all agree, but also strong evidence of surface bargaining. See, e.g., *Regency Service Carts*, 345 NLRB 671, 673 (2005) (citing cases involving dilatory bargaining tactics, including unreasonable refusal to accede to union's requests for more frequent meetings).

Acknowledging that this is a "close case," the majority nevertheless concludes that there is no connection between the Respondent's failure to meet more frequently and the surface-bargaining allegation. But surely the only reasonable inference to draw from the Respondent's failure to meet at reasonable times—a failure that is otherwise entirely unexplained—is that the Respondent did

[3] Unlike the majority, I do not discount the significance of Rutherford's "troublesome" statement because it was uttered before the Union was certified. Whatever its timing, the statement provides a clear, and authoritative description of how the Respondent would approach negotiations if the Union was certified.

[4] Contrary to the judge, I do not find the content of this proposal to have been unlawful. See *Lexington Health Care Group*, 328 NLRB 894 (1999) (Board upheld contractual provision waiving union's right to organize certain employees as a bar to union's filing of petition seeking representation election).

not wish to reach an agreement. The two alleged violations are not separate, but inextricably linked.[5]

Further, as the judge correctly found, the Respondent's continued advancement of proposals that would require protracted negotiations, while at the same time inexplicably and invariably refusing the Union's requests for additional bargaining sessions, demonstrated that the Respondent was not serious about reaching an agreement.[6]

In particular, I would find that the Respondent's withdrawal and resubmission of proposals included in the "Management Rights" provision had an especially strong tendency to "stretch out the negotiations [by] produc[ing] renewed controversies over old ground." *Prentice-Hall, Inc.*, 290 NLRB 646, 646–647 (1988). That the Respondent had previously warned the Union that it might see some of the proposals again did not mitigate the actual effect of prolonging negotiations. The parties never reached agreement on the provisions that had been reintroduced.

The majority contends that the Respondent "was voicing its intent not to retreat from the substance of its bargaining position." However, this is too simple a view of the situation. While the withdrawal and resubmission of proposals was completed within 2 weeks, the Respondent's tactic both reversed the parties' progress at negotiations and resurrected problematic bargaining proposals, already rejected by the Union.[7] The migration of these terms into several other proposals, instead of a single proposal, may well have created additional challenges to reaching agreement. The Respondent's conduct of "pretending to concede on some matter particularly objectionable to the Union, while retaining essentially the same provision in another clause in the Respondent's overall contract proposal (or transferring the provision to another clause)" certainly does not evidence a desire to reach an agreement. *Prentice-Hall, Inc.*, 290 NLRB at 646.

C.

I would also find that the remark by Antone during negotiations that he "enjoyed taking time off between meetings to contemplate what was done during the meeting," is a candid admission that reaching an agreement was not of any genuine concern to the Respondent. Clearly, this statement echoes the earlier expressions by Ferguson and Rutherford that the Respondent would manipulate negotiations to allow it to avoid reaching an agreement with the Union. When viewed in light of the Respondent's conduct during bargaining, these statements are persuasive evidence that the Respondent never intended to reach an agreement with the Union.

D.

In finding that the Respondent bargained in good faith, the majority cites the number of times the Respondent met with the Union and the number of items tentatively agreed upon, without properly considering the Respondent's overall conduct.

The majority's reliance on the number of times the parties met is hard to understand, given the unanimous finding that the Respondent violated the Act by refusing to meet with the Union at reasonable times. Even more perplexing is the majority's reliance on the claim that the Respondent's refusals to meet more frequently with the Union did not occur during the last several months of negotiations and the period closer to the withdrawal of recognition. The Union's ongoing requests for additional bargaining during the latter half of 2002 were steadfastly disregarded by the Respondent. Surely the Union simply gave up asking, rather than continue to make futile requests. If anything, as noted by the judge, the time periods between negotiation sessions actually *increased* during the final months of negotiations.

Further, although the Respondent and Union tentatively agreed on a number of issues, no agreement was reached on such significant issues as wages and health care. Indeed, the record shows that the parties engaged in few, if any, substantive discussions with regard to these issues. Ultimately, the parties never came close to reaching a collective-bargaining agreement.

In these circumstances, the number of meetings and the list of agreed-upon proposals are not enough to prevent a finding of surface bargaining. See *Calex Corp.*, 322 NLRB 977 (1997), enfd. 144 F.3d 904 (6th Cir. 1998) (finding that employer engaged in bad faith bargaining by engaging in pattern of delay even though parties met on 20 occasions over a 15-month period and reached agreement on about 75 percent of contract).

[5] The majority is incorrect in suggesting that Sec. 8(d) of the Act itself supports viewing the requirement to "meet at reasonable times" and the requirement to "confer in good faith" as somehow distinct. The Supreme Court has told us that in interpreting the Act, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956). The "meet" and "confer" requirements must be seen as interrelated components of the statutory duty to bargain collectively. As the facts of this case confirm, the two requirements cannot be separated without undercutting the duty to bargain.

[6] The General Counsel has not excepted to the judge's finding that the substance of various proposals was not indicative of bad faith bargaining on the part of the Respondent.

[7] As the judge remarked, in some instances, these proposals constituted a "dramatic rebuff" to the Union.

II.

Contrary to the majority, the Respondent's withdrawal of recognition from the Union, also violated the Act, applying the principles of *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Even assuming that the sole violation here was the Respondent's failure to meet with the Union at reasonable times, that violation by itself would be sufficient to sustain a finding of taint under *Master Slack*. I am not persuaded by the majority's argument that the violation was too remote in time to affect employee attitudes toward the Union. Surely, the Respondent's refusal to meet with the Union affected the *entire* bargaining process, by depriving the Union of an opportunity to achieve more rapid progress in resolving issues and preventing the parties from being more readily able to conclude a collective-bargaining agreement by the end of the certification year. "The Board has long recognized that dilatory bargaining tactics . . . have a tendency to invite and prolong employee unrest and disaffection from a union." *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001). In particular, failing to meet and bargain at reasonable times and intervals "reasonably convey[s] the message that union activity is futile." Id. at 394–395.

That the withdrawal of recognition was tainted becomes even clearer, of course, in light of the Respondent's surface bargaining, which the majority fails to find. That conduct significantly impeded the bargaining process and was instrumental in the failure of the parties to reach a contract during the certification year. By preventing the Union from achieving results for employees, such a violation would clearly have a tendency to cause employee disaffection and therefore taint the withdrawal of recognition. See *Prentice-Hall Inc.*, 290 NLRB at 646 (withdrawal of recognition of union found to be unlawful where employer had failed to negotiate with union in good faith).

III.

In this case, it is the employees who are the true losers. They selected a collective-bargaining representative, but faced a hostile Employer who was determined from the outset never to reach an agreement with the Union. As a result, they understandably lost faith in the collective-bargaining process. But for the Respondent's actions, this would not have happened. Such conduct should not go unremedied. Accordingly, I dissent.

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 interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail to meet with the Union, Teamsters Local 745, at reasonable times and confer with it in good faith to reach a collective-bargaining agreement at a time when we have an obligation to bargain with the Union.

WE WILL meet with the Union at reasonable times and confer with it in good faith to reach a collective-bargaining agreement at a time when we have an obligation to bargain with the Union.

GARDEN RIDGE MANAGEMENT, INC.

Elizabeth A. Washka, Esq., for the General Counsel.
Steven L. Rahhal, Esq. and *Christopher Antone, Esq. (Jackson Lewis, LLP),* of Dallas, Texas, for the Respondent.
James L. Hicks Jr., Esq., of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF CASE

KELTNER W. LOCKE, Administrative Law Judge. The Respondent, Garden Ridge Management, Inc., failed to satisfy its obligation under Section 8(d) of the Act to meet with the Union, General Drivers, Warehousemen and Helpers, Local Union 745, a/w International Brotherhood of Teamsters, AFL–CIO, at reasonable times, thereby violating Section 8(a)(5) and (1) of the Act. Because I conclude that this failure to meet was part of a broader design to engage in surface bargaining, I find that Respondent also breached its duty under Section 8(d) by failing to confer in good faith with the Union. This, too, violated Section 8(a)(5) and (1) of the Act.

Procedural History

On April 12, 2002, Board agents from Region 16 conducted a representation election at Respondent's distribution center in Dallas, Texas. The Union received a majority of the valid votes in the following collective-bargaining unit:

> INCLUDED: All regular employees including putaways, transporters, loaders, unloaders, stock coordinators, checkers, order pullers, pickers, yard hosslers, inventory control, shipping lead, checker lead, plant clericals,

> and receiving schedulers employed by the Employer at its facility at 3700 Pinnacle Point #200, Dallas, Texas.
>
> EXCLUDED: All other employees including office clericals, management, guards and supervisors as defined in the Act.

On April 22, 2002, the Board certified the Union to be the exclusive representative of the bargaining unit employees. The Union and Respondent began negotiations for an initial collective-bargaining agreement on May 15, 2002.

On October 10, 2002, in Case 16–CA–22275, the Union filed an unfair labor practice charge against Respondent, alleging that since about August 2001, Respondent had failed and refused to bargain in good faith. The Regional Office investigated this charge. The Union amended this charge on October 17, 2002.

On April 28, 2003, the Union filed an unfair labor practice charge against Respondent in Case 16–CA–22756.

On April 29, 2003, the Regional Director for Region 16 issued a complaint against Respondent. In doing so, the Regional Director acted on behalf of the Board's General Counsel (the General Counsel or the Government). Respondent filed a timely answer.

On June 9, 2003, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing. (For simplicity, I will refer to this pleading as the complaint.) Respondent filed a timely answer.

On June 30, 2003, hearing in this matter opened before me in Fort Worth, Texas. Parties presented evidence on that date, on July 1 through 3, 2003, and on July 16 and 17, 2003. On July 18, 2003, counsel for the General Counsel and for Respondent presented oral argument.

Procedural Ruling

After Respondent rested its case, counsel for the General Counsel called David Shirk as a rebuttal witness. Shirk had been general manager of Respondent's Dallas distribution center until shortly before the April 12, 2002 election, when Respondent terminated him, ostensibly for misconduct. The asserted misconduct did not relate to the election or the union organizing campaign.

When the General Counsel called Shirk, Respondent objected that his testimony could not rebut any testimony given by Respondent's witnesses because Respondent's testimony related exclusively to the negotiations, which didn't begin until more than a month after Shirk's discharge. Overruling Respondent's objection, I allowed Shirk to testify, subject to motion to strike. After completion of Shirk's testimony, Respondent did move to strike it, and I took that motion under advisement.

After careful consideration, I have decided to deny Respondent's motion. The testimony which Respondent elicited while cross-examining Shirk does, in fact, relate to testimony offered during Respondent's case. More than that, Shirk's testimony clearly affects how the testimony of Respondent's witness should be interpreted.

The General Counsel called Shirk to the stand to describe a conversation which took place in his office while he was the distribution facility's general manager. Several other officials of Respondent, including Human Resources Vice President Kevin Rutherford, were present. Shirk testified that when one of the managers asked what the "environment" of the distribution center would look like with a union, Rutherford said that "we would basically tie the union up at the bargaining table and we would not come to an agreement."

Respondent had offered no evidence concerning this conversation when it presented its case, so Shirk's testimony about Rutherford's comment would not be proper rebuttal. Had Shirk given no other testimony, I might well have granted Respondent's motion to strike.

However, on cross-examination, Respondent's counsel asked Shirk about a statement which Shirk attributed to Respondent's senior vice president, Dan Ferguson. Shirk had described this matter in a pretrial deposition which Respondent's counsel used during the cross-examination.

Shirk's deposition mentioned an occasion when Vice President Ferguson answered a question concerning what Respondent would do if the Union won the election. Shirk quoted Ferguson as explaining "there's all kinds of things we can do," that "the bargaining would go on," and that "the union won't get anything we don't want to give them."

The statement which Shirk attributed to Ferguson directly affects the credibility of testimony given by the Respondent's chief negotiator, Christopher Antone, during Respondent's case. Antone testified that he "primarily consulted with" Vice President Ferguson and, from this statement and other testimony, I gather that while Antone was negotiating with the Union, he reported to Ferguson.

My conclusion that Ferguson "called the shots" gains additional strength from Antone's closing argument, in which he stated that this case was "about" Ferguson and that Ferguson controlled the Respondent's distribution facility, where the bargaining unit employees worked. During that argument, Antone further stated:

> It's uncontroverted that Ferguson was the senior vice president of supply chain, that Ferguson was responsible for the Dallas Distribution Center, that Ferguson was the decision maker regarding the distribution center, and he vested me with full authority to bargain for him at the table.

Without doubt, when Ferguson gave instructions to the management negotiators, they clearly reflected Respondent's intent—its good faith or bad faith—during the negotiations.

Negotiator Antone testified that Vice President Ferguson gave him instructions to achieve several goals, including a contract that preserved management's operational flexibility. Ferguson also wanted an agreement that maintained Respondent's ability to recognize individual performance, and to retain and reward the best employees.

Clearly, Respondent's negotiator offered this testimony to support its argument that its contract proposals were not intended to stall the negotiations but instead sought to achieve legitimate business objectives. However, the obligation to bargain in good faith entails more than simply having legitimate goals. A party must also pursue those objectives in a spirit consistent with the collective-bargaining process, with a

"mindset open to agreement" rather than one "opposed to true give-and-take." *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991).

The words Shirk attributed to Ferguson, that "the union won't get anything we don't want to give them" and that "there's all kinds of things we can do," certainly reflect on Ferguson's mindset. To the extent that Union Negotiator Antone's testimony suggests that Ferguson's instructions were consistent with Respondent's bargaining obligation under the Act, Shirk's testimony calls such a conclusion into question. Therefore, Shirk's testimony properly may be considered rebuttal evidence and Respondent's motion to strike it is denied.

Admitted Allegations

Based on the admissions in Respondent's answer, I find that the Government has proven the allegations in complaint paragraphs 1, 2, 3, 4, 5, 7, and 10, and also paragraph 8, as amended orally at the hearing. More specifically, I find that the Union filed and served the charge as alleged in the complaint. I also find that it is a labor organization within the meaning of Section 2(5) of the Act.

Additionally, based upon Respondent's admissions, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and satisfies both the statutory and discretionary standards for the exercise of jurisdiction. Further, I find that it is a Delaware corporation which operates retail stores, and that to supply these stores, it also maintains a distribution center and warehouse in Dallas, Texas. The employees represented by the Union work at that center and warehouse.

Further, Respondent has admitted that at material times until March 2003, Kevin Rutherford held the position of senior vice president of human resources and in that position was Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act, respectively. I so find. Respondent's attorney and chief negotiator, Christopher Antone, stated on the record that he had full authority to negotiate on his client's behalf. I find that at all material times, he was Respondent's agent within the meaning of Section 2(13) of the Act.

Paragraph 8 of the original complaint alleged that the Board certified the Union as the exclusive bargaining representative on April 12, 2002, which was the date of the election. During the hearing, the General Counsel orally amended the complaint to allege the date of certification as April 22, 2002, and Respondent orally amended its answer to admit the corrected allegation. I find that on April 22, 2002, the Board certified the Union to be the exclusive bargaining representative of the bargaining unit employees.

Paragraph 10 of the complaint alleges, and Respondent's answer admits, that at various times from May 2002 through March 2003, Respondent and the Union met for the purposes of collective-bargaining with respect to wages, hours, and other terms and conditions of employment of the employees in the bargaining unit. I so find.

Paragraph 12 of the complaint alleges, and Respondent admits, that on April 25, 2003, it withdrew recognition from the Union. I so find.

Other portions of the complaint allege that Respondent's actions violated Section 8(a)(5) and (1) of the Act. Respondent denies that it acted unlawfully.

Disputed Allegations

The Government alleges that Respondent negotiated with the newly-certified Union in bad faith to slow down the process until employees became so frustrated they circulated a petition withdrawing their support from the Union. Based on that petition, Respondent withdrew recognition from the Union. The General Counsel alleges that Respondent lawfully could not take this step because its own unfair labor practices had caused the employee discontent. In discussing the Government's theory, it may be helpful to begin by summarizing some basic principles.

For the first year after the Board certifies a labor organization as the employees' exclusive bargaining representative, it presumes conclusively that a majority of the bargaining unit employees continue to support the union. During this period, an employer cannot justify withdrawing recognition from the union by citing doubts about the union's majority status. After the "certification year" ends, the union continues to enjoy a presumption of majority status but this presumption may be rebutted by evidence to the contrary.

The Board's case law documents that sometimes, an employer not wishing to deal with a union will use various tactics to stall negotiations. Rather than bargaining in good faith with the newly certified union, such an employer will drag out the negotiating process until the certification year ends. During the lengthy and fruitless negotiating, employees may become discouraged enough to change their minds about union representation.

As noted above, the Government alleges that Respondent engaged in such tactics. More specifically, the General Counsel alleges that Respondent engaged in "surface bargaining"—going through the motions of negotiating without intending to reach an agreement—producing the kind of employee disaffection described above. Under the General Counsel's theory, Respondent's bad faith bargaining caused the employee discontent, and it therefore has no legal right to end the bargaining relationship.

This theory does not challenge the Respondent's assertion that a majority of unit employees no longer wants the Union to represent them, but attributes their change of mind to Respondent's allegedly unlawful conduct. Therefore, if the Government proves that Respondent bargained in bad faith, that same evidence will be sufficient to render the withdrawal of recognition unlawful. On the other hand, if the record fails to demonstrate that Respondent breached its duty to bargain in good faith, the evidence also will be insufficient to establish that Respondent unlawfully withdrew recognition from the Union.

Theories Underlying Alleged Violations

In the present case, the complaint alleges that Respondent demonstrated bad faith "by its overall conduct" including four types of conduct described in complaint paragraph 11:

(1) Respondent failed to devote sufficient time to bargain.

(2) Respondent offered proposals designed to frustrate the bargaining process.

(3) Respondent reproposed language initially proposed in a management rights clause and refused to bargain further on said individual proposals.

(4) Respondent delayed making a wage proposal.

Complaint paragraph 12 alleges that on April 25, 2003, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit. Complaint paragraph 13 alleges:

> By its overall conduct, including the conduct described above in paragraphs 11 and 12, Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

Reading the language of complaint paragraphs 11 and 13 together, it appears clear that the Government is proceeding under the theory that Respondent engaged in "surface bargaining," pretending to negotiate but with the secret intention of preventing rather than achieving agreement. Indeed, counsel for the General Counsel tried this matter as a "surface bargaining" case.

Additionally, for reasons discussed below under the "Legal Principles" heading, I believe that the complaint language quoted above subsumes a theory of violation of Section 8(a)(5) somewhat different from a "surface bargaining" theory. In my view, the complaint also sufficiently alleges an 8(a)(5) violation based on Respondent's failure to fulfill its obligation to meet with the Union at reasonable times.

Because a "failure to meet at reasonable times" theory differs somewhat from a "surface bargaining" theory, due process requires me to determine whether Respondent had clear notice that it must defend against both theories of violation, and a fair opportunity to do so. No violation may be found unless the matter has been fully and fairly litigated. The mere presentation of evidence relevant to a possible violation does not satisfy the "fully and fairly litigated" requirement. See *Mine Workers District 29*, 308 NLRB 1155, 1158 (1992). As the Board recently emphasized, it "is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion International Corp.*, 339 NLRB 672 (2003) (complaint alleging 8(a)(5) unilateral change violation was insufficient to place the respondent on notice that it would also have to defend against an 8(a)(5) direct dealing allegation.) See also *Stage Employees IATSE (Hughes-Avicom International)*, 322 NLRB 1064 (1997), in which the Board refused to find that the respondent had violated the Act in certain ways not alleged in the complaint.

In the present case, I conclude that the complaint did place Respondent on fair notice of the allegation that it had failed to meet with the Union at reasonable times. Thus, complaint paragraph 11(1) alleges that "Respondent failed to devote sufficient time to bargaining."

Moreover, during opening argument, the General Counsel stated, in part, "we'll present testimony through [Union Negotiator] Ellison which will show that from the first meeting that the union had a concern about the number of times the company was agreeing to meeting, which is twice a month basically, that the company and the union were not meeting long enough to reach a contract by July. . . ."

It appears clear from context that the General Counsel was not asserting that Respondent violated the Act by failing to meet often enough to reach a contract by July. The Act does not oblige a party to seek agreement by any particular deadline, but instead requires, more generally, that the parties meet "at reasonable times." Rather, the General Counsel was arguing that from a very early point in the bargaining, the Union's negotiators wanted to meet more frequently but that such concerns fell on deaf ears.

To support its "surface bargaining" theory of violation, the Government contends, in part, that Respondent demonstrated bad faith by ignoring the Union's requests to meet more often. In effect, the General Counsel argues that when a party adheres to a sparse, unproductive negotiating schedule notwithstanding repeated requests for more meetings, this stubborn insistence on a leisurely pace provides evidence of bad faith supporting a finding of "surface bargaining."

However, not every refusal to agree to a proposed meeting date warrants an inference of bad faith. For example, if a negotiator's need for prompt medical care caused him to reject one particular proposed date, that action would say nothing about his motivation over the course of negotiations. An inference of bad faith arises not because a party has rejected a number of proposed bargaining dates but because it did so unreasonably, thereby manifesting indifference to reaching agreement.

By arguing that bad faith may be inferred from Respondent's refusal to agree to more frequent bargaining sessions, the General Counsel implicitly contends that Respondent's unwillingness to meet more often was unreasonable. Only an unreasonable refusal to meet would be probative because a *reasonable* refusal to meet does not indicate bad faith. Thus, when the General Counsel predicates a surface bargaining theory, in part, on a respondent's unreasonable rejection of meeting dates, the Government must present much the same evidence needed to establish that a party breached its 8(d) duty to meet at reasonable times.

By alleging that Respondent had failed to devote sufficient time to bargaining, complaint paragraph 11(1) clearly put Respondent on notice that it would need to present evidence showing that it did bargain a sufficient number of times or stood ready to do so. Being willing to bargain a sufficient number of times means being willing to bargain a *reasonable* number of times. Therefore, I conclude that the parties fully and fairly litigated the issue of whether Respondent breached its 8(d) duty to meet at reasonable times.

Complaint paragraphs 12 and 13, read together, allege that Respondent violated the Act by withdrawing recognition from the Union. It may be noted that the General Counsel does not assert that Respondent's withdrawal of recognition from the Union was unlawful because it was made in the absence of a bona fide doubt concerning the Union's continuing majority status. Rather, the Government contends that the employees became disaffected with the Union because of Respondent's bad-faith bargaining. The law does not allow an employer to benefit from its own wrongdoing by withdrawing recognition from a union when the employer's unfair labor practices caused

the union to lose employee support. *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996).

Legal Principles

An employer's duty to bargain with a labor organization arises when a majority of employees in an appropriate bargaining unit select the union to represent them. In this instance, the duty arose when the Union won a majority of the votes in the April 12, 2002 election.

The Board's subsequent certification of representative, admitted by Respondent, left no doubt that Respondent had a duty to recognize the Union and bargain with it concerning the wages, hours, and working conditions of the employees in the bargaining unit. Section 8(d) of the Act defines this duty to bargain:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

29 U.S.C. §158(d).

Significantly, the duty to bargain requires compliance with *all* of the following different elements: (1) meeting at reasonable times; (2) conferring in good faith; (3) negotiating a contract; and (4) on request, reducing the agreement to writing. I have listed these obligations separately to emphasize that a party may fall short of its 8(d) responsibility, and therefore violate Section 8(a)(5), by failing to satisfy *any* of them.

The General Counsel's primary theory concerns the requirement that an employer must "confer in good faith." The Government argues that Respondent engaged in "surface bargaining," going through the motions of negotiation but with a fixed intent to avoid an agreement rather than achieve one.

As discussed above, I believe the complaint fairly raises another legal theory, namely, that Respondent violated another distinct duty under Section 8(d), the duty to meet at reasonable times. Proving a violation under this theory is somewhat more straightforward than proving that a party failed to confer in good faith.

"Bad faith" is a state of mind which, so far at least, cannot be detected by MRI or other brain scans. The best evidence of it probably would be an admission by a party's negotiator and the next best evidence might be a subpoenaed document describing the bargaining strategy and objectives. In real life, such evidence seldom appears. Surface bargaining involves a bit of cleverness, and someone clever enough to do it usually is clever enough not to write about it in his notes.

So bad faith typically must be inferred from some outward and visible signs of the inner disgrace. Complaint paragraph 11 lists a number of ways that Respondent, according to the Government, manifested bad faith.

Although determining whether a party acted in bad faith often involves the tricky task of drawing sound inferences, deciding whether a party refused to meet at reasonable times is more straightforward. Testimony and bargaining notes will establish how many times a party offered to meet, how many times the party refused to meet, and how often the parties really did meet.

Once the judge has ascertained how often a party was willing to meet, the next step is to determine whether this amount constitutes a "reasonable" number of times. As in other areas of the law, deciding what is "reasonable" cannot be done with absolute precision, but the judge, and ultimately the Board, can make this determination without having to infer very much about the party's inner state of mind.

Determining how many bargaining sessions constitute a reasonable amount of time involves making an objective estimate by applying general knowledge about labor negotiations to the specific facts of the case. The Board has plenty of knowledge about labor negotiations.

Congress established the Board as an agency with special expertise in the field of labor relations. By hearing and deciding collective-bargaining cases for nearly seven decades, the Board has become familiar with the challenges facing labor negotiators in many different circumstances. Thus it can appreciate, from the perspective of the parties, whether the magnitude of the task facing the negotiators is grossly out of proportion to the time a party is willing to devote to it.

In addition to the Board's experience, common sense sheds light on what amount of time is reasonably necessary for bargaining under various circumstances. Obviously, it will take a lot more time to negotiate an initial contract, because every single item will be up for discussion. Conversely, it reasonably will take less time to negotiate subsequent agreements, as a general rule, because the parties already have settled many issues.

Similarly, parties reasonably would need less time for bargaining about a provision that is common in the industry than for proposed language which is novel. Certainly, there is nothing wrong with proposing new or unusual language which, in fact, might prove better tailored to the parties' needs than "off–the–rack" articles from other contracts. However, it reasonably will require more time to negotiate such customized language because both sides must become fully familiar with the proposal and all its ramifications.

Another commonsense notion suggests that, all else being equal, it reasonably will take more time to negotiate the language in a 4-page proposal than in a 1-paragraph proposal. Of course it is just as proper for a party to propose a lengthy contract term as a short one, and the parties might well favor a longer proposal which defines their obligations more precisely. However, the length and complexity of a proposal will affect the amount of time reasonably necessary to discuss it at the bargaining table. To satisfy the 8(d) obligation to "meet at reasonable times," a party certainly must be willing to spend an amount of time discussing its proposals which the proposals foreseeably would require.

To summarize, "surface bargaining" describes a party's failure to satisfy the 8(d) requirement to confer with the union in good faith. Because a lack of good faith involves intention or state of mind, it often reveals itself only indirectly, and must be inferred from the party's conduct.

On the other hand, a "failure to meet at reasonable times" violation arises from failure to satisfy the 8(d) duty to do just that. Such a legal theory focuses on evidence concerning how long and how often a party was willing to meet and whether this amount of time was reasonable under the circumstances.

Respondent's Conduct During Negotiations

The parties stipulated that the Respondent and Union began negotiations with a meeting on May 15, 2002, and that the last bargaining session took place April 7, 2003. The parties met 20 times before Respondent withdrew recognition.

Typically in collective-bargaining, each side proposes a contract consisting of a number of different articles. When the parties reach agreement on the language to be included in a particular article, the negotiators will mark it "T.A." for "tentatively agreed." In the present case, the parties stipulated that the Union and Respondent reached tentative agreement on the following articles on the dates indicated:

Military Leave	June 14, 2002
Duration	June 27, 2002
Visitation Rights	June 27, 2002
Articles of Agreement	July 18, 2002
Recognition	July 18, 2002
New Employees	July 25, 2002
Bulletin Boards	August 15, 2002
Funeral Leave/Bereavement Leave	August 15, 2002
Arbitration	September 4, 2002
Management Rights	September 19, 2002
Bonds	October 1, 2002
Jury Duty	October 1, 2002
Legality/Stability of Agreement	October 1, 2002
Grievance Procedure	October 29, 2002
Seniority	October 29, 2002
Extra Contract Agreement	January 10, 2003
No Oral or Implied Agreement	January 10, 2003
Uniforms	January 10, 2003
Examinations	January 30, 2003
Wage Rate and Classifications	January 30, 2003
Wash Rooms and Lunch Rooms	January 30, 2003
Attendance	March 7, 2003
Automatic Payroll Deposit	March 7, 2003
Election Day/Time Off to Vote	March 7, 2003
Employee Discount	March 7, 2003
Intent and Purpose	March 7, 2003
Sick Personnel	March 7, 2003
Substance Abuse Control	March 7, 2003

The General Counsel argues that these 28 tentative agreements do not represent significant progress because a number of major items, such as wages, remained unresolved. (The agreed-upon article, "Wage Rate and Classifications," did not include actual wage rates, which remained in dispute.) Respondent's reply, that these tentative agreements concern many substantive provisions with economic consequences, will be discussed later in this decision.

Obviously, good faith—or the absence of it—cannot be determined by counting up the number of tentative agreements or even by some more complex mathematical formula. No demonstrable correlation exists between the sheer number of agreed-upon proposals and the presence or absence of good faith.

The General Counsel asserts that Respondent revealed bad faith, in part, by engaging in the conduct described in complaint paragraph 11. These allegations are discussed below.

Alleged Failure to Devote Sufficient Time to Bargaining

Complaint paragraph 11 alleged, in part, that Respondent failed to devote sufficient time to bargaining. At hearing, the General Counsel described two ways in which Respondent assertedly failed to spend enough time in negotiations with the Union. According to the General Counsel, Respondent's representatives showed up late for meetings and left early. Additionally, the Government contends, Respondent only met with the Union, on average, twice a month.

Alleged Arriving Late and Leaving Early

The record establishes that Respondent's negotiators did not always arrive on time. The Union's chief negotiator, Robert Bridges, testified as follows:

> The company shows up late. They leave early. It's a pattern. They caucus a lot. We're not spending many hours a day negotiating. We're spending a lot of time caucusing and waiting.

This testimony is uncomfortably vague. Rather than pointing to any specific instances of tardiness which actually had occurred in the past, Bridges spoke in the present tense. It seems unlikely that Bridges intended to suggest that Respondent continued to be late for meetings because the Union no longer was meeting with the Respondent. Instead, it appears that Bridges was using the present tense in a more figurative way, to express a generality.

A generality may find its roots in unstated facts, but it also represents the conclusion that a particular observer drew from whatever information he privately considered relevant and sufficient. Severed from a foundation of verifiable fact, such a conclusion is free to float upward, balloonlike, expanding as it goes.

Therefore, it is important to test such a general statement against other evidence in the record, such as Bridges' bargaining notes, in evidence as General Counsel's Exhibit 74. The extent to which Bridges mentions such incidents in his bargaining notes gives some idea of how much impact tardiness may have had on the bargaining process.

Bridges' notes are not always helpful regarding when a particular bargaining session was scheduled to begin and when the negotiators actually arrived. In any case, they do not document a chronic and consistent problem with tardiness.

For example, Bridges' notes indicate that the parties' December 6, 2002 bargaining session was scheduled to begin at 8 a.m. and that the Respondent's negotiators arrived at 8:10. On November 13, 2002, these notes indicate that the bargaining session was to begin at 8 a.m. but that Respondent's representatives did not arrive until 8:20.

Even though the notes suggest Respondent's representatives arrived late on these two of the 20 bargaining sessions, they fail to establish any pattern of tardiness as a tactic of delay. Any number of factors, bearing no relationship to good or bad faith, could produce occasional lateness. Indeed, Bridges' notes indi-

cate that Union Negotiator Michael Kline arrived late at the October 29, 2002 meeting.

Incidents of tardiness are relevant to this case if they are part of a plan to frustrate the bargaining process or evince a fixed intent not to reach agreement. In deciding whether the late arrivals indicate such a design, I also take into account that, pursuant to the Respondent's suggestion, the first bargaining sessions took place at the Union's offices. The parties continued to meet at the Union's offices until the Union began handbilling Respondent's retail stores in fall 2002.

It would seem uncommonly disingenuous, indeed devious, for a company to propose an accommodation saving the union negotiators travel time and then arrive at the bargaining sessions late to thwart the process. Therefore, I infer no bad faith from those instances when Respondent's negotiators were tardy.

Bridges' notes also do not establish that Respondent's negotiators invariably left early. Page 40 of those notes does bear the following notation: "3:30 Kevin has to go to plane." It appears clear that this entry refers to Kevin Rutherford, who was then Respondent's vice president of human resources. Rutherford worked in Respondent's Houston office and flew to Dallas for the bargaining sessions.

There is some ambiguity concerning the date when Rutherford had to leave early to catch a plane, because this notation appears above the entry concerning the start of negotiations on November 26, 2002. Most likely, the note signifies that Rutherford left the November 13, 2002 bargaining session at 3:30.

The notes of another union negotiator, Douglas Ellison, also refer to an incident when bargaining had to be concluded earlier than desired because Respondent's chief negotiator, Christopher Antone, had to catch a plane. That session, on June 6, 2002, also began 25 minutes after the scheduled 10 a.m. starting time, but Ellison's notes do not indicate what caused the delay.

Because of the enhanced security following the September 11, 2001 tragedy, negotiating the lines at an airport—particularly a hub such as Dallas/Fort Worth International—can seem almost as formidable as negotiating a labor agreement. Therefore, I will infer no bad faith from the fact that a member of Respondent's bargaining team left early to catch a plane.

In addition to the incidents discussed above, the record indicates there may have been some other instances of late arrival or early departure. Even when considered all together, such instances do not, by themselves, establish a pattern from which bad faith may be discerned. See, e.g., *Houston County Electric Cooperative*, 285 NLRB 1213, 1215 (1987) ("Although [respondent's representative] was often late . . . his tardiness amounted to no more than 10 to 20 minutes per session and thus was not significantly disruptive of the bargaining process.")

In his testimony, quoted above, Bridges also alluded to how much time Respondent spent in caucuses. Caucuses constitute an integral and important part of the bargaining process. They provide necessary time to consider proposals presented by the other party, and they also allow time to formulate counterproposals that address, intelligently and creatively, the concerns raised at the bargaining table. Thus, I would not regard the minutes spent in a caucus in the same way as bargaining time dissipated by a negotiator arriving late or leaving early. Additionally, the evidence fails to establish that Respondent called or prolonged its caucuses to frustrate the bargaining process.

To summarize, Respondent's occasional late arrivals and early departures do not, considered alone, constitute a failure to meet with the Union at reasonable times. Compared to the Respondent's refusal to schedule more bargaining sessions, discussed below, the tardy arrivals and early departures caused relatively little damage to the negotiating process.

Number of Bargaining Sessions

At hearing, the parties stipulated that the Union and Respondent met on 20 specified locations beginning with a bargaining session on May 15, 2002, and ending with the bargaining session on April 7, 2003. Generally, all witnesses gave consistent testimony about these meetings. To the extent that the testimony may be in conflict, I rely on that given by Union Negotiators Bridges and Ellison.

Based on my observations of the demeanor of the witnesses, I conclude that Bridges and Ellison gave reliable testimony. Further, I conclude that the notes taken by Bridges and Ellison accurately reflected events during the bargaining sessions. In this regard, I take into account an observation Respondent's counsel made in closing argument, to the effect that the notes of the union negotiators reliably recorded events during bargaining which they considered significant.

At the first negotiating session, the parties discussed the possibility of meeting once a week, notably, on Thursdays. The parties never reached agreement on such a schedule. The second bargaining session took place on June 6, 2002, some 3 weeks after the first. The parties next met on June 14, 2002. This third session ended only 5 hours after it began, when Respondent's chief negotiator, Christopher Antone, said he had to return to his office.

The fourth bargaining session did not take place until almost 3 weeks after the third, and by this time the union negotiators were becoming concerned about the slow pace of the bargaining. Union Negotiator Ellison asked if several days could be "strung together," in other words, if the parties could arrange to meet several days in a row. Respondent's negotiator, Antone, answered, "probably not," but said he would check on it.

The parties waited 3 weeks before the next bargaining session, which took place on July 18, 2002. Towards the beginning of this meeting, a union negotiator told the Respondent's negotiators that they were going too slowly and it seemed as if the company was stalling. Respondent's negotiators denied such an intention.

At the beginning of the sixth bargaining session, on July 25, 2002, Union Negotiator Bridges expressed concern about the pace of the negotiations and said that they needed to meet longer and more often. Respondent's negotiators replied that they would check on that possibility.

The next bargaining session did not take place for 20 days. When the parties did meet, on August 15, 2002, Union Negotiator Ellison again expressed the opinion that the parties were not meeting enough. Nonetheless, another 19 days elapsed before the parties met again.

At the September 4, 2002 bargaining session, Union Negotiator Bridges informed Respondent that if they did not reach agreement on a contract soon, the Union would begin handbilling Respondent's stores. The Union later did engage in such handbilling. Respondent then insisted that the bargaining sessions take place at a neutral location, rather than at the Union offices.

The parties held their 9th and 10th negotiating sessions on September 19, 2002 and October 1, 2002. The 11th bargaining session took place 9 days later. At this October 10, 2002 meeting, Union Negotiator Ellison asked Respondent's negotiators if they could stay over and continue bargaining the next day. Respondent's negotiators declined.

This meeting became rather heated, with one company negotiator and one union negotiator exchanging insults. At the end of the session, Union Chief Negotiator Bridges said that they needed to set more meeting dates because they were getting behind. Rather than agreeing to meet more frequently, Respondent's Chief Negotiator Antone said he would see them on October 29.

Thus, the 12th bargaining session took place 2-1/2 weeks after the 11th. At the beginning of this meeting, Union Chief Negotiator Bridges said that they must "string some meetings together" to be productive. Bridges testified that Antone replied that he enjoyed taking time off between meetings. The bargaining notes support this testimony, which I credit.

The next bargaining session took place 2 weeks later, on November 13, 2002. It began about 8:20 a.m. and ended sometime around 3:15 to 3:30 p.m., after Respondent's Negotiator Rutherford said he had to leave to catch a plane.

During this meeting, Union Negotiator Kline accused Respondent of engaging in delaying tactics by refusing to meet more often. Rather than suggesting an earlier meeting date, Respondent's Chief Negotiator Antone said that he would see them at the next meeting, on November 26, 2002.

At this November 26, 2002 meeting, Antone asked the union negotiators if they could meet on December 5, 2002, and they agreed. Respondent's chief information officer attended the November 26, 2002 meeting and described at length the new computer system which Respondent would be installing to track its warehouse inventory. At one point, Union Chief Negotiator Bridges protested that the Union already understood the system and that they should be spending this time negotiating. The record is unclear as to how much further time the Respondent's chief information officer spent describing the computer system.

The parties next met on the evening of December 5, 2002. This meeting concerned an announced layoff of employees, rather than contract proposals.

At a bargaining session the next day, Union Chief Negotiator Bridges pressed the Respondent for more meetings. Bridges proposed that the parties meet again the following Monday, December 9, and again on either Thursday or Friday, December 12 or 13. He also proposed bargaining sessions on December 16 and 20, 2002. Respondent declined to meet on any of these dates.

Respondent's Chief Negotiator Antone said that he would get back to the Union on meeting dates. However, the next bargaining session did not take place for more than a month.

The parties held their 17th bargaining session on January 10, 2003. This meeting began at 8 a.m. and ended around 3:40 p.m., when Respondent's Negotiator Rutherford had to leave. The parties next met on January 30, 2003, but did not meet after that until March 7, 2003.

At the March 7 meeting, Respondent's chief negotiator Antone, said that he would be available to meet with the Union on March 28, but that he did not think the new human resources director would be available. The next, and last, negotiating session took place April 7, 2003. At that meeting, the parties discussed scheduling a meeting on May 2, 2003 but that meeting never took place because Respondent withdrew recognition from the Union.

As discussed above, the Act requires both the employer and the employees' exclusive bargaining representative to meet at reasonable times and confer in good faith concerning wages, hours, and other terms and conditions of employment. Although the Act does not define the term "reasonable," common sense is a reliable guide.

Whether an allotted amount of time is "reasonable" depends on the magnitude of the task to be accomplished. Initial estimates may prove incorrect because a job may turn out to be more difficult than expected. In that event, the estimate must be adjusted to fit the reality. It would hardly be reasonable for someone to insist on spending only the small amount of time originally considered sufficient when all the circumstances shout that the initial estimate was too low.

Stated another way, collective bargaining does not present a situation analogous to an automobile body shop, where a service writer makes an estimate of the total cost of repair, and that estimate then limits the car owner's obligation to pay. No service writer appears at the beginning of collective-bargaining to tell the parties how many total hours they must spend to discharge their 8(d) obligation. Rather, participants in collective bargaining have an ongoing obligation to devote reasonable time to the process. What constitutes a reasonable amount of time may well change depending on the circumstances and the stage of negotiations.

In the present case, I conclude that Respondent never was willing to schedule bargaining sessions often enough to satisfy its statutory duty to meet with the Union at reasonable times. It had a duty to meet often enough to give the collective-bargaining process a reasonable chance of success. Clearly, it knew, or should have known, that it was meeting with the Union less frequently than needed.

Respondent's chief negotiator, Christopher Antone, is a certified labor law specialist in the State of Texas and a veteran of many negotiations. His experience alone would tell him that the meeting schedule was insufficient to reach agreement on a contract within a reasonable time. Indeed, the fact that the Union was not agreeing to his proposals should have placed him on notice that he needed to do more talking, not less. Moreover, the Union itself repeatedly requested additional bargaining sessions.

Respondent's actions demonstrate that it did not take these requests seriously. For example, at the October 10, 2002 bargaining session, when Union Negotiator Bridges said that they needed to schedule more meeting dates because they were getting behind, Respondent did not offer to meet at any time before the next scheduled meeting on October 29. Instead, Bridges credibly testified, Antone replied that he would see them on October 29.

On other occasions, when the Union requested additional bargaining dates, Respondent's negotiators replied that they would "check on it," but such checking did not result in scheduling more meetings. It is true that once, Respondent asked for an additional bargaining session, which took place on the evening of December 5, 2002. However, Respondent sought this meeting to discuss an expected layoff, not contract proposals, and the December 5 meeting did not advance the negotiation of a collective-bargaining agreement.

Notwithstanding their differences concerning what should be included in a contract, the parties must work together to schedule enough bargaining sessions to give the process a reasonable opportunity to succeed. Respondent's unwillingness to schedule more sessions, as the Union requested repeatedly, does not manifest the spirit of cooperation implicit in the duty to bargain in good faith. Indeed, by October 2002, the lack of progress had become so inescapably clear that no reasonable person would have considered the meeting schedule sufficient. Yet Respondent didn't even give the Union a serious explanation for its refusal.

Sometimes, a respondent will try to justify infrequent meetings by raising the "busy negotiator" defense, asserting that other business or legal matters prevented its negotiator from attending more bargaining sessions. The Board consistently rejects this defense. See, e.g., *Fruehauf Trailer Services,* 335 NLRB 393 (2001).

In the present case, however, Respondent did not even use the "busy negotiator" excuse. Union Negotiator Bridges gave the following testimony, which I credit, concerning his request, on October 29, 2002, to schedule bargaining sessions on consecutive days:

> Q. And when you told Mr. Antone that you wanted to string some meeting dates together, what was his response?
>
> A. Mr. Antone told me that he enjoyed taking time off between meetings to contemplate what was done during the meeting.

Antone's reply does not suggest that he needed time to review his notes to formulate counterproposals; instead, it indicates that he simply took time recalling his performance at the bargaining table for his own pleasure. Even assuming that Antone spent half a day in such reverie—which seems implausible considering the typical attorney's quest for billable hours—doing so hardly explains why he was unavailable to meet with the Union more than once every 2 to 3 weeks.

Moreover, needing time for personal enjoyment does not excuse a negotiator's failure to meet with the Union as often as reasonably necessary to make progress in bargaining. A negotiator may also enjoy catching trout, but he cannot justify a refusal to meet with the Union by hanging a "gone fishing" sign on his door.

Perhaps Antone's "I enjoy contemplating" remark was nothing but a wisecrack or attempt at humor. However, the record does not establish that Respondent ever gave the Union any better explanation for its unwillingness to meet on consecutive days or to schedule bargaining sessions more frequently.

Indeed, even at the hearing, Respondent did not provide any credible explanation as to why it could not have met more frequently than twice a month. Similarly, it provided no explanation regarding why it could not, as the Union requested, meet on consecutive days.

The duty to bargain in good faith does not require a party to meet any preordained number of times, such as once a week, or twice a week, or every day. Rather, the law requires the party to meet at *reasonable* times, and what is reasonable will depend on the circumstances. When an existing bargaining schedule proves inadequate, reasonable negotiators agree to change it. Respondent would not.

Typically, parties will hold more bargaining sessions as they near agreement. Such a course is reasonable because parties also typically save the hard issues for last, and hard issues require more time. In the present case, Respondent did defer the difficult "economic" issues until later in the bargaining, yet the frequency of meetings did not increase. To the contrary, the parties met more often at the start of the process than when it ended.

One further point warrants discussion. Although the Act does not set any kind of a deadline for meeting agreement, the requirement that the parties meet "at reasonable times" also includes the notion that the parties will work fast enough to reach an agreement in the reasonable future.

Respondent has emphasized that the parties were not at impasse at the time it withdrew recognition. That, indeed, is an understatement. It is difficult to predict how long it would eventually take the Respondent and the Union to reach agreement at the rate of two meetings a month but it is safe to say that, absent some major, dramatic change, it would not be soon.

Respondent's willingness to reach agreement with the Union sometime in the "sweet by-and-by" is not good enough. Because a newly-certified union only enjoys an irrebuttable presumption of majority status for 1 year from the date of certification, an employer may face some temptation to fiddle around in negotiations for 12 months, hoping that when the certification year ends, some disgruntled employees will circulate a petition to decertify the union. Bargaining, however, is not a basketball game in which one party can win by "letting the clock run out."

In determining whether a respondent has been willing to meet a reasonable number of times, the Board can take into account the "certification year" factor. Considering this factor does not impose a deadline on an employer to reach agreement within one year, but simply means that the Board will be alert to the possibility that an employer is dragging its heels.

In the present case, the parties met *less* frequently as the certification year neared its end. At this time, the parties had many difficult issues to discuss. Under these circumstances, Respondent's willingness to meet once a month did not satisfy its 8(d) duty.

Examining the Respondent's entire course of conduct during the negotiations, I conclude that it failed to meet with the Union at reasonable times, as required by Section 8(d) of the Act. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(5) and (1).

Proposals Allegedly Designed to Frustrate Bargaining

Complaint paragraph 11(2) alleges that Respondent offered proposals designed to frustrate the bargaining process. During the hearing, the General Counsel asserted that the following proposals (listed by their titles) fell into that category: Discipline and Discharge, Complete Agreement, Intent of Agreement, Nonbargaining Unit Personnel, Shop Stewards, Checkoff, Layoff and Recall, Health and Welfare, and Pension Plan.

Before examining these specific proposals, it is helpful to review the extent to which I may infer bad faith from the content of a particular proposal. The language of the statute, a Supreme Court decision, Board precedent, and reasons of public policy all affect what conclusions properly may be drawn from the language a party proposed.

Section 8(d) of the Act specifically provides that it does not require a party to agree to a proposal or make a concession. Additionally, in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Supreme Court held that the Board has no authority to write terms into a collective-bargaining agreement. Thus, the Board is not in the business of writing contracts or telling negotiators what they should or should not put in a labor agreement.

If the Board were to pass on the "rightness" or "wrongness" of a particular proposal—for example, by pronouncing that a certain proposal was evidence of a party's bad faith—the Board would be entering the contract writing business through the back door. Even though the Board didn't issue an order telling the parties what to include or exclude, a finding that a particular proposal evidenced "good faith" or "bad faith" would have much the same effect.

Some public policy reasons also favor maintaining a respectful distance between the Government and the collective-bargaining process. When two parties bargain creatively, the result can be a unique agreement addressing their particular concerns and needs. Undoubtedly, many preliminary proposals will fall short of the mark before the parties find the right language for their purposes. Were the Government to scrutinize the proposals with too critical an eye, it could discourage originality and innovation.

Nonetheless, a party's proposals sometimes do provide a clue to its intentions, and to some extent, they may be considered in determining the presence or absence of good faith. Such examination must be done delicately, in a way that least inhibits the freedom of negotiators to propose original terms in good faith. The Board has struggled to strike exactly the right balance. For example, in *Reichold Chemicals*, 277 NLRB 639, 639–640 (1985), the Board dismissed the complaint, stating:

> The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith. Accordingly, the respondent's insistence on broad management-rights and no-strike clauses with a restrictive grievance provision is not evidence of an intent to frustrate the collective-bargaining process.

After the Board issued this decision, the charging party in that case and the General Counsel moved for reconsideration. Reversing its dismissal of the complaint, the Board clarified its previous holding:

> On further reflection, we conclude that this statement is an imprecise description of the process the Board undertakes in evaluating whether a party has engaged in good-faith bargaining . . . we wish to emphasize that in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith. The Board's earlier decision in this case is not to be construed as suggesting that this Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in certain situations. [Footnote omitted.]
>
> That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals.

Reichold Chemicals, Inc., 288 NLRB 69 (1988). Thus, the Board draws a line between considering the substance of a proposal to ascertain whether it may be part of a pattern of conduct revealing an intent to frustrate bargaining (permissible), and letting a subjective reaction to a proposal color its judgment about the presence or absence of good faith (impermissible).

Even though the Board may consider proposals in the limited fashion described above, it remains reluctant to base a conclusion of good faith or bad faith *solely* on the content of a party's proposals. For example, in *Coastal Electric Cooperative*, 311 NLRB 1126 (1993), the Board reversed a judge's finding of surface bargaining because that conclusion was predicated only on the content of the respondent's proposals. The Board distinguished the facts in *Coastal Electric* from two other cases in which it found bargaining in bad faith. In *South Carolina Baptist Ministries*, 310 NLRB 156 (1993), and *Western Summit Flexible Packaging*, 310 NLRB 45 (1993), other factors, such as the manner in which the respondent presented the proposals and the respondent's conduct away from the bargaining table, also supported a finding of bad faith.

The Board thus emphasizes that it does not scrutinize a party's proposals in isolation but takes notice of them in considering the party's conduct as a whole. For example, in *Hardesty Co.*, 336 NLRB 258, 260 (2001), it stated:

> In determining whether the Respondent bargained in bad faith, we look to the "totality of the Respondent's conduct," both at and away from the bargaining table. Relevant factors include: unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table. See *Atlanta Hilton & Tower*, 271 NLRB 1600 (19[8]4); *NLRB v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377 (9th Cir. 1955); and *NLRB v. Arkansas Rice Growers Assn.,* [400 F.2d 565 (8th Cir. 1968)] at 572.

Here, I will follow that course. I will consider whether a common design emerges from all of Respondent's actions, including but not limited to the substance and timing of particular proposals.

Discipline and Discharge Proposal

At the June 14, 2002 bargaining session, Respondent gave the Union a proposal for a contract term titled "Discipline and Discharge," consisting of five sections. The first section excluded the discipline of probationary employees from the grievance procedure. The remaining sections stated as follows:

> *Section 2*—The Employer may discipline and discharge non-probationary employees for just cause. The Employer may decide, in its judgment, whether discipline or discharge is the appropriate penalty for any offense. Just cause for discipline or discharge shall include, but not be limited to, all of the offenses listed in the Work Rules.
>
> *Section 3*—The Employer may discipline and/or discharge employees for any reason in addition to the reasons listed in Article ___ Work Rules.
>
> *Section 4*—If, in accordance with the provisions of Article ___ Grievance Procedure, an arbitrator concludes that a non–probationary employee engaged in any of the conduct listed in Article ___ Work Rules, just cause for the discipline or discharge imposed shall have been established and the grievance shall be denied.
>
> *Section 5*—The absence of an offense from the list of rules contained in Article ___ Work Rules shall not be considered by an arbitrator in deciding whether just cause exists for discipline or discharge based on an offense not contained in the Work Rules.

Although the parties never reached agreement on a discipline and discharge article, the Respondent did modify its proposal as bargaining progressed. Moreover, Respondent told the Union the reason for the language it proposed.

At hearing, Respondent's counsel and chief negotiator, Christopher Antone, explained that the language in this proposal addressed, in part, a problem he had encountered while representing another employer. An employee of that employer had committed a very serious act of sexual harassment in the workplace and lost his job because of it. However, an arbitrator ordered the employee reinstated because of his long service with the company. Antone intended the wording of Respondent's discipline and discharge proposal to preclude an arbitrator from reinstating such an employee. From Respondent's perspective, the proposal would limit an arbitrator's power to be arbitrary.

There is nothing unlawful about Respondent's discipline and discharge proposal and I draw no inference of bad faith from it.

Complete Agreement Proposal

After the Union tendered a "maintenance of standards" proposal which would obligate the Respondent to maintain all terms and conditions of employment in effect, Respondent countered with a proposal entitled "Complete Agreement." Commonly in collective bargaining, the language in this proposal is called a "zipper clause."

The complete agreement proposal provides that both parties waive the right to bargain during the term of the collective-bargaining agreement "with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been in the knowledge or contemplation of either or both parties at the time this Agreement was signed."

Another section of this proposal provides that Respondent would not be deemed to have agreed to any term or condition of employment not specifically set forth in this agreement. "Any alleged past practice of the Employer which is not included in this agreement shall not be considered agreed to."

During negotiations, Respondent told the Union that it intended to maintain the current terms and conditions of employment in effect, but to preclude future disputes, wanted the parties to agree on what terms and conditions of employment then existed. After substantial negotiations, the parties reached agreement on contract language addressing the Respondent's concerns, although this language did not appear in a clause labeled "Complete Agreement."

Respondent gave the Union legitimate reasons for seeking the language in its complete agreement proposal. Moreover, such zipper clauses are lawful and, in fact, not uncommon in collective-bargaining agreements. I draw no inference of bad faith from this proposal.

Intent of Agreement Proposal

On June 14, 2002, Respondent gave the Union a proposal titled "Intent of Agreement" which is in evidence as Respondent's Exhibit 52. It stated, in its entirety:

> During the life of this collective bargaining agreement, and any extension thereof, the Union agrees not to seek to represent, solicit or accept into union membership any other individual employed at or working out of any other of the Employer's facilities.

On July 18, 2002, Respondent gave the Union a 3-paragraph proposal titled "Intent and Purpose." The first two paragraphs proposed nothing controversial but simply constituted a preamble summarizing what the parties hoped to achieve in the collective-bargaining agreement. The final paragraph stated:

> During the life of this Agreement, and any extension thereof, the Union agrees not to seek to represent, solicit or accept into union membership any other individual employed at or working out of any other of the Employer's facilities.

On January 30, 2003, Respondent submitted to the Union another "Intent and Purpose" proposal with language identical

to that given the Union on July 18, 2002. On March 7, 2003, the parties tentatively agreed to this intent and purpose language after deletion of the third paragraph, which contained the language quoted above.

As noted above, the Board generally does not scrutinize collective-bargaining proposals. However, I believe that the Board is warranted in making an exception to this rule where the proposal in question impinges upon rights established and guaranteed by the Act. Congress established the Board to administer and enforce the Act, and it has both the authority and the duty to make sure that employee rights under the Act are protected.

For example, when a union and an employer entered into a contract providing that the employer would make pension fund contributions only for those employees who belonged to the union, the Board ordered the union to cease and desist from maintaining this provision in its collective-bargaining agreement. *Stage Employees IATSE (Hughes-Avicom International)*, above, 322 NLRB at 1066. Ordering the respondent to cease maintaining this provision did not put the Board in the contract writing business; the Board remained, as always, in the rights protecting business.

In the *Reichold Chemical* case, discussed above, the employee insisted to impasse on a management's rights clause which would cause the union to waive its right to engage in an unfair practice strike and also its right to resort to the Board's processes. The Board held that the employer lawfully could insist to impasse that the union waive its right to engage in an unfair labor practice strike, but it could not insist to impasse that the union waive its right to go to the Board.

Significantly, the Board found that such a waiver was a nonmandatory subject of bargaining for two reasons: (1) It was contrary to a fundamental policy of the Act and (2) was unrelated to terms and conditions of employment. *Reichold Chemical*, 288 NLRB at 79. Those same reasons apply to the objectionable language in Respondent's "intent and purposes" proposals.

Section 7 of the Act gives employees a number of rights, beginning with the right to form, join, or assist labor organizations. Respondent's proposal directly denies employees this fundamental statutory right by requiring the Union not to "accept into union membership any other individual" employed by Respondent at one of its stores. Thus, it would clearly deny an employee the Section 7 right to join a labor organization simply because the employee was working for Respondent.

Moreover, the proposal does not relate to any term or condition of employment of any employee in the bargaining unit. To the contrary, it explicitly applies to *other* individuals, meaning Respondent's employees outside the bargaining unit. This fact alone—that it seeks to dictate conditions for individuals outside the bargaining unit—suffices to make it a nonmandatory subject of bargaining.

Respondent argues that it is lawful to ask a Union to waive a statutory right and that a no-strike clause provides a common example of such a waiver. However, a no-strike clause seeks to prevent the exercise of a particular right—the right to strike—which has a direct, immediate, and substantial impact on Respondent's ability to operate its business. Moreover, a no-strike clause does not exist in isolation but typically is part of a contract which also includes a binding dispute resolution procedure, so that employees have an alternative to striking to resolve a dispute during the term of the agreement.

Additionally, in the April 12, 2002 election, bargaining unit employees chose the Union to represent them. Respondent properly may ask the Union to waive these employees' right to strike because the employees designated the Union to act on their behalf. However, Respondent's intent and purpose proposal did not ask the Union to waive a statutory right of employees *it represented*. Rather, agreement to this proposal would affect the representation rights—or at least the representation opportunities—of employees who had not empowered the Union to speak for them.

At its core, Respondent's proposal seeks to discourage union membership among its employees by preventing the Union from accepting them. However, discouraging union membership is never a legitimate business purpose.

Clearly, it would be an unfair labor practice for Respondent to discourage union membership by discriminating, or threatening to discriminate, regarding terms and conditions of employment. Indeed, it would be an unfair labor practice even for Respondent to *ask* employees about their union membership or sympathies. Simply put, an employee's union membership status does not affect an employer's business and is none of the employer's business.

Respondent's "intent and purpose" proposal seeks to accomplish through bargaining what otherwise would be an unfair labor practice: Preventing employees from joining the Union should they choose to do so.

Certainly, Section 8(c) of the Act recognizes an employer's right to tell employees its opinions about unionization, even though the opinions may be unfavorable, so long as the employer communicates no threat of reprisal or force or promise of benefit. In other words, Section 8(c) protects a totally *noncoercive* attempt to persuade an employee not to join a union.

Respondent's proposal, however, is coercive. It would compel the Union to reject an employee's application for membership even if the employee wanted to join. If a contract actually included such a provision, I would conclude that this term interfered with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

In other words, I conclude that Respondent's proposal is neither a mandatory nor permissive subject of bargaining but is an *unlawful* subject of bargaining. Respondent therefore demonstrated bad faith by making it.

Respondent contends, however, that the proposal was permissive. Therefore, Respondent argues, it lawfully could make the proposal so long as it did not insist upon the matter to impasse. Respondent further notes that it withdrew the proposal on March 7, 2003.

In effect, Respondent's argument amounts to "no harm, no foul." However, even were I to agree that Respondent's proposal was permissive rather than unlawful, I would reject Respondent's argument because Respondent's proposal did cause harm—foreseeable harm—to the collective-bargaining process.

As a general rule, the fact that a party has made a proposal on a permissive subject of bargaining does not suggest any

want of good faith, so long as the party did not insist upon such a proposal to impasse. Additionally, a party does not manifest bad faith by proposing that a union waive a statutory right, at least so long as the party *has a legitimate reason* for seeking the waiver. For example, an employer has a legitimate business reason for proposing that a union waive its right to strike because a strike would affect the employer's ability to do business.

Respondent has no legitimate business reason for wanting to interfere with an employee's Section 7 right to join a union. Merely making such a proposal—asking the Union to do something Respondent itself lawfully could not—reveals something about Respondent's state of mind, regardless of whether Respondent insisted upon it to impasse.

Moreover, regardless of whether such a proposal is classified as unlawful or permissive, it *foreseeably* would lengthen the amount of time reasonably necessary for the parties to reach agreement. No reasonable person, and certainly no one with the labor relations experience and training of Respondent's chief negotiator, would expect any union to agree quickly to a proposal requiring the union to reject applicants for membership. Respondent clearly knew, or should have known, that its proposal would lengthen the negotiating process considerably.

Moreover Respondent knew or should have known that this proposal—involving at best only a permissive subject—would consume time the parties otherwise could use discussing mandatory subjects of bargaining. The proposal was, in effect, an elephant at the water hole, sucking up time the parties needed to reach agreement on essential contract terms.

Despite the predictable effect of this proposal on the amount of time reasonably necessary for bargaining, Respondent refused to schedule more meetings. This action clearly is inconsistent with good faith.

The Nonbargaining Unit Personnel Proposal

On July 18, 2002, Respondent's negotiators offered a proposal titled "Nonbargaining Unit Personnel." It specified when supervisors and others who were not bargaining unit employees could be assigned to do bargaining unit work.

The Union did not agree to the proposal, instead expressing concerns that it allowed supervisors and others too many opportunities to do bargaining unit work. Union Negotiator Bridges told Respondent's negotiators that when all of the provisions of the proposal were considered together, Respondent could work non-unit personnel "around the clock." Respondent's negotiators denied that it was intended for that purpose.

The Union also objected that the proposal would allow contractors to perform bargaining unit work. Thus, it differed from proposals in some collective-bargaining agreements which defined the term "nonbargaining unit personnel" more narrowly to mean only supervisors.

The parties exchanged counterproposals but never reached agreement on this matter.

The proposal concerns a mandatory subject of bargaining and addresses legitimate business objectives. I do not infer bad faith from either the content of the proposal or from Respondent's conduct in pursuing it.

The Shop Stewards Proposal

On July 25, 2002, Respondent gave the Union a proposal titled "Shop Stewards" which resulted in a great deal of discussion. The more controversial provisions stated as follows:

> 1. A shop steward may not communicate with employees, the Union, or representatives of the Employer concerning Union business on working time without first obtaining the permission of the General Manager or his designee. Such permission shall be granted in the Employer's sole discretion.
>
> 2. A shop steward may not communicate with the Union office by telephone during his working time without first obtaining the permission of the General Manager or his designee. Such permission shall be granted in the Employer's sole discretion.
>
> 3. The Union office may communicate with the shop steward during working hours by first obtaining the permission of the General Manager or his designee. Such permission shall be granted in the Employer's sole discretion.
>
> 4. The authority of the shop steward so designated by the Union shall be limited to, and shall not exceed, the following duties and activities:
>
> a. The investigation and presentation of grievances in accordance with the provisions of the collective bargaining agreement.
>
> b. The collection of dues when authorized by appropriate union action.
>
> c. None of the foregoing activities may take place during working time without the express permission of the Employer.

The Union protested that the clause was too restrictive and could prevent a shop steward from representing an employee during a disciplinary interview. Respondent asserted that a shop steward would have time before and after his shift, and during breaks, to perform union duties, but that during working time, the employee should be doing the work for which he was being paid.

The parties negotiated at some length concerning this proposal, and at the November 13, 2002 bargaining session, Respondent offered to delete the words "sole discretion" from the proposal. However, the parties never reached agreement on a "Shop Stewards" clause.

Respondent's proposal concerns a mandatory subject of bargaining. Respondent explained a legitimate business reason for this proposal and discussed it at length during bargaining. I do not infer bad faith either from the proposal itself or from Respondent's conduct in advancing it.

Dues Checkoff

Early in the bargaining, Respondent's chief negotiator indicated to the Union that a dues checkoff clause would be "no problem." However, Respondent did not agree to the Union's proposed dues checkoff clause and did not make a counterproposal immediately. Respondent's eventual counteroffer proposed that the Union would reimburse it for the clerical time

spent withholding and remitting union dues from employees' paychecks.

The parties discussed this proposal at length but did not reach an agreement on it. The proposal concerns a mandatory subject of bargaining and Respondent articulated legitimate business reasons for advancing it. I do not infer bad faith either from the proposal itself or from Respondent's conduct in advocating it.

Layoff and Recall

On October 1, 2002, Respondent presented to the Union a proposed contract article titled "Layoff and Recall." Under the proposal, when Respondent found it necessary to lay off employees, temporary employees would be laid off first. Then employees would be laid off in the following order:

> Employees on final warning laid off first;
> Employees on written warning next;
> Employees with worst attendance record next;
> Employees with next worst attendance record next;
> Employees with lowest performance evaluation score next;
> Employees with the least skill, knowledge and ability.

The Union did not agree to this proposal. Although the parties spent considerable time discussing the matter and exchanging counterproposals, they never reached agreement.

The General Counsel contends that this proposal manifests bad faith, in part, because subjective factors dictate who will be laid off. This argument would require me to intrude into the bargaining process and make a judgment—indeed a subjective judgment—about the merits of the proposal.

In fact, the General Counsel's argument would involve more than one judgment about the contents of the proposal. First, it would entail a judgment concerning whether the proposal really did permit the subjective selection of individuals for layoff and, second, it would require a judgment about whether subjectivity was good or bad. Doing so would not be consistent with Board precedent.

The proposal concerns a mandatory subject of bargaining. Respondent did not refuse to explain the proposal or listen to the Union's arguments. Indeed, Respondent modified its proposal after hearing and considering the Union's position. Therefore, I do not infer bad faith either from the proposal itself or from Respondent's conduct in advancing it.

Health & Welfare and Pension Proposals

The General Counsel argues that bad faith may be inferred, in part, from the fact that Respondent waited more than 8 months before informing the Union that it did not want to participate in the Union's health & welfare and pension plans. This argument does not invite me to judge the substance of a proposal but rather to draw an inference from the timing.

In this negotiation, Respondent followed the common practice of addressing noneconomic issues first and saving the wage and benefit issues for later in the bargaining. The record indicates that the Union acquiesced in this bargaining procedure. In view of this negotiating order, I do not draw an inference of bad faith from the timing of Respondent's announcements that it did not want to agree to the Union's health & welfare and pension proposals.

On the other hand, Respondent's unwillingness to meet more frequently, even after bringing these issues to the table, does indicate a degree of bad faith. Respondent retained as its chief negotiator an experienced attorney, Christopher Antone, who is certified as a specialist in labor law. Even someone without this level of training and experience would recognize that when the parties are in conflict about health & welfare and pension provisions—two major subjects with significant economic consequences—a lot of bargaining will be necessary.

The amount of time reasonably required for negotiations increased when the conflict over these issues became apparent. Yet Respondent did not increase the frequency of its meetings with the Union. It's failure to do so does indicate bad faith.

Management-Rights Proposal

On June 14, 2002, Respondent tendered to the Union a 4-page proposal titled "Management Rights." This proposal allowed managers to make decisions and take actions concerning many different aspects of the employment relationship, and provided that the exercise of such rights would not be subject to any dispute resolution procedure.

The parties spent considerable time discussing this proposal and the Union's counterproposal. Respondent modified its initial proposal by deleting many of the provisions, including the clause excluding such management decisions from the grievance procedure. The parties tentatively agreed to the revised management-rights proposal on September 19, 2002.

In modifying its management-rights proposal to obtain agreement, Respondent told the Union that it might see some of the deleted provisions later in other proposals Respondent would be tendering to the Union. That proved to be the case.

At the next bargaining session, on October 1, 2002, Respondent gave the Union four proposals. One of them concerned contractors; the others were captioned "Technology Language and Production Standards," "Location of Operations," and "Employee Transfers." As described in detail below, these proposals revived language which Respondent had deleted from its management-rights proposal at the last bargaining session.

In some instances, these proposals constituted a dramatic rebuff to the Union. For example, on June 27, 2002, the Union had proposed language for a contract article titled "Technology Language and Production Standards." This language would bind Respondent to notify and bargain with the Union before substantially changing the existing production standards and quotas. It also included a pledge that Respondent would work with the Union in implementing new technology and would train employees to use this technology. Further, it provided that Respondent would recognize seniority in the selection of employees for training.

Respondent did not submit a counterproposal until October 1, 2002, when it offered a proposal titled "Employee Standards, Evaluations, and Merit Increases." This proposal stated, in its entirety, as follows:

> 1. The Employer retains the exclusive right, authority and discretion to determine employee production methods and standards, including, but not limited to, quality, quantity, efficiency, and safety standards.

2. The Employer retains the exclusive rights, authority and discretion to evaluate employee performance based upon the employment evaluation process currently in place.

3. The Employer retains the right to continue granting discretionary increases based on individual employee merit.

This language, discussed further below, brought back to life terms that Respondent had deleted from its management-rights clause. Similarly, at the October 1, 2002 bargaining session Respondent tendered a "Location of Operations" article which also recycled language it earlier had deleted from its management-rights proposal:

The Employer retains the sole and exclusive right, authority and discretion to:

1. Determine the location of its operations;
2. Open, close, consolidate its operations;
3. Relocate operations in whole or in part; and
4. Separate its employees in connection with moving; transfer of work; closing; selling; consolidation; or relocation of its operations.

Also on October 1, 2002, Respondent offered the Union a proposal titled "Employee Transfers" which reincarnated language which previously had been deleted from the Respondent's previous management-rights proposal:

1. The Employer retains the exclusive right, authority and discretion to transfer and/or reassign employees from one job, department, or work location to another.

2. The transfers and/or reassignments may be made on a regular, temporary, or intermittent basis.

Respondent's original management-rights proposal also had contained language permitting it to employ contractors without limitation. The Union objected to that proposal and Respondent removed it. However, Respondent then included similar language in another proposal. In his testimony, Respondent's chief negotiator, Christopher Antone, admitted the repackaging:

Q. And, again, this contractor language was taken out of the management rights clause. Correct?

A. Yes, it was.

Q. And you put everyone on notice that they *might see it again later* in negotiations.

A. Absolutely.

(Emphasis added.) Respondent attaches importance to the fact it told the union negotiators that they "might see" the deleted management-rights language again. However, giving the Union this clue does not change either what the Respondent did or why.

The Union objected to Respondent's original management rights-proposal because this provision would have given Respondent plenary control over all working conditions. After much bargaining, Respondent seemed to back off of this demand for absolute power and the union negotiators must surely have felt that they were making some progress at last.

On September 19, 2002, when Respondent tentatively agreed with the Union on the modified management-rights clause, from which the objectionable language had been stripped, Respondent's negotiators did not state plainly that Respondent's apparent concession was illusory and that signing off on the clause therefore meant nothing. Instead, Respondent's chief negotiator merely stated, coyly, that the Union *might* see some of the language again.

This veiled remark did not tip Respondent's hand concerning when it planned to reintroduce the deleted language and likewise it did not disclose the full extent to which Respondent intended to resurrect the language it supposedly had buried. However, the words do reveal the Respondent's mindset on September 19, 2002, when it announced its "concession" and went through the motions of signing the management-rights clause. At that very time, Respondent already knew that it soon would undo the progress towards a contract which the parties seemingly had made.

During closing argument, Respondent emphasized that it had reached tentative agreement with the Union on a large number of contract articles. This large number of tentative agreements, it contends, demonstrates that it was bargaining in good faith.

To the contrary, based upon Respondent's entire conduct, I conclude that it was collecting pieces of paper marked "T.A." to use as evidence of its good faith but that these documents have little probative value. Respondent's conduct concerning the management-rights clause demonstrates that regardless of superficial agreement on the wording, it had no intention of resolving the underlying management-rights *issue*.

The bargaining process may be regarded as the mutual effort to resolve disputes over particular terms of employment, and then memorializing these understandings in a document. The written words are important because they preserve the meeting of the minds which the parties reached. When labor negotiators mark a proposal "T.A."—tentatively agreed—they are signifying, in effect, that they have resolved the issue which divided them.

On September 19, 2002, Respondent went through the motions of marking the revised management-rights clause tentatively agreed, but it did so with mental reservations or purpose of evasion. This secret intent revealed itself when Respondent told the Union that it "might be seeing" some of the same language again. Those words are almost as cryptic as Nostradamus and hardly conveyed what Respondent had in mind. However, at the very next meeting, when Respondent offered the same controversial deleted language in four new proposals, its hypocrisy at the September 19 bargaining session became unmistakable.

Scratching through objectionable language and going through the pretense of marking the document "tentatively agreed," while secretly planning to introduce the same language at the next bargaining session, is not consistent with good faith. Moreover, for reasons discussed further below, I conclude that Respondent's actions on September 19 and October 1, 2002, were not isolated aberrations but part of a strategy timed to have great psychological impact on the Union and the bargaining unit employees.

To summarize, although I do not infer bad faith from the *content* of Respondent's management-rights proposals, I conclude that the way Respondent went through the motions of

making a concession, without intending to give up anything, does indicate an intent to bargain without reaching agreement. Additionally, the way Respondent continued to advance proposals which it knew the Union disliked, while at the same time refusing the Union's requests for additional bargaining sessions, strongly indicates that it was not interested in reaching agreement.

Indeed, the Union's requests for more bargaining sessions became more urgent right after the October 1, 2002 bargaining session. At the next meeting, on October 10, 2002, Union Negotiator Ellison asked Respondent's negotiators if they could stay and bargain the next day. Respondent declined.

Later in this same meeting, the Union's chief negotiator said that they needed to set more meeting dates because they were getting behind. Rather than accommodating this request, Respondent adhered to the existing schedule. Respondent's chief negotiator told the union negotiators that they would "see you on October 29th."

At the October 29th meeting, the Union again pressed Respondent for more meeting dates, specifically, for negotiations on consecutive days. Respondent's chief negotiator denied this request, saying that he "enjoyed taking time off to contemplate what was done."

Those words—that he enjoyed taking time to contemplate what was done—acquire additional meaning in the light of what really *was* done: Respondent had made the negotiating process foreseeably more time-consuming by resurrecting deleted proposals, but then refused to meet the additional times that its tactic had necessitated.

As discussed above, Section 8(d) requires a party to meet at reasonable times. The reasonableness of a given meeting schedule depends on the negotiating task facing the parties; the more issues on the agenda, the more time reasonably will be necessary to resolve them.

Respondent placed four more issues on the agenda by exporting the deleted management-rights language into other proposals which it then presented to the Union for negotiation. Having thus extended the agenda, it also had a duty to increase the frequency of bargaining sessions.

Respondent's refusal to meet more often certainly constitutes evidence of bad faith, but it has an even greater significance. In addition to being evidence that Respondent failed to confer in good faith, this refusal to schedule enough meetings, in and of itself, also constitutes a breech of the 8(d) duty to meet at reasonable times.

Evidentiary Significance of Respondent's Proposals

To summarize, I have not inferred bad faith from the content of any of Respondent's proposals except for the "Intent and Purpose" language which sought a promise from the Union that it would not accept into membership any of Respondent's employees who were not in the bargaining unit. Because this proposal would deny employees the freedom to join a labor organization, a right explicitly guaranteed by Section 7 of the Act, it is appropriate for the Board to take a closer-than-usual look.

As discussed above, this proposal applies to employees *outside* the bargaining unit and concerns a nonmandatory subject of bargaining, possibly unlawful and permissive at best. Unlike a no-strike clause, aimed at preventing a work stoppage during the term of the agreement, Respondent's intent and purpose language seeks to bar its other employees from joining a particular labor organization, which is not a legitimate business purpose.

By advancing a proposal seeking an objective repugnant to the Act, Respondent has raised questions about its motivation and good faith. Additionally, by pressing this nonmandatory subject of bargaining while denying the Union's request for more negotiating sessions, Respondent denied the Union sufficient time to bargain over the mandatory subjects. This, too, is evidence of bad faith.

Respondent also demonstrated bad faith by resurrecting terms deleted from its management-rights language, tendering these deleted terms to the Union as new proposals, and then denying the Union's repeated requests for more negotiating sessions.

By these actions, and more generally by failing to increase the frequency of its bargaining sessions, Respondent breached its 8(d) duty to meet with the Union at reasonable times. This failure independently violated Section 8(a)(5) of the Act. It also constitutes evidence of bad faith which may be considered in connection with the surface bargaining allegation.

Delay In Making Wage Proposal

Although bargaining began May 15, 2002, Respondent did not propose any specific change in employee wage rates until the last meeting, on April 7, 2003. At this last negotiating session, Respondent proposed an across-the-board wage increase of 5-cents-per-hour. The General Counsel asserts that Respondent's almost 11-month delay in making a wage proposal indicates bad faith.

(To prevent confusion arising from the titles of proposals, the following may be noted: On January 30, 2003, the parties tentatively agreed on a proposed contract article titled "Wage Rate and Classifications," but this term did not include any actual wage rates.)

It is difficult to ignore the psychological impact that this action predictably would have on bargaining unit employees who had recently selected a union and were awaiting the outcome of the collective-bargaining process. For almost a year, they had been in suspense about what Respondent would offer, and the suspense continued to build day-by-day. When employees asked their union leaders about management's position on a wage increase, the union negotiators only could reply, "I don't know. They haven't offered anything yet." This answer, honest as it was, made the Union appear increasingly ineffectual.

Moreover, at the start of bargaining, the Union had proposed a system which would eliminate wage inequalities and, at the same time, provide one-time bonuses for the higher-paid workers and sizable wage increases for those on the other end of the scale. The resulting elevated hopes crashed with considerable impact when Respondent, after 11 months, offered only 5-cents-per-hour more. Quite likely, the resulting disappointment contributed to employee disaffection with the Union.

However, Respondent did not cause employee hopes to be elevated unrealistically. Nothing in the record indicates that

Respondent gave employees any reason to believe it would offer a generous wage increase.

Additionally, I cannot infer automatically that bad faith motivated Respondent's delay in offering a wage proposal merely because the delay had a psychological impact—perhaps a foreseeable psychological impact—on employee support for the Union. The law does not require a party to forswear an otherwise lawful bargaining tactic because it would be likely to make employees unhappy with their representative.

Indeed, it is just as legitimate for an employer to seek a contract holding down wages as it is legitimate for a union to see a contract increasing them. Yet when a company achieves this goal, a likely result is employee dissatisfaction with their bargaining representative. The employer's negotiators do not have an obligation to bargain any less effectively simply because their success might reflect poorly on the union.

On the other hand, an employer's negotiators do not act in good faith when they fashion bargaining strategy and proposals to foment employee disaffection rather than to reach an agreement favorable to their side. To determine the Respondent's intention, I must consider the reasons its negotiators offered for the timing of its wage proposal.

Respondent argues that it is typical during negotiations to defer bargaining on "economic" terms—wages and benefits—until after the parties have reached agreement on the "noneconomic" or "language" provisions. Negotiators adopt such a strategy if they believe that it will be easier to reach agreement on these "noneconomic" items than on the tougher wage and benefit issues. By reaching agreement on the less contentious provisions first, they hope to build up "momentum"—a habit of finding common ground—which can carry them through the more difficult conflicts on monetary terms. Respondent asserts that its use of such a common bargaining procedure does not evidence bad faith.

Respondent further argues that even so-called "language" issues have economic costs to the employer. Understandably, a negotiator might want to get a firm idea of the costs associated with the "language" provisions before deciding what wage offer to place on the bargaining table.

In cross-examining the Union's chief negotiator, Robert Bridges, Respondent addressed both these points:

> Q. Could it be that language issues like overtime and shop stewards taking time off from work and other language proposals could impact on the economics of the facility?
>
> A. That's possible, yes.
>
> Q. And have you ever heard that it's a usual practice to bargain economics after language has been agreed to? Have you ever heard of that?
>
> A. I haven't heard it, but I know it's sometimes—it's usually practiced. . . .

Bridges' testimony thus supports a conclusion that Respondent was bargaining in an ordinary manner and that, accordingly, bad faith should not be inferred from its delay in making a wage proposal. Bridges also acknowledged that during negotiations, Respondent attributed the delay in presenting a wage proposal to uncertainties about operating costs once Respondent's new warehouse computer system went online.

Moreover, even good-faith collective bargaining involves more than a little game playing. Just as negotiators may sometimes begin with a "lowball" proposal offered in totally good faith—a tactic to make the end point of bargaining closer to their side than the other—a party also may use the timing of proposals to gain, ultimately, a more favorable deal.

In sum, a party may delay making a wage proposal for a number of different reasons. Some of these reasons quite clearly are consistent with good faith. Therefore, in the present case, any inference drawn solely from the fact of delay would be based on speculation rather than logic, and might be incorrect.

As discussed above, Respondent did demonstrate bad faith in other ways. However, I am reluctant to conclude that everything Respondent did manifested bad faith merely because some of its actions did. Logic would not require such an assumption and fairness would not favor it. Therefore, I draw no inference of bad faith from Respondent's delay in offering a wage proposal.

"Dilatory" Bargaining Tactics

In the discussion above, I have not used the term "dilatory bargaining tactics" to describe Respondent's practice of offering time-consuming bargaining proposals and then rejecting the Union's requests for additional meetings to discuss them. Use of that phrase could draw attention away from the true issues in this proceeding and into an academic discussion of what constitutes a "dilatory bargaining tactic" as the Board uses that term of art. See, e.g., *Rocky Mountain Hospital*, 289 NLRB 1347 (1988) (The Board found it unnecessary to pass on judge's finding that the respondent also violated Section 8(a)(5) by engaging in dilatory bargaining tactics.).

Typically, a "dilatory bargaining tactics" case involves a party repeatedly agreeing to bargain on certain dates and then canceling the scheduled meetings. Such a pattern is fairly obvious, but Respondent's conduct is more subtle.

In general (and with one exception), Respondent did not cancel scheduled meetings. Instead, it proposed a meeting schedule which might be reasonable if the parties faced only simple issues, for example, if the parties were bargaining to modify an existing contract and had to discuss only a handful of items. Respondent then made the negotiating process more difficult by offering proposals which predictably would generate controversy, most notably, its four proposals resurrecting the language it previously had deleted from the management rights-clause.

Respondent's further action—refusing the Union's repeated requests to meet more often—ground the negotiating process to a virtual halt. Because Respondent did not demonstrate a pattern of agreeing to, and then canceling negotiating sessions, it could argue that it did not engage in "dilatory bargaining tactics." However, Respondent's more subtle maneuvers frustrated the bargaining process every bit as well.

Whether or not Respondent's conduct is called a "dilatory bargaining tactic," it is inconsistent with the requirements of good faith.

Other Evidence of Bad Faith

The former general manager of Respondent's Dallas distribution center, David Shirk, testified, over Respondent's objection, as a rebuttal witness. For the reasons discussed above, I have denied Respondent's motion to strike this testimony.

Shirk described a meeting in his office which took place in late March or early April 12, 2002. Present were General Manager Shirk, Senior Vice President Dan Ferguson (Shirk's immediate superior), Human Resources Manager Chris Baker, and Human Resources Vice President Kevin Rutherford. During their conversation, the upcoming representation election came up.

According to Shirk, Human Resources Manager Baker asked "what the environment of the distribution center would look like" if the Union gained certification. Vice President Rutherford replied "that we would basically tie the union up at the bargaining table and we would not come to an agreement."

Rutherford, who no longer works for Respondent, did not testify. Neither did Baker or Ferguson. Shirk gave the only testimony concerning this statement and it is uncontradicted. However, a judge need not credit uncontradicted testimony if there are reasons to doubt its reliability, so I must make a credibility finding.

Respondent discharged Shirk, so there is a possibility that an urge to get even might color his testimony. However, observing Shirk as a witness, I did not form the opinion that he was testifying out of vengeance or that negative feelings about Respondent affected his testimony.

In cross-examination, Respondent referred to a transcript of Shirk's pretrial deposition. This deposition recounted an exchange between Baker and Ferguson, but it is not entirely clear from the record that this question and answer were part of the same conversation that Shirk described on direct examination, summarized above.

Shirk admitted that in the deposition, he had stated that Baker asked something to the effect of "what do we do if the Union comes in" and Ferguson had answered "You know, if the Union gets in, the Union gets in, we just go on, you know, with our business just like we do every day."

Shirk also admitted that in the deposition he had quoted Ferguson as saying that "there's all kinds of things that we could do, and that, you know, the bargaining would go on and the union is not going to get anything that we don't want to give them."

This testimony about what Ferguson said does not directly contradict Shirk's testimony on direct examination about what *Rutherford* said. Because the deposition is not in evidence, it is not possible to determine whether it also recounts the words which Shirk attributed to Rutherford, namely, that Respondent basically would tie the Union up at the bargaining table and not come to an agreement.

As vice president of human resources, Rutherford was in a better position than Ferguson to know about Respondent's bargaining plans. Rather than specializing in labor relations, Ferguson was a "line manager" whose responsibilities included the operation of the distribution center, not negotiations with unions. Thus, his comment that "we just go on, you know, with our business just like we do every do [sic]" probably refers to how the Union's presence would affect the operation of the distribution center rather than to Respondent's strategy in collective bargaining. Ferguson's message, in essence, was that management would continue to operate the distribution center in the same way even should the Union win the election.

To the extent that Ferguson's comments pertain to Respondent's collective-bargaining strategy, they are consistent with the words Shirk attributed to Rutherford. Thus, his remark that "there's all kinds of things that we could do" does not contradict Rutherford's statement that Respondent would tie the Union up at the bargaining table.

Similarly, Ferguson's observation that "the bargaining would go on and the union is not going to get anything that we don't want to give them" does not contradict Rutherford's comment that the Union would not get a contract. If anything, Ferguson's remark would be consistent with a finding that Respondent entered the bargaining process with an intent not to compromise.

The cross-examination of Shirk with his pretrial deposition did not disclose any significant discrepancy between his testimony in the hearing and his testimony when deposed. Based on my observations of Shirk's demeanor, I credit his testimony and find that both Rutherford and Ferguson made the statements Shirk attributed to them.

During closing argument, Respondent's counsel, Christopher Antone, addressed the significance of the statement which Shirk attributed to Ferguson. The transcript records the following: "God bless Dan Ferguson. Do you know what he did? He stayed to the law." (Antone actually said that Ferguson *stated*, rather than *stayed to*, the law, and the transcript is corrected accordingly.)

However, it is not 100 percent correct to say either that Ferguson stated the law or that he stayed to it. Shirk's credited testimony establishes that Ferguson said that the Union would not "get anything we don't want to give them." That remark is not quite the same as Section 8(d)'s provision that the duty to bargain in good faith does not require agreement to a proposal or making a concession.

Even though the Act does not require either party to "give in" on any particular point, the duty to bargain in good faith does contemplate that the parties will be willing to compromise and engage in give–and–take. An inflexible "my way or none" attitude, signifying a willingness to reach agreement only if the other side capitulates on every point, is hardly consistent with good faith bargaining.

Ferguson's comment that the Union would not receive anything that the Respondent did not want to give suggests such an unyielding attitude. His remark that there were many things the Respondent could do at least hints at the tactics of delay demonstrated by Respondent's refusal to meet often enough to make progress on its proposals.

In sum, Rutherford's statement that Respondent would tie the Union up in negotiations, resulting in no contract, provides evidence that Respondent bargained in bad faith. Ferguson's remarks do not negate that evidence. Even though Respondent's managers made such statements before the election and certification of the Union, such evidence still may be consid-

ered in determining Respondent's good faith, or lack of it, at the bargaining table. See *Gadsden Tool, Inc.*, 327 NLRB 164 (1998).

Respondent's Overall Conduct

In a surface bargaining case, the Board determines intent based upon all of Respondent's conduct, both at and away from the negotiating table. Therefore, it is appropriate to take a look at the forest as well as the trees.

Respondent avoided, I believe carefully avoided, engaging in overt conduct which the Board has condemned in prior cases as manifestations of bad faith. In particular, it never communicated with words that collective bargaining would be futile but it conveyed that message through its actions. At times, it appeared to be engaging in subtle psychological warfare with the Union.

For example, it went through the motions of deleting language from its management-rights clause and signing off on the revised version, while dropping the merest of hints that its actions should not be taken at face value. Its oblique remark that the Union "might be seeing" some of the same language appears calculated to defend against a later accusation that it had engaged in regressive bargaining. However, it also served a psychological purpose.

If Respondent had wanted to be candid with the Union, it could have said plainly that the tentative agreement on management rights—reached after considerable bargaining—really meant nothing because Respondent intended to revive the deleted language at the next bargaining session. That kind of candor, however, would have reduced the anticipated psychological impact produced later when Respondent offered the Union fresh proposals containing the stale rejected language.

Already, and at great length, the Union had explained to Respondent its objections to this language, which would allow Respondent to do pretty much as it pleased without having to bargain about it first. When Respondent's negotiator drew a line through this language and gave it to the Union thus modified, it symbolized more than a compromise on this one proposal. Because deletion of these terms represented Respondent's willingness to settle for less than absolute control, doing so signaled a new willingness to work with the Union.

That act raised hope for the bargaining process. When Respondent resurrected the same "absolute control" language at the next meeting, it dashed those hopes. Obviously, Respondent could not come out and say "bargaining is futile" without being caught in a violation of the Act. However, it conveyed this same discouraging message by leading the union negotiators to believe they had made some hard-earned progress and then promptly demonstrating that all this effort changed nothing. Fans of the "Peanuts" comic strip will recognize the Lucy-and-football pattern here, but without the humor.

When Respondent proposed that the Union agree to reject the membership applications of Respondent's employees, it similarly communicated its hostility to dealing with the Union. Maybe it *had to* put up with the Union for this one bargaining unit, but it wanted to make absolutely sure that kind of thing never happened again.

Respondent's experienced negotiators clearly would know that this proposal had no chance of acceptance. Obviously, no labor organization could agree to become an employer's surrogate in preventing employees from joining a union. Taking up limited bargaining time to advocate this proposal, which so distorts the Union's appropriate role, demonstrates no desire to address and resolve the immediate issues facing the parties.

Both sides would recognize this proposal as a time waster. The proposal also revealed Respondent's hostility to the Union, thus indicating why Respondent was intent on wasting time.

By refusing the Union's increasingly urgent requests for more bargaining sessions, Respondent not only slowed down the process but also conveyed the discouraging message that bargaining was futile.

Respondent's Defenses

Respondent contends that three legitimate, business-related goals—and not bad faith—motivated its actions in bargaining. Respondent communicated these goals repeatedly to the Union during negotiations. For example, Union Chief Negotiator Bridges testified that Respondent's Chief Negotiator Antone said "he had three goals: to maintain the [Respondent's] ability to manage the facility, to preserve work time for work, and to recognize performance."

All of these goals arise from lawful business objectives and pursuing them, Respondent argues, does not manifest bad faith. Moreover, Respondent never refused to listen to the Union or reply to its concerns. Additionally, Respondent took pains never to act unilaterally; it consulted the Union before making any change in the unit employees' working conditions.

Further, Respondent argues that bargaining was particularly difficult, and slow to produce results, because of philosophical differences between the Respondent and the Union. (To prevent confusion, it should be noted that the term "philosophical differences," as used here, does not mean the same thing as "philosophical reasons," a phrase sometimes offered by an employer to explain its rejection of a union security proposal. By "philosophical differences," I mean that the two sets of negotiators interpreted facts from distinct perspectives and reasoned from premises and assumptions different enough to make agreement—and sometimes even communication—more difficult.)

The parties' disagreement over "layoff and recall" proposals illustrates Respondent's argument that philosophical differences, not bad faith, frustrated agreement. Respondent initially proposed that employees be chosen for layoff in an order, discussed above, which it believed would assure that the best employees would remain at work and the worst would go. The Union, concerned that supervisors were playing favorites, strongly objected that the proposed system selected employees for layoff based on purely subjective factors.

The Union urged a system based on qualifications and seniority and its use of the term "qualifications" certainly suggested that some middle proposal could accommodate both the Union's greater emphasis on seniority and the Respondent's focus on productivity. However, the Union defined "qualifications" narrowly, to mean how many orders an employee could

pull in an hour, but without regard to attendance or disciplinary records.

So the Respondent is quite correct in asserting that differences of attitude and belief contributed to the slow progress of the bargaining. However, these factors were not the *proximate* cause. Negotiations slowed to a halt not because the parties had differences but because Respondent would not meet frequently enough to resolve them.

Respondent certainly had the right to offer and press proposals which pertained to its legitimate business interests even though these proposals collided with the Union's philosophy and world view. I draw no adverse inference from Respondent's tendering of such tough proposals concerning mandatory subjects of bargaining because, when advanced and discussed in good faith, challenging proposals can lead to creative compromises.

However, I do infer bad faith from the combination of Respondent's willingness to place jaw-dropping proposals on the table and its unwillingness to meet reasonably often to talk about them. This inference of bad faith draws additional strength from the cavalier manner in which Respondent's chief negotiator dismissed the Union's requests for more bargaining sessions—by saying that he enjoyed taking time to contemplate what had been done—without ever giving the Union a legitimate explanation for its unwillingness to meet.

Respondent's assertion that it advanced tough proposals for legitimate business reasons and sincerely sought the Union's agreement, would be more persuasive had it not rejected the Union's repeated requests for more meetings. If Respondent *truly* had been bargaining to reach agreement rather than frustrate it, Respondent would have welcomed the opportunity for more time to talk about the merits of its proposals.

Indeed, a party's willingness to talk about its proposal, even ad nauseam if necessary, provides an important clue distinguishing the hard bargainer from the surface bargainer. The proposals offered by the hard bargainer and the surface bargainer may look very much alike and in some instances may be identical. However, the hard bargainer, truly wanting the other side to agree to his proposal or something as much like it as possible, will seize every opportunity to talk about it in the hope that persistence will wear down resistance.

The surface bargainer, on the other hand, does not offer the proposal in the hope of reaching agreement but for the contrary reason, expecting the other side to balk. See, e.g., *Gadsden Tool, Inc.*, above, in which a union surprised an employer by agreeing to a proposed contract the employer had considered too unpleasant to swallow. When the employer in that case backed away from the very agreement it had proposed, the Board found bargaining in bad faith.

It involves only mild exaggeration to state that when a negotiator offers an obviously difficult proposal, one indication of his good faith is how much the negotiator acts like the single-minded telemarketer who calls right when supper is ready. Such a telemarketer is bent on selling you something and to do that he must keep the conversation going; he won't shut up until you hang up. Likewise, if a good-faith negotiator recognizes that his proposal is about as easy to sell as the telemarketer's juice machine that also cleans carpet, he won't stop extolling it until the other side says "all right, already, where do I sign?"

The surface bargainer, however, doesn't offer a difficult proposal in the hope that he can persuade the other side to agree. In fact, agreement is the last thing he wants, and as discussion increases, so does the risk of agreement. Therefore, the surface bargainer may claim that his proposal is important but will talk about it only for a bare minimum amount of time, just long enough to sigh, with pretended disappointment, "Well, I tried."

In the present case, Respondent certainly knew that the Union would not be receptive to the four proposals it tendered on October 1, 2002, because the Union refused to agree to the very same language when it was part of Respondent's proposed management-rights clause. Respondent knew that a lot more talking would be necessary to persuade the Union to accept language it had just rejected. In such circumstances, Respondent's refusal to schedule more meetings indicates that it was indifferent to the success of its own proposals.

In oral argument, Respondent described the conduct of the respondent in *Wisconsin Steel Industries*, 318 NLRB 212 (1995), and asserted that its own conduct was different in every way. Respondent is absolutely correct to state that its conduct is not the same as that of the respondent in *Wisconsin Steel*. Indeed, the conduct at issue in *Wisconsin Steel* is so different from the conduct at issue here that this precedent is inapposite. However, the fact that Respondent's conduct was different does not mean that it was lawful.

Further, it is true that, as the Respondent contends, at least some of the delay in bargaining arose from a matter the Union raised. It wanted a particular employee included within the bargaining unit, notwithstanding that Respondent had classified her as a receptionist, a position outside the unit. Thus, Respondent asserts, it spent a significant amount of negotiating time discussing this employee's unit placement, a nonmandatory subject of bargaining. Moreover, Respondent ultimately found the employee a suitable position within the bargaining unit, and thus resolved the matter to the Union's satisfaction.

The record indicates that the Union raised the matter of the receptionist's unit placement at the first bargaining session and that the parties spent most of the time discussing it early in the negotiating process. On the other hand, the effect of Respondent's bargaining proposals on the pace of negotiations did not become manifest until later. Indeed, Respondent did not repropose the rejected management-rights language, and then refuse to bargain more often, until October 2002.

More fundamentally, David Shirk's credited testimony establishes that Respondent began formulating its plan to "tie up" the Union in bargaining even before negotiations started. Thus, any delay resulting from the Union's desire to discuss the receptionist's unit placement is merely incidental. The Union's action did not frustrate the bargaining process.

Respondent also points to a number of actions it took which manifest good faith. For example it resolved the conflict concerning the receptionist by allowing her to transfer to a job within the bargaining unit. Additionally, it notified and bargained with the Union before implementing merit increases and before laying off employees. Such actions, Respondent contends, demonstrate its good faith.

However, the General Counsel does not allege that Respondent violated Section 8(a)(5) in every way possible. The fact that Respondent did not break the law in every way does not mean that it didn't break the law in some way.

Additionally, Respondent's overall purpose would not be served if it were too profligate in violating Section 8(a)(5). Respondent's experienced counsel clearly knew that the Board looks at a party's *overall* conduct to determine whether it bargained in good faith, so it would benefit Respondent tactically to follow the law in all ways that did not interfere with the primary objective of preventing agreement. Therefore, I reject the argument that Respondent's incidental displays of good faith refute the evidence of violation.

During oral argument, Respondent called attention to the collective-bargaining agreement the Union had entered in April 2001 with an employer called Minnesota Corn Processors. Respondent first became aware of this contract when the Union provided it during the hearing pursuant to Respondent's subpoena.

Respondent points to provisions in this agreement which appear to be less favorable to the Union than the terms of Respondent's proposals on topics such as management rights and layoff of employees. Respondent argues that in view of the Union's willingness to agree to such language, no bad faith should be inferred from its own bargaining proposals.

As discussed above, I have not drawn any inference of bad faith from any of Respondent's proposals except the one which would require the Union to reject membership applications from Respondent's employees. Because I have not inferred bad faith from any proposal except this one, the Respondent's argument is largely unnecessary.

The Union's contract with Minnesota Corn Processors does not include a provision similar to the one which, I concluded, provided an indication of bad faith. Specifically, the Minnesota Corn Processors contract does not require the Union to reject any employee from membership.

Even if Minnesota Corn Processors contract had included such a term, the fact that the Union had agreed to such language would not establish that the employer had proposed in it good faith. The Board's decision in *Gadsden Tool*, above, provides an illustration. Therein, an employer proposed extreme terms as part of its strategy to bargain in bad faith. The fact that the union finally agreed to the onerous contract proposal did not change the employer's bad faith into good faith.

Additionally, while it was negotiating with the Union, Respondent was unaware of the Union's contract with Minnesota Corn Processors. Because Respondent did not know about the Union's willingness to agree to certain proposals, that information could not have affected Respondent's conduct or motivation.

Moreover, the record does not disclose how long it took Minnesota Corn Processors and the Union to reach this agreement. No evidence indicates either the length or duration of such bargaining sessions. The contract itself provides no clues about some key missing facts: When Minnesota Corn Processors proposed these terms, did the Union request additional bargaining sessions? If so, did that employer grant the Union's request?

For all of these reasons, I reject Respondent's arguments concerning the significance of the agreement between the Union and Minnesota Corn Processors.

Conclusions About Respondent's Intent

Respondent clearly fell short of its duty to meet with the Union at reasonable times. It repeatedly refused the Union's requests for more bargaining sessions even after it had tendered proposals foreseeably requiring much discussion. Respondent's failure to meet at reasonable times, as required by Section 8(d), constitutes a violation of Section 8(a)(5). Additionally, it also provides evidence that Respondent lacked good faith when it did confer with the Union and instead bargained with a fixed intent not to reach an agreement.

Respondent's failure to meet at reasonable times is not the only evidence of bad faith. Rather, in concluding that Respondent failed to confer with the Union in good faith, I rely on all of the following factors:

> Repeatedly, Respondent proposed contract terms that foreseeably would lengthen the bargaining process, which was its right, but refused to meet often enough to engage in a reasonable amount of bargaining over those proposals, which was its responsibility.
>
> Respondent proposed a contract provision which would diminish the Section 7 rights of nonunit employees, by prohibiting the Union from accepting them into membership. Although this proposal, concerning a nonmandatory subject of bargaining, increased the amount of meeting time reasonably necessary for negotiations, Respondent refused to agree to more frequent bargaining sessions.
>
> At the very time Respondent deleted language from its management-rights proposal, it knew it would place the same language in new proposals it would soon give the Union. This action demonstrated Respondent's intention of going through the motions of bargaining while avoiding agreement.
>
> The statement which Respondent's Vice president Rutherford made in Shirk's presence further indicates that Respondent did not enter negotiations with an intention of reaching agreement.

Respondent's Withdrawal of Recognition

Respondent has admitted that on April 25, 2003, it withdrew recognition from the Union. Respondent predicated this withdrawal on receipt of a petition indicating that a majority of bargaining unit employees no longer wanted the Union to represent them.

Respondent's failure to negotiate with the Union in good faith produced or greatly contributed to employee disaffection with the Union and led directly to circulation of the petition. Under such circumstances, Respondent lawfully could not withdraw recognition from the Union. See *Lee Lumber & Building Material Corp.*, above.

CONCLUSIONS OF LAW

1. Respondent, Garden Ridge Management, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party, General Drivers, Warehousemen and Helpers, Local Union 745, affiliated with the International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since the Board's certification of April 22, 2003, pursuant to Section 9(a) of the Act, the Charging Party has been and remains the exclusive bargaining representative of Respondent's employees in the unit described below, which is an appropriate unit for collective-bargaining purposes:

> All regular employees including putaways, transporters, loaders, unloaders, stock coordinators, checkers, order pullers, pickers, yard hosslers, inventory control, shipping lead, checker lead, plant clericals, and receiving schedulers employed by the Employer at its facility at 3700 Pinnacle Point #200, Dallas, Texas, EXCLUDING all other employees including office clericals, management, guards and supervisors as defined in the Act.

4. Since May 15, 2002, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act by failing to meet with the Charging Party at reasonable times, as required by Section 8(d) of the Act.

5. Since May 15, 2002, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act by failing to confer in good faith with Charging Party, as required by Section 8(d) of the Act.

6. On May 25, 2003, Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of the Charging Party as the exclusive bargaining representative of the unit described in paragraph 3, above. At all times since May 25, 2003, Respondent has continued to violate Section 8(a)(5) and (1) by continuing to refuse to recognize and bargain with the Charging Party as the exclusive representative of this unit.

REMEDY

Respondent must remedy the violations of Section 8(a)(5) and (1) discussed above. I recommend that the Board order Respondent to recognize the Union and bargain with it in good faith. Additionally, I recommend that the Board order Respondent to rescind, at the Union's request, any unilateral change in any material, significant and substantial term or condition of employment which it may have implemented since April 7, 2003, its last negotiating session. Respondent admits that it was not then at impasse with the Union, and thus it was not privileged to make any such unilateral change.

Additionally, to undo the harm caused by Respondent's unlawful withdrawal of recognition from the Union, the certification year should be extended for a 1-year period running from the date that Respondent begins to bargain in good faith. See *Enertech Electrical*, 309 NLRB 896 fn. 1 (1992), and cases cited therein.

Further, I recommend that the Board order Respondent to post the notice attached to this decision as appendix A.

Having found that Respondent engaged in unfair labor practices, I issue the following recommended.

[Recommended Order omitted from publication.]