

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

UNIVERSAL FUEL, INC.

and

Case 5-CA-34622

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 4

ANSWERING BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

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I. INTRODUCTION

The issues in this case involve the very core of the National Labor Relations Act, and employees' rights guaranteed by Section 7 to select the bargaining representative of their own choosing to engage in meaningful bargaining with their employer. Here, the evidence shows that Respondent completely failed to fulfill its duty to bargain in good faith with the Union, thereby depriving every unit employee the benefits of collective bargaining. After months of bargaining, and with an approaching critical deadline, Respondent retreated from long-held agreements, offered its employees terms that were worse than what they enjoyed before they selected the Union, injected significant new subjects without any purpose, made illegal proposals, and insisted on meddling with internal union affairs. When this conduct predictably derailed the bargaining process, Respondent withdrew all of its contract offers, and then falsely informed its employees that it was the all the Union's fault that they did not receive a raise.

Based on the facts and arguments below, Counsel for the General Counsel respectfully urges that the Board reject Respondent's Exceptions, adopt the Judge's findings that Respondent has violated the Act, and direct Respondent cease its unlawful conduct and affirmatively undo the harm it has caused to its employees.

II. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENT HAS WAIVED

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board (herein called Board Rules), any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. The following findings and conclusions of the judge are among those not specifically challenged by Respondent:

- By the second session on June 25, the parties had reached tentative agreement that promotions, job assignments, layoffs, and recalls were to be based on seniority. This in essence incorporated Respondent's practices at the time.(ALJD 28:29-31)
- The evidence reveals that during the initial session on June 24, the parties had reached tentative agreement that discipline and discharge were to be for just cause. (ALJD 28:31-33)
- By making its Proposal B containing the described management rights clause, Respondent reneged on tentative agreements reached early on in negotiations that promotions, job assignments, layoffs, and recalls were to be seniority based, and that discipline and discharge were to be for just cause. Respondent also interjected an unlimited subcontracting proposal, a proposal to waive employees' right to picket, as well as a proposal for unlimited discretion in the creation of work rules during the very late stages of negotiations. (ALJD 29:37-43)
- [Respondent attorney and negotiator] Mitchell admitted telling the Union that Respondent's proposal on subcontracting was made for no specific reason, that it was just part of a management rights provision taken from another document so Respondent left it in there. (ALJD 30:25-27)
- [Regarding Respondent's no-strike proposal] I find that Respondent's first time proposal of such an important and legally complex provision, with no justification for doing so, during this late stage of bargaining was part and parcel of its conduct designed to frustrate agreement, and constitutes strong indicia that it was engaged in surface bargaining. (ALJD 31:48-51)
- The testimony of [Union representatives] Provost and Compher concerning the discussion on union security was consistent between witnesses and had a ring of truth....I have credited the testimony of the Union officials that they informed Mitchell that agency fee payers did not have to pay one hundred percent [of dues] under the Union's union security proposal, and that they gave assurances that they would assist in explaining this to employees....I do not find Mitchell's testimony worthy of belief. (ALJD 24:30-45)
- I find that during negotiations, Respondent objected to the Union's union security proposal purely on philosophical grounds. (ALJD 31:9-10)
- Respondent made this proposal [Proposal B] after having heard that there were relatively few open issues at the end of the October 8 session, and after requiring the Union to absorb considerable expense in travelling from...Maryland due to Respondent's insistence on continuing negotiations in Birmingham, Alabama, a great distance from the bargaining unit. (ALJD 29:31-35)
- In order to ensure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, I shall

recommend that the initial year of the certification be extended to begin on the date that Respondent, in compliance with the Order herein, commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. (ALJD 35:15-19)

III. FACTS

A. *Respondent's Business Operation.*

Respondent, an Alabama corporation, is engaged in the business of refueling military aircraft at Naval Air Station Patuxent River (NAS Pax River) under contracts with the U.S. Department of Defense. (GCx 1-C ¶ 2; GCx 1-E ¶ 1; GCx 1-F ¶ 2; GCx 1-H; Tr. 83:7-12)¹ There is no dispute that Respondent's operations at NAS Pax River are governed by the Service Contract Act of 1965 (SCA), 41 U.S.C. 351 *et seq.* (ALJD 2:45-3:2; Tr. 84:7-8; 143:23-25) Under the SCA, employees' wages are set according to the U.S. Department of Labor's Area Wage Determination (AWD) or a collective-bargaining agreement. Where the employees' wages are set by a collective-bargaining agreement, the employer is reimbursed by the government for most of the economic costs arising under the agreement, provided it is the product of arms-length negotiations. (Tr. 71:11-14; 84:17-25.) The AWD only sets the minimum wage an employer must pay; an employer may pay wages in excess of the AWD, but will not receive reimbursement from the government for these excess costs. (ALJD 3:2-16; Tr. 72:12-22; 72:24-73:1; 84:11-16)

Respondent's contract year runs from December 1 to November 30 of each year. If a collective-bargaining agreement is submitted to the government's contracting officer in advance of the December 1 contract year, the collective-bargaining agreement (CBA) becomes the AWD.

¹ Throughout this brief, all citations to the transcript will be referred to as "Tr." followed by the appropriate page and line number(s). General Counsel's exhibits will be referred to as "GCx," and Respondent's exhibits will be referred to as "REx."

If the CBA is not submitted by the December 1 date, the employer would be liable to pay any increased costs arising under the CBA until the next contract year begins. While it is agreed that the parties were operating with an intent of meeting this December 1 deadline, missing the pass-through date, however, does not eliminate an employer's obligation to comply with the collective-bargaining agreement it voluntarily negotiated. (Tr. 84:17-25; 88:6-14; 144:17-145:8)²

B. The Union Wins a Secret-Ballot Election to Represent Respondent's Employees.

As the result of a representation petition filed by the Union, a secret-ballot election was conducted among Respondent's employees by the Board on January 30, 2008. The Union overwhelmingly won the election by a vote of 22 to 5. On February 8, 2008, under Section 9(a) of the Act, the Board certified the Union as the exclusive collective-bargaining representative of a unit of Respondent's employees. (GCx 1-C) ¶¶ 5(b) and 5(c); GCx 1-E ¶1; GCx 9-A); GCx 9-B) Respondent did not file any objections to the Board election. (Tr. 127:20-22) Respondent claims, however, that there was an unspecified delay before it was notified of the Union's certification.³ (Tr. 127:23-128:2)

² In its Exception 1, Respondent erroneously claims that "[i]t is undisputed that Respondent is a small company that lacks the independent wherewithal to provide wages and benefits tentatively agreed to in Proposals A and B," citing pages 72-72 and 85 of the transcript. Those pages do not support Respondent's claim. Respondent's financial health was not an issue during this proceeding, and the General Counsel has no information regarding Respondent's ability to independently pay for contracted benefits. In any event, Respondent's representation is irrelevant as the judge's order only requires that Respondent resume bargaining from its own proposal (the October 8 proposal), and does not order that Respondent agree to any contract provision.

³ Respondent suggests that the period of time between the Union's election win in January and the parties' first bargaining session in June demonstrates that the Union was in "no rush to get to the table." (Tr. 11:12-17) The evidence shows that this suggestion should be disregarded. Less than a month after the Board's February 8 certification, the Union contacted Respondent seeking to bargain, and said it was available to meet during periods in March and April 2008. (REx 13) Rather, it was Respondent, and not the Union, that was in no rush. (Tr. 127:23 – 128:2; REx 12)

C. The Parties Begin Bargaining and Reach Tentative Agreements.

The Union and Respondent (collectively, “the parties”) met approximately seven times for bargaining in June, July, and October 2008. (Tr. 91:16-20; 147:18-21) During bargaining, Business Representative Joseph “Rick” Compher served as the Union’s chief negotiator, while attorney Chris Mitchell served as Respondent’s spokesperson. (GCx 1-E ¶4(b); GCx 1-E ¶1; Tr. 19:13-20:5; 147:12-14) At every bargaining session through October 2008, the Union was also represented by employees Terry Delahay and Owen Turner, and non-Respondent employee Tad Waters. (Tr. 91:24-92:5; 92:15-21) Similarly, Co-owner John Crawford and NAS Pax River General Manager Charles Evans assisted Mitchell in representing Respondent. (Tr. 91:24-92:25)⁴

Following their bargaining session on October 8, 2008, Respondent reduced to writing its then-current contract proposals and the parties’ tentative agreements.⁵ (GCx 2) Respondent’s October 8, 2008 proposal reflects that Respondent and the Union had reached tentative agreements on many subjects, and many subjects had been tentatively agreed-to for some time.

1. Seniority Controls All Job Assignments, Promotions, Layoffs and Recalls.

Specifically, it is undisputed that by October 8, 2008, Respondent and the Union had reached tentative agreements that “all promotions, job assignments, layoffs, and recalls shall be based on seniority, provided that the senior employee is qualified and available to perform the work in question.” (GCx 2, § 7, p. 7, ¶3) It is also undisputed that this agreement was reached very early in bargaining, on either the first day, or early in the morning on the second day. (Tr. 33-34; 159:9-12; 163:21-23; 165) During the June 25 bargaining session, when the Union

⁴ Crawford did not attend the July 24 negotiation session.

⁵ Although occasionally identified in the record as “Proposal A,” the evidence shows that this proposal was not presented to the Union as “Proposal A” or otherwise identified by this label during contract negotiations, though Mitchell claims he “think[s] at some point” he “did probably use the term Plan A.” (GCx 2; Tr. 64:10-11; 102:20-23) Nothing on the document admitted as GCx 2 identifies it as “Proposal A.”

proposed that Respondent would post job vacancies, Attorney Mitchell's trial testimony and bargaining notes reflect that there was no need to post promotions because they were governed by the just-negotiated seniority language. (GCx 4, p. 7; Tr. 36:18 to 37:19) Moreover, Respondent's July 25 and October 8 proposals continued to precisely reflect the parties' June agreement on this subject. (GCx 10 § VI; GCx 2 § VII, p. 7, ¶3)

This tentative agreement largely embodied the existing practice at Respondent's facility. Attorney Mitchell testified that, in general, work assignments are controlled by seniority, in the absence of an overriding reason to use another criterion. (Tr. 42:14 to 44:9) In fact, Union representative Compher testified that this seniority provision was incorporated into the parties' agreement because it embodied Respondent's current practice, as represented to the Union across the table by co-owner Crawford and Manager Evans. (ALJD 3:fn 7; Tr. 166:3-8) Compher's trial testimony is further corroborated by his contemporaneous bargaining notes. (Tr. 166; GCx 11, p. 3 ¶7, p. 4 ¶3, p. 6, ¶8 ("C[harles] E[vans] * Seniority – Job assignments are made by seniority – training is done by seniority."))

Since at least the 1970s when Mitchell began representing Respondent, Respondent has never had a layoff or recall at its NAS Pax River facility. (Tr. 46:17-22; 80:17-18) Based on this long history, Mitchell claims Respondent questioned the need for a contract provision on layoffs and recalls, and that layoffs and recalls were not "part of [Respondent's] thought process," but put this provision in its contract proposal anyway. (Tr. 32:17-21; 34:8-15; 46:17-22)

2. *Discipline and Discharge for Just Cause.*

The parties had also agreed since the first day of bargaining that all discipline and discharge will be for just cause. (ALJD 28:31-33; Tr. 37:20-24; 38:11-25; 167:24 – 168:1; 168:22 – 169:3; GCx 4, p. 4 (Mitchell notes): "Section VIII – agreed to change "good and

proper” to “just” cause.”) Respondent’s July and October proposals continued to “exactly” reflect the parties’ June agreement on this subject. (GCx 10, § VII; GCx 2, § IX; Tr. 169:19-24; 170:11-15) There was no discussion about the standard for discipline and discharge between the parties’ June agreement and bargaining on November 6. (ALJD 4:4-12; Tr. 170:20-24)

3. *At the Conclusion of Bargaining on October 8, the Open Issues are Identified.*

At the conclusion of bargaining on October 8, Mitchell asked the Union to identify the remaining open issues in priority order. (Tr. 94:24 – 95:3) The Union listed eight open issues: (1) reclassify all truck drivers to Fuel Distribution Systems Operators (FDSO); (2) union security; (3) arbitration language; (4) pay for lead persons; (5) proposed pay increase for boiler tenders; (6) shift differential for second and third shifts; (7) shoe allowance; and (8) pay increase for the dispatcher. (Tr. 96:11-25; 155:5-12; 220:19-221:7)

The subject of management rights was not identified as an open issue by either party. (Tr. 158:14-15) Although Respondent’s proposal on this subject was not tentatively agreed-to, Compher testified that what was in Respondent’s October proposal was fine with the Union, that the Union had not objected to anything in Respondent’s proposal, and that Compher shared this opinion with Mitchell across the bargaining table. (158:9-14; 158:19-21) Compher’s account is supported by the fact that the Union did not submit a management rights proposal to Respondent during bargaining.⁶ (ALJD 29:25-27; Tr. 158:18; 203:4-6)

⁶ Mitchell claimed at trial that in either July or October, Compher gave him a copy of the management rights clause from the Union’s agreement with DynCorp, while conceding it was not a Union proposal. Compher directly denied giving a copy of the DynCorp contract, or any pages from it, to Mitchell, which denial the ALJ found credible. (ALJD 17:40-51; Tr. 246:17-22; 252:23-253:5) Mitchell does not recall where he got the DynCorp contract from, and nothing in his bargaining notes from July or October reflects him receiving it from the Union. (ALJD 10:48-50; Tr. 250:25 – 251:17)

Mitchell admitted at trial that the standard for discipline and discharge was not an open issue at the end of bargaining on October 8, 2008, and that Respondent did not seek to add this subject to the Union's list of open issues. (Tr. 39:8-18)

At the end of negotiations on October 8, 2008, Mitchell claims Respondent verbally made its final offer to the Union, which was later reduced to writing and sent to the Union by e-mail, though nothing in the written October 8 proposal or in Mitchell's e-mail to the Union says it is Respondent's last and final offer. (GCx 2; Tr. 97:1-4) Compher unequivocally denied that Respondent said it was making its last and final offer on October 8, and that Mitchell refused to say if the October 8 proposal was such an offer. (Tr. 211:22-23; 216:15-19) Judge Fine discredited Mitchell's version over Compher's denial. (ALJD 5:40-6:8)⁷ Moreover, in his e-mail to Mitchell on October 10, Compher asked that the parties continue negotiations during the week of October 13-18. (GCx 2; Tr. 150:20-24)

D. As the Contract Year Comes to a Close, Respondent Reneges on Past Agreements and Submits New Proposals to the Union.

1. At Respondent's Insistence, Bargaining is Relocated to Alabama.

The parties' final bargaining session was on November 6, 2008. (Tr. 39:19-22; 147:25 – 148:3) At Respondent's insistence, this session was in Alabama, as Respondent refused to return to Maryland to continue talks. (ALJD 7:6-8 and fn 12; Tr. 39:23-25; 150:4-19; 151:1-7) All of the parties' previous meetings had been in Maryland, and only a few miles from Respondent's NAS Pax River facility, and where all of the bargaining unit employees work. (Tr. 40:1-9; 91:11-

⁷ In its Exception 5, Respondent claims that the judge ignored certain facts and "perfunctorily" concluded the October 8 proposal was not a final offer because it was not labeled as such. Any objective review of the judge's decision shows that Judge Fine considered more evidence than Respondent suggests, including Mitchell's demeanor, which he found to be incredible. Although Respondent believes its cited facts "are consistent with how parties typically act when dealing with a final proposal" (Exceptions p.14) this generalized statement is far short of showing the judge's credibility findings were clearly incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951).

15; 150:8-12) Traveling to Alabama for negotiations caused the Union to incur costs for preparation, travel, lodging, and meals. (Tr. 151:15-25; 152:1-7)

Present during negotiations on November 6 for Respondent were Mitchell, Crawford, Evans, and co-owner John Byrd. The Union was represented by Compher and Special Representative Anthony “Tony” Provost. Also present was FMCS Commissioner William McFadden. (Tr. 93:4-10; 148:4 – 150:3; 191:4-11)

2. *Union Security is Among the Open Issues.*

The bargaining session opened with Mediator McFadden discussing the six or seven unresolved issues separating the parties, and his goal to bring the negotiations to a conclusion. (Tr. 99:21-23; 156: 16-20)

One of the major open issues was union security, and which would eventually become the major subject of bargaining on November 6. (Tr. 173:24 – 174:1) The Union had proposed an agency shop language, and had explained several times in negotiations that the agency shop proposal was what the bargaining-unit employees wanted in any contract. (REx 17; Tr. 177:1-3) The Union also explained that it was important to the Union to have a union-security clause to ensure consistency among its agreements with other employers at NAS Pax River. (Tr. 176:7 – 178:3; 231:8-19)

It is undisputed, and the judge found, that Respondent refused to accede to the Union’s agency shop proposal because Respondent had philosophical objections to union security. Compher testified that on numerous occasions, Mitchell said that he had a “philosophical difference” with employees having to pay dues, and that this was the only reason Respondent gave. (Tr. 175:5-10) Mitchell admits in his trial testimony that Respondent has refused to accede to union security because of philosophical objections, but also tries to blame the Union’s

intransigence as an additional factor. (Tr. 124:3-6) While substantively conceding Respondent's philosophical objections to union security were preventing an agreement on this subject, Mitchell asserts he did not use the term philosophical beliefs, adding, "I don't think." (Tr. 248:25 – 249:5)

Respondent's contract offer eventually included dues check-off, but Compher testified without contradiction that he informed Respondent that it was illegal for the Union to come to the federally-operated NAS Pax River facility for the purpose of collecting dues. (Tr. 179:2-15; GCx 5, §VI, p. 6)

3. *Respondent Derails the Bargaining Process When it Presents "Proposal B."*

After the introductory remarks, the parties took a caucus. Upon returning from the caucus, Respondent presented the Union with a contract proposal, identified as "Company Proposal B," which modified many of the terms from the October 8 offer. (Tr. 41:7-9 (Mitchell); 156:20-23; 161:1-6; 157:4-11; GCx 5) Specifically, Respondent's Proposal B retreated from many of the long-settled agreements between the parties, offered the employees fewer protections than what they enjoyed before they selected the Union, and introduced new, controversial, and even illegal subjects into negotiations.

Mitchell testified that he prepared Proposal B in response to the Union's insistence on an agency shop provision. (Tr. 100:6-15) However, Mitchell never explained during his testimony how the contract's agency shop provision caused Respondent to retreat from long-settled agreements on seniority, discipline and discharge, or how agency shop was related to subcontracting or picketing. The closest Mitchell came to an explanation was while he was "arguing semantics" at trial and claims he talked about "management security and flexibility" during bargaining. (Tr. 46)

Compher testified that during bargaining, when a subject was marked as being tentatively agreed, it was not discussed again. (Tr. 216:2-8; 155:2-4⁸) Compher added that it would be highly unusual in his experience for a party to resurrect a subject that had been tentatively agreed. (Tr. 216:9-12) Compher has been a business representative for the Union for 13 years. (Tr. 139:5-11)

a. Respondent Retreats from Tentative Agreements on Seniority.

Respondent's Proposal B reneged on its earlier agreement that all promotions, job assignments, layoffs, and recalls would be controlled by employee seniority. (GCx 5). Instead, the decisions involving these actions were now all within the exclusive discretion of Respondent's management. (GCx 5, p. 4, § V). Attorney Mitchell claims that this change was made to give Respondent more "management security" (Tr. 44-45) If there could have been any doubt that Respondent was retreating from the parties' prior agreement on this subject, it was removed when Compher asked Mitchell across the table if seniority still controlled, and Mitchell replied "no." (Tr. 182:12-18; 182:21-23)

Respondent did not present any evidence at the hearing that there was any change in the nature or operation of its business that may have motivated its proposals to eliminate seniority as a consideration from promotions, job assignments, layoffs, or recalls. Similarly, Respondent did not present any evidence that there was a change in its business that motivated it to propose that the employees should lose the seniority protections for job assignments that they enjoyed before they selected the Union.

⁸ This reference is a subject of Counsel for the General Counsel's Motion to Correct the Transcript, which was granted by the ALJ.

b. Respondent Reneges on the Tentative Agreement that Discipline and Discharge Will Be for Just Cause.

In Proposal B, Respondent asserts that it was wholly within the discretion of management to determine whether employees should be disciplined or discharged. (GCx 5, p. 4, § V, p. 20, § 9) This new proposal retreated from the parties' agreement reached during their very first bargaining session that all discipline and discharge would be only for just cause.⁹ When Respondent presented Proposal B, Compher asked Mitchell if discipline and discharge were for just cause, and Mitchell responded "no." (Tr. 182:17-20)

Respondent did not present any evidence at the hearing that there was any change in the nature or operation of its business that may have motivated its proposal to eliminate just cause as a consideration from discipline or discharge.

c. Respondent Injects the Issue of Subcontracting Late in Negotiations.

Although the December 1st deadline was looming, Respondent claimed in Proposal B – for the first time – that it was within Respondent's rights of management to subcontract any or all of its operations at NAS Pax River. (GCx 5, p.4 § V) It is undisputed that the issue of subcontracting had never been raised in any of the parties' prior negotiations, and was introduced for the first time on November 6. (Tr. 46:23-47:2; 123:22-25; 172:24-173:3) further, Mitchell admits that he told the Union during bargaining that he *did not know of a specific reason for including subcontracting* in Respondent's latest proposal. (Tr. 47:3-8; 102:21-25) Most tellingly, Mitchell admits that he told the Union that he could not foresee the need to subcontract work

⁹ Although not marked as "TA" in Respondent's October 8 proposal, there is no dispute that there was an agreement on this subject since June 24, and was incorporated into Respondent's written July and October proposals. Moreover, there was no discussion about the standard for discipline and discharge since the June agreement, and Respondent never claimed on November 6 that there had not been an agreement on this subject. (Tr. 37:20-24; 38:11-25; 167:20-168:1; 168:22-169:3; 171:24 – 172:1)

under Respondent's current operation, unless under the "very remote possibility" that Respondent "somehow got a contract to perform mechanical work or something of that nature," but it was not anticipated that Respondent would get this mechanical work. (Tr. 47:3 to 50:11; 102:1-4; 103:6-8) Although Mitchell's trial testimony is consistent with his pre-trial affidavit, his answer on this point was labored prolix. (Tr. 47-50) Mitchell also admitted that he was mistaken when he informed the Region on November 24, 2008, that there was "never any question, discussion, or mention of subcontracting work..." on November 6, but continues to maintain that the Union "...never made any issue of it...". (GCx 7, p.4, ¶1; Tr. 77:5-10)

Although Mitchell has represented Respondent since the 1970s, he is not aware of Respondent ever subcontracting work from its NAS Pax River operation. (Tr. 50:12-14; 50:18-51:1) In fact, Special Representative Provost questioned whether Respondent *could* subcontract any of its work at NAS Pax River because of the Navy's tight security regulations, though this question went unanswered by Respondent during both negotiations and the trial. (Tr. 224:20-225:10)

d. Respondent Insists on Bargaining About the Amount of Fees Paid by Employees Who Are Not Members of the Union.

Notwithstanding its professed philosophical objections to union security, on November 6, Respondent began insisting for the first time on bargaining over the amount that non-members would pay in fees to the Union. (Tr. 51:20-52:3; 174:3-6) Initially, Respondent proposed that employees who did not join the Union would only pay fees equal to 50% of full-member dues. (GCx 5, p. 6, § VI, ¶ 3) Later on November 6, Respondent agreed to increase this amount to 75%. (Tr. 52:4-6) On both occasions, the record evidence shows that the Union unequivocally refused to negotiate about the amount of agency fees, and claimed that such bargaining was

illegal and that it violated the Union's constitution.¹⁰ (Tr. 53:15-20; 54:4-22; 174:6-9; 176:3-4; 183:8-12; 186:6-10; 192:2-5; 193:12-13; 226:2-14; 249: 22-25)

Mitchell asserts that on several occasions during bargaining, the Union insisted both verbally and through its contract proposal on union security, that *all* employees must pay 100% of dues. (Tr. 52:8-21; 104:9-12; 106:16-22; 249:22-25) Compher and Provost each directly denied having ever demanded that all employees pay 100% of dues. (Tr. 178:4-6; 185:20-25; 232:11:13 (Provost: "absolutely no way."); 233:20-25) Contrary to Mitchell's testimony, both Compher and Provost offered to help any interested employee pay *less* than 100% of fees when they told Mitchell they would personally explain non-member and objector statuses to any interested employee. (Tr. 175:20 – 176:2; 196:8:12; 240:5-24)

Mitchell claims that the Union's proposal on union security requires that all employees pay 100% of dues. (Tr. 234-239.) The Union's proposal on union security provides, in part:

- (A) All employees in the bargaining unit must as a condition of continued employment be either a member of the Union and pay union dues or pay an agency fee to the Union, but not both.
- (B) All employees in the bargaining unit...who are not union members must, as a condition of continued employment, pay to the Union...an agency fee equal in amount to monthly membership dues...

- (D) An employee required to pay an agency fee [or] membership dues...shall be notified in writing of his delinquency...The Company will...discharge any employee who is not in good standing in the Union or fails to pay applicable agency fees as required by paragraphs A-D of this Article....
"Good Standing" is defined as in compliance with standards permitted by NLRB and court decisions relating to Union shop requirements. (emphasis added)

- (H) *Nothing contained in this Article shall be construed to require the Company to violate any applicable law....*(emphasis added) (REx 17)

¹⁰ There was some testimony concerning whether negotiating the amount of agency fees violated the Union's constitution, which was not introduced into evidence. Whether negotiating over this subject did or did not violate the Union's constitution is not determinative; the relevant inquiry is whether the Union refused to bargain over a permissive subject and Respondent's continued insistence on talking about it.

Mitchell testified at the hearing that he has practiced law exclusively in the field of labor and employment relations since 1973, and has negotiated at least 75-80 different collective-bargaining agreements. (Tr. 79:9-17) Having considered all of the testimony and the “realities of the meeting,” Judge Fine concluded that Mitchell’s testimony was not “worthy of belief.” (ALJD 24:30-49)

Throughout the negotiations on November 6, Provost was in contact with the International Union to confirm that the Union could not negotiate over the amount of agency fees. (Tr. 52:19-20; 227:14) Both Compher and Provost offered Mitchell the opportunity to speak with the International’s president or general counsel to confirm that the Union could not bargain over this subject. (Tr. 174:9-15; 232: 1-10) The record shows that while Mitchell did not accept the Union’s repeated offers to speak with higher Union officials, he simultaneously insisted that Compher and Provost could speak with their “higher-ups” to obtain permission to bargain about the amount of agency fees. (Tr. 176:4-6; 183:12-13; 223:11-15; 225:22-23; 226:17-18; 249:20-21; 249:25 – 250:2 (Mitchell: “...and [I] repeatedly said that I felt that the union could, if it wanted to, negotiate for [the amount of the agency fees].”))

Notwithstanding the Union’s repeated refusal to bargain over this subject, Compher testified that this topic ended up driving the talks on November 6, and by the conclusion of negotiations that day, Mitchell admits Respondent was continuing to adhere to its proposal that would set the amount of nonmembers’ fees by contract. (Tr. 55:3-7; 124:22-24; 180:5-6)

e. Respondent Proposes that Employees May Not Picket Under Any Circumstances.

In Proposal B, Respondent changed its proposal for Section IX – Strikes and Lockouts to add language stating that:

There will be no picketing of any kind by employees represented by the Union, and such employees will cross any picket lines in order to report to work or perform their job assignments. (Compare GCx 2, p. 21 § IX with GCx 5, p. 21, § IX).

Compher testified that picketing was not discussed before November 6, and he does not recall any discussion of the subject on November 6. (Tr. 181:22 – 182:4) By the conclusion of bargaining on November 6, Respondent had withdrawn its proposal to ban all employee picketing.

4. *The Union Strongly Objects to “Proposal B.”*

Mitchell testified that the Union “expressed dissatisfaction” with the changes made by Proposal B, and the discussion was a “typical collective-bargaining discussion.” (Tr. 102:1-10) The Union’s recollection is not as benign as Mitchell’s. Compher testified that he was “very upset” and “very agitated” about Proposal B because Respondent was now proposing to eliminate or regress from the parties’ earlier tentative agreements. Compher further described himself as “pissed.” (Tr. 157:15 – 158:4) Provost corroborates that Compher was “extremely upset” and that Provost confronted Mitchell about the regressive proposals in Proposal B. (Tr. 224:1-7)

Compher’s testimony of what he told Mitchell across the bargaining table on November 6 was both candid and eidetic. Compher testified that “things got contentious” after Proposal B was presented, and there was some “yelling and screaming.” (Tr. 161:7-8; 171:5-8). Compher said to Mitchell that Proposal B was a “crock of shit,” and that the Union “had come all the way [to Alabama] and [Respondent] wanted to pull back on proposals, things we already agreed to,” adding, “this is a bunch of bullshit.” (Tr. 161:11-17) Compher testified he told Mitchell that they had already agreed to tentative agreements long before November 6, and accused Mitchell of pulling those tentative agreements back. (Tr. 161:17-21)

Yet even after being confronted with Compher's visceral reaction to Proposal B, Mitchell inexplicably did not say anything about Respondent's earlier proposals still being on the table, though Respondent claims that they were. (Tr. 56:19-21; 161:24 – 162:1; 184:17-20¹¹)

Mitchell claims that when Proposal B was presented to the Union, he told them that the October 8 proposal was still on the table. In his position statement, he claims Respondent "stressed" this point. (Tr. 101:13-19; GCx 6, p.2, ¶ 4) Both Compher and Provost directly contradict Mitchell, and assert that Mitchell never said the October 8 proposal was still on the table, or anything close to that remark. (Tr. 184:21-24; 185:2-3; 23:16-21; 228:23 – 229:5) Even Mitchell corroborates that the October 8 proposal was not discussed on November 6, except he claims, at the very beginning and very end. (Tr. 58:18-20) Mitchell, however, argues that by saying both proposals would be withdrawn on December 1 (which the Union denies he said), Mitchell was implying that both the October 8 proposal and Proposal B were still on the table. (Tr. 56:21-23) Nothing in Mitchell's contemporaneous bargaining notes corroborates his testimony.¹² (Tr. 56:25 – 57:11; GCx 4) Respondent did not call any other witnesses to corroborate Mitchell's testimony, though there were three other Respondent representatives present during bargaining on November 6, including the local General Manager Evans.

Respondent's claim that it simultaneously had the October 8 proposal and Proposal B on the table is not consistent with the parties' past bargaining practices. Compher testified that Respondent never bargained by presenting alternative contract proposals, and Provost adds that Respondent never bargained in this fashion while he was present on November 6. (Tr. 185:11-

¹¹ This reference is a subject of Counsel for the General Counsel's Motion to Correct the Transcript.

¹² Mitchell also argued that the label of "Proposal B" implies that Respondent's proposal is an alternative to the October 8 proposal, rather than a substitution. Respondent sought to introduce evidence (REx 1-4) that purportedly show the colloquial meaning of the term "Plan B." Judge Fine excluded this evidence because it is irrelevant. Judge Fine's ruling should be affirmed and Respondent's Exception 15 should be denied. Instead the relevant inquiry involves what Respondent said to the Union during bargaining. On this point, Compher testified that, to his knowledge, no one ever explained why Respondent's November 6, 2008 proposal was called "Proposal B." (Tr. 208:8-10)

15; 229:15-18) Finally, after the negotiations concluded on November 6 (and especially during the period between November 6 and December 1), no one from Respondent told the Union that the October 8 proposal was still on the table. (Tr. 185:4-7; 187:21-24; 229:10-14)

Judge Fine found that the Union's account on this point was clear and convincing. He found that Mitchell was aware, and Respondent intended that on November 6 the Union officials were operating under the assumption that the October 8 proposal had been withdrawn and supplanted by Proposal B. (ALJD 22:23-31)

5. *By the Close of Bargaining on November 6, Respondent Makes "Concessions."*

After the Union objected to the changes made by Proposal B, Respondent agreed to restore some of the parties' prior agreements. Specifically, Respondent agreed to restore seniority as a consideration for layoffs and recalls, but not for job assignments and promotions, which remained a right of management. (Tr. 106:4-6; 182:24 – 183:7) Respondent also agreed to restore the negotiated "just cause" language in the provision covering discipline and discharge. (Id.)

Despite Respondent's "concessions" to restore some of the previously-negotiated agreements, it continued to insist on bargaining over the amount of fees paid by non-members, and now proposed that these employees should pay 75% of dues. (Tr. 52:4-6; 55:3-7; 106:8)

6. *Negotiations Break Down and Respondent Announces It Will Withdraw All of Its Contract Proposals On December 1, 2008.*

When the Union repeated that it could not bargain about the amount of fees paid by non-members, Mitchell told the Union that it had Respondent's final offer. (Tr. 56:1-8; 58:22 – 60:13; 106:16-22 (Mitchell asserts Union wanted all employees to pay 100% of dues)) At the

conclusion of bargaining, Mitchell claims he told the Union that Respondent was withdrawing its contract proposals if not accepted by December 1. Mitchell claims that he told the Union that Respondent was withdrawing *all* of its proposals so it would not have to pay increased wages and benefits without being reimbursed by the government. (Tr. 64:23 – 65:5) Respondent offered no explanation at trial about why *all* of its contract offers were being withdrawn, instead of only the wage and benefit provisions. On December 1, 2008, Respondent’s contract proposals were effectively withdrawn. (Tr. 63:4-11; 67:15-24) Nothing on Respondent’s October 8 proposal or on Proposal B evidences that these proposals were valid only until December 1, 2008. (GCx 2; GCx 5; Tr. 55:17-19; 65:9-12)

Mitchell claims that he explicitly said during bargaining that both the October 8 proposal and Proposal B would be withdrawn on December 1, and Provost replied that Respondent needn’t worry because *neither* proposal would be accepted by the Union. (Tr. 55:20-25; 64:9-21; 107:7-12) Provost specifically and unequivocally denied making such this statement to Mitchell, and the ALJ credited the Union. (ALJD 22:23-34 and fn 23; Tr. 230:7-11)¹³

In a final attempt to salvage the negotiations, Union representative Compher met alone with Respondent co-owner John Crawford, but there was no change in the parties’ positions. (Tr. 107:12-18)

E. Although Several Issues Remained Open, Respondent Falsely Informed Employees That the Only Issue Preventing an Agreement is Union Security.

After negotiations ended on November 6, Respondent, by General Manager Evans, published a memorandum to its employees about this bargaining session. (Tr. 74:1-23; GCx 8) In

¹³ In its Exception 9, Respondent erroneously claims that Judge Fine found that Respondent did not withdraw its proposals, citing p. 32, lines 4-9 of the ALJD. Contrary to Respondent’s assertion, the judge found only that Mitchell did not *inform* the Union that it was withdrawing its proposals. The judge did, however, find that Respondent withdrew its proposals on November 6 (the October 8 proposal) and December 1 (Proposal B.)

this memorandum, Respondent told employees that all contract terms had been agreed to, but the Union's insistence on receiving dues was preventing a final agreement. In relevant part, the memorandum states:

The issue discussed was union security – mandatory union membership and payment of dues by all employees. All pay and benefit items and other contract language were agreed upon.

The Company went against its beliefs and proposed that...(3) no one will be fired over whether they do or do not join the Union or pay dues. The Union refused to accept this, and the negotiations ended in a standoff. (GCx 8)¹⁴

Contrary to Respondent's assertions, however, there were several subjects besides union security that had not been agreed to by the parties, and the trial testimony shows that even Respondent does not dispute this. As examples, by the end of negotiations on November 6, the parties had not reached agreements on subjects such as arbitration language (ALJD 33:1-8; Tr. 128:17-25 (Mitchell); 155:9-16 (Compher); 229:22-25 (Provost)), subcontracting (Tr. 130:13-19 (Mitchell); 230:2-3 (Provost)), reclassifying FDSO (Tr. 128:14-16 (Mitchell); 155:8-16 (Compher)), no-strike/no-lockout (Tr. 229:25 – 230:1 (Provost)), and shoe allowance. (Tr. 129:13 – 130:6 (Mitchell); 155:10-16 (Compher); 230:5-6 (Provost))¹⁵

¹⁴ Over an objection from Counsel for the General Counsel, the ALJ admitted testimony from Mitchell that he believes the information in this memo was accurate and correct. (Tr. 111:25 – 112:2) It remains the General Counsel's position that Mitchell's feelings or beliefs about the veracity of this memorandum are irrelevant. The memorandum to employees clearly states, "All pay and benefit items and other contract language were agreed upon." Respondent did not qualify this statement by saying *it believed* all contract items were agreed upon; it said they were agreed upon. This objective statement to employees is either true or false, which Mitchell's subjective opinion cannot alter.

¹⁵ At trial, Respondent attempted to impeach Compher by using affidavit testimony stating that the only way the Union could communicate to bargaining-unit employees was through the negotiating committee, going to individual employees' homes, and through employee meetings, but did not mention the Union's website postings. Compher testified without contradiction that the Union does not have employees' telephone numbers or e-mail addresses. (Tr. 198:23-25) While website postings are theoretically addressed to the entire world, there is no evidence that the Union could alert bargaining-unit employees to the Union's website other than through the means Compher listed in his affidavit. Judge Fine rejected the attempt to impeach Compher on this point, and found that the Union's website posting did not serve to counter Respondent's false memo to employees. (ALJD 33:22-26)

The parties have had some contact by telephone since the November 6 bargaining session, focusing on the union-security issue, though Respondent continued to adhere to its position that nonmember fees should be set by contract at 75% of dues. (Tr. 111:2-23)

By a letter dated February 18, 2009, Respondent presented a new contract offer to the Union, which was essentially identical to the October 8, 2008 proposal, with the exception that all wage increases were now effective on December 1, 2009, instead of December 1, 2008. (REx 14; Tr. 68:11-18; 68:21 – 69:5; 118:8-13) Respondent and the Union have not reached a contract. (Tr. 147:2-24)

IV. ARGUMENT¹⁶

A. There is Abundant Evidence That Respondent Has Violated the Act by Engaging in Bad-Faith Bargaining with the Union.

The obligation to bargain in good faith is a fundamental tenet of the National Labor Relations Act, and the evidence shows that Respondent has failed to meet this statutory obligation. In determining whether a party has violated its duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989); *enfd.* 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984). This conduct includes delaying tactics, unreasonable bargaining demands, ... withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton*, 271 NLRB at 1603 (footnotes omitted). The duty to bargain in good faith does not require any party to agree to any particular proposal. 29 U.S.C. § 158(d). However, the duty implies both "an open mind and a sincere desire to reach an agreement" and a "sincere effort...to reach a common ground." *NLRB v. Reed & Prince Mfg.*

¹⁶ Any argument referring to Mr. Mitchell is directed solely at his testimony as a witness, and not at his character or competency as an attorney.

Co., 118 F.2d 874, 885 (1st Cir. 1941); *NLRB v. Montgomery Ward*, 133 F.2d 676, 686 (9th Cir. 1943).

An examination of the totality of Respondent's conduct shows that Respondent deliberately sabotaged the progress that was achieved after months of bargaining with the Union, and that Respondent chose to disrupt the bargaining process in the critical time before the December 1st renewal date.

Respondent's conduct is proscribed by well-settled Board and court decisions, and therefore, there is ample justification for the Board to overrule Respondent's exceptions and to affirm the judge's findings that Respondent has violated the Act.

1. Respondent Unlawfully Retreated from Tentative Agreements.

Respondent has not excepted to the judge's finding, and thus there is no dispute that after months of bargaining, Respondent retreated from its previous agreements reached with the Union, and Board law is clear that retreating from tentative agreements is an indicia of bad-faith bargaining. "...the law is settled that the withdrawal of a proposal which had previously been agreed upon will be considered unlawful and designed to frustrate the bargaining process unless good cause is shown for the withdrawal." *Suffield Academy*, 336 NLRB 659, 669 (2001), *enfd.* 322 F.3d 196 (2d Cir. 2003); *Homestead Nursing & Rehabilitation Ctr.*, 310 NLRB 678, 680-681 (1993).

In this case, the objective documentary evidence firmly supports the ALJ's finding that Respondent retreated from tentative agreements that promotions, job assignments, layoffs, and recalls would be governed by seniority, and that all discipline and discharge would be imposed for just cause.

Testimony from both Mitchell and the Union’s representatives supports that there was an agreement on this subject, and that it had been reached early in bargaining. Chris Mitchell’s own bargaining notes reflect in their very first bargaining session, that the parties “agreed – tentatively on Co. proposal on seniority.” Moreover, Respondent’s June 24 contract proposal, as modified, incorporates this negotiated language on seniority. Finally, both of Respondent’s subsequent contract proposals – on July 25 and October 8 – repeat that all promotions, job assignments, layoffs, and recalls will be controlled by seniority. Respondent’s October 8 proposal identifies the seniority provision as “(TA),” further showing that the parties had reached a tentative agreement on this subject.

In the same June 24 bargaining session, the parties agreed that all discipline and discharge will be imposed for just cause. Although this proposal was not marked “(TA)” in the October 8 proposal, the judge properly found that the weight of the evidence shows that the parties had reached agreement on this subject. The testimony of both Mitchell and Compher agree that this subject was agreed to in the parties’ first day of bargaining. Further, the objective documentary evidence supports that there was an agreement. Mitchell’s bargaining notes reflect that there was an agreement on June 24 on the just cause standard. Lastly, Respondent’s subsequent July and October proposals continued to reflect the parties’ June agreement, and the subject was not brought up again before bargaining on November 6.

Regarding both seniority and the just cause standard, a plain reading of Proposal B shows that Respondent retreated from these long-standing agreements and arrogated to itself the discretion to decide how decisions involving these subjects would be made. Respondent presented no business justification for withdrawing from these agreements, such as a change in the nature of its operations. Instead, Respondent’s sole explanation is that it withdrew from these

proposals to get more “management security” as a condition of offering its proposal on union security. Yet, Respondent has failed to explain any connection between conceding on union security and retreating from agreements on seniority and the standard for discipline. In the absence of such an explanation, this conduct shows a lack of good cause, and evidences bad faith. *Valley West Health Care, Inc.*, 312 NLRB 247, 252-253 (1993), enfd. mem. 67 F.3d. 307 (9th Cir. 1995), overruled on other grounds, *TNT Skypack, Inc.*, 328 NLRB 468 (1999.)

Any argument suggesting that Respondent did not violate the law because it eventually agreed to restore seniority and just cause to Proposal B should be rejected. The legal rationale for prohibiting the unjustified withdrawal of tentative agreements is based on the frustration injected into the bargaining process. Respondent essentially required the Union to travel to Alabama to spend all day on November 6 bargaining back what it already had achieved over months of negotiations. To provide further context, this “wasted day” was shortly before the December 1st date that Respondent had made the employees’ wage increases contingent upon. The natural and foreseeable consequence of Respondent’s proposals is that the parties would waste precious time bargaining over subjects that had already been settled. Respondent’s admitted regression on these subjects shows that it was not working toward reaching an agreement from the Union, but rather ensuring that a final agreement would not be reached just as the parties were making progress to a resolution. In addition, Respondent only partially restored what it had taken away: it never offered to restore seniority as a consideration for promotions or job assignments, but only for layoffs and recalls.

Respondent has also argued in its Exceptions that it did not retreat from its tentative agreements because the October 8 proposal was never formally withdrawn when Proposal B was presented. In fact, in his position statement to Region 5, Mitchell claims that when Respondent

presented Proposal B, he “stressed” to the Union that the October 8 proposal remained on the table. This self-serving claim is refuted by a considered examination of the evidence, and was properly discounted by the judge. First, there is no record in any parties’ bargaining notes that the October 8 proposal remained open for consideration, let alone that Mitchell “stressed” that it remained viable. Moreover, Mitchell’s and Compher’s bargaining notes are in agreement that Proposal B was Respondent’s “last and final offer.”

Furthermore, a comparison between the October 8 proposal and Proposal B show that the most reasonable conclusion is that Proposal B supplanted the one of October 8, given their commonalities. Although there is no evidence that Respondent withdrew its June proposal when it was replaced by the July offer, or withdrew the July offer when it was replaced by the October proposal, it now expects the Board to believe that its November proposal did *not* replace the October offer. Under Respondent’s theory, its June, July, October, and November proposals were all on the table on November 6 because it never formally announced that any of them were withdrawn (except at the conclusion of bargaining). Had Respondent presented a wholly divergent “Proposal B,” its argument of alternative proposals might be more persuasive. Instead, the facts show that the parties bargained exclusively from Proposal B after it was introduced, just as the parties had done every other time Respondent presented a new offer. Moreover, had Mitchell “stressed” that the October 8 proposal was still on the table, why was the Union so outraged at Proposal B, and why did negotiations break down after Respondent said Proposal B was its “last and final” offer? Why wouldn’t the parties simply return to the unobjectionable October 8 proposal, which Mitchell claims was figuratively there side-by-side with Proposal B? The only logical conclusion reached from these facts – and that reached by the ALJ – is that Respondent presented Proposal B as its sole contract offer, and not as an alternative to the

October 8 proposal. In so doing, Respondent reneged on the agreements reached earlier in bargaining, and evidenced its intention to bargain in bad faith in violation of the Act.

2. *Respondent's Proposal on Seniority was Regressive.*

In addition to retreating from its tentative agreements with the Union, Respondent further demonstrated its intent to frustrate bargaining by proposing that the employees accept fewer protections than what they already enjoyed before they voted for the Union. Here, it is undisputed that Respondent proposed in Proposal B that it would be within the discretion of Respondent to make all job assignments. However, it is undisputed that the pre-existing practice at Respondent was to make job assignments by seniority. Therefore, in addition to reneging on an agreement with the Union to codify the established practice, Respondent was proposing to take away an existing benefit.

Although under some circumstances it would be lawful for Respondent to make such a proposal, the totality of the circumstances here show that Respondent's true purpose was to frustrate an agreement with the Union. Respondent offered no business justification for its new offer, and there is no evidence of changed circumstances to support this new proposal. "Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining." *Mid Continent Concrete*, 336 NLRB 258, 260 (2001). In the absence of such reasons, the only logical conclusion is that Respondent's offer was motivated by bad-faith considerations.

3. *Late in Negotiations, and Without any Justification, Respondent Injects the Issue of Subcontracting.*

The Board has held that introducing significant new proposals late in bargaining is an indicia of bad-faith. *Hotel Roanoke*, 293 NLRB 182, 185 (1989). Here, Respondent injected the issue of subcontracting late in negotiations, and indisputably did so without *any* justification – business or otherwise. Mitchell admits that subcontracting had not been discussed in negotiations before November 6, and that he told the Union during bargaining that he “did not know of a specific reason” for including subcontracting in Respondent’s latest proposal. Beyond this explicit admission, other facts show that there was no legitimate reason for this proposal. Mitchell admits that he could not foresee the need for Respondent to subcontract work, except in the “very remote possibility” that Respondent got a contract to perform mechanical work, which it was not anticipating. Moreover, there is no evidence that in over 30 years of operating at NAS Pax River that Respondent has *ever* subcontracted work, and there is an open question about whether under Navy security regulations, it even *could* subcontract any of its work.

Besides the total absence of any business justification for this proposal, the timing is also suspect. Respondent admits that through months of negotiations, the subject of subcontracting has never been discussed. Yet, curiously, Respondent decided to broach this topic during the critical time before the December 1st contract-renewal date. When the timing of this proposal is coupled with Respondent’s admitted lack of justification, the inescapable conclusion is that the purpose of this proposal was a further attempt to frustrate the bargaining process with the Union.

4. *Respondent Refuses to Accede to Union-Security Provisions Because of Philosophical Objections.*

The Board has held that unwavering philosophical objections to union-security provisions can be an indicia of bad-faith bargaining, and can demonstrate a fixed intention not to

reach an agreement. *Chester County Hospital*, 320 NLRB 604, 621-623 (1995); *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1036 n. 1 (1980), enf'd 667 F.2d 562 (6th Cir. 1982), cert. denied, 459 U.S. 969 (1982); *St. George Warehouse, Inc.*, 341 NLRB 904, 907 n.10 (2004). In this case, Respondent has demonstrated such unwavering philosophical objections. It is undisputed that Respondent has refused to accede to a union-security clause during negotiations with the Union. Respondent's attorney Mitchell admits that Respondent has not agreed to union security because Respondent has philosophical objections to union security, and that he gave this reason to the Union repeatedly during bargaining. Moreover, Respondent has chosen not to challenge the judge's findings that it objected to the Union's proposal on union security for purely philosophical reasons.

Although Respondent has argued that the Union was equally intransigent, unlike Respondent, the Union provided reasons for its proposals: its union-security proposal was what the bargaining-unit employees had asked for, and the Union wanted its contract with Respondent to be consistent with its other contracts at NAS Pax River. Respondent gave no other justification for withholding union security, and any (unsupported) concern it may have had about employees unwilling to pay dues or fees is contrary to the Union's overwhelming victory in the Board's secret-ballot election. When viewed in the context of its other conduct during bargaining, Respondent's intransigent position on union security evidences an intent to prevent an agreement with the Union, and demonstrates that Respondent bargained in bad faith.

Respondent's claim that it was privileged by the First Amendment to object to union security for philosophical reasons should be rejected. First, Respondent cites no authority in support of its argument that the First Amendment grants it a license to take whatever position it wishes during bargaining. Second, Respondent is free to *believe* whatever it wishes; however it is

Respondent's *conduct* during bargaining that is the focus of this case. By way of example, Respondent is free to believe that women are inferior to men, though it may not insist on wage proposals during bargaining that discriminate along gender lines. "...it is axiomatic that various restrictions are placed on an individual's or employer's speech to the extent that the speech conflicts with, or infringes upon, other established rights." *Wild Oats Community Markets*, 336 NLRB 179, 182 (2001). In a seminal bargaining case, *General Electric*, 150 NLRB 192, 280-281 (1964), the Board adopted the Trial Examiner's finding that "[i]t is perfectly obvious, to begin with, that Congress could not have intended a strictly literal construction of Section 8(c) which would bar employer expressions from being considered under any circumstances for their probative bearing on unfair labor practices not concerned with the legality of the expressions themselves. Certainly, no one would contend, for example, that an employer's arguments to a union in the course of bargaining...must be ignored in deciding whether Section 8(a)(5) has been violated."

Finally, the judge never found, as Respondent seems to argue, that its philosophical objections constitute per se unlawful conduct. Instead, the judge found – consistent with established Board law – that Respondent's conduct was *an indicia* of bad-faith bargaining. And, when this indicia was considered within the context of all the other facts, the judge properly concluded that Respondent violated the Act by engaging in bad-faith bargaining.

5. *Respondent Insists on Bargaining About the Amount of Fees Paid by Nonmembers.*

Although Respondent purports to have a strong belief that employees should not be compelled to pay dues to the Union, it changed its tack on November 6 by insisting on bargaining about the amount nonmember employees pay in fees to the Union. As discussed

below, by its continued focus on this subject, Respondent prevented bargaining from moving toward any common ground.

The subject of union dues, or what nonmember objecting employees pay to a union under a union-security clause is an internal union matter, and is a permissive subject of bargaining. *Social Services Union, Local 535*, 287 NLRB 1223, 1223 n.1 (1988). As a permissive subject, the parties may bargain if they choose, but neither party can require the other to negotiate, and it is unlawful to bargain to impasse over a permissive subject. *NLRB v. Borg-Warner (Wooster Division)*, 356 U.S. 342 (1958).

In this case, Respondent has insisted on bargaining over the amount of fees paid by nonmember employees: a permissive subject, and the record evidence shows that the Union has categorically refused to discuss this matter. In fact, negotiations broke down on November 6 after the parties could not move past their respective positions.¹⁷ The Union claims that it was prohibited from bargaining over this subject, which potentially could turn from a permissive subject to an illegal subject. For example, if the Union agreed to Respondent's proposal that nonmembers would pay 75% of full-member dues, and subsequent calculations showed that nonmembers were only required to pay 60% of dues, they have arguably maintained an illegal union-security provision in their collective-bargaining agreement.

Furthermore, although Respondent repeatedly suggested that the Union could speak with its "high-ups" about negotiating the amount of the agency fee, Mitchell refused repeated

¹⁷ The General Counsel is not alleging that Respondent unlawfully insisted on this subject to the point of impasse because the record shows that other bargaining subjects remained open. Contrary to Respondent's claim in its Exception 4, the judge made no impasse finding. Rather, the judge found that Respondent's insistence on bargaining about the amount of fees paid by nonmembers was part and parcel of its scheme to waste time and frustrate the bargaining process.

Additionally, in its Exception 2, Respondent erroneously claims that, "...the undenied and undisputed fact that the Union eventually accepted all of the proposals in the final version of Proposal B except for the percentage amount of agency fee dues," citing pages 111 and 249-250 of the record. Respondent's representation is not supported by those pages, or by any other parts of the trial record. To the contrary, the record shows that there were several open subjects at the conclusion of bargaining on November 6.

invitations to speak with those very same “higher ups” when Compher and Provost offered him the opportunity to speak with the Union’s General Counsel or International President. Had Respondent truly been seeking to reach a common ground for the Union, one would expect that Mitchell would have at least walked through the door the Union had opened for him.

Moreover, Respondent incredibly suggests that the Union continually insisted that all employees pay 100% of dues. As described above, the Union unequivocally denies making such a patently illegal proposal or any statements to that effect. Rather than insisting on 100% of dues as Respondent claims, the Union lawfully, and repeatedly, refused to bargain over this subject. The absurdity of Respondents’ accusations are demonstrated by even a cursory examination of the record. While at first glance, the Union’s union-security proposal requires agency-fee payers to pay fees equivalent to dues, the proposal also states that its terms are interpreted in light of applicable NLRB and court decisions, and that nothing is intended to cause an employer to violate the law. The Supreme Court has held in the context of a union-security clause, “membership” in the Union is a term of art. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46-48 (1998). Mitchell, an attorney who has admittedly practiced exclusively in the field of labor and employment for over three decades, should have appreciated the legal meaning of the Union’s proposal and that “compliance with standards permitted by NLRB and court decisions relating to Union shop requirements” would include such seminal decisions such as *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), *CWA v. Beck*, 487 U.S. 735 (1988), or *California Saw & Knife Works*, 320 NLRB 224 (1995). Instead, Mitchell chose to ignore these cases, and read his claimed “100%” figure into the Union’s contract proposals. Thereafter, he accused the Union’s representatives of verbally repeating this unlawful “100%” demand, which Compher and Provost have denied. Although other Respondent representatives were present during bargaining on

November 6, including NAS Pax River Manager Evans, Respondent chose not to present any of these representatives to rebut the Union's denials. Instead, the evidence shows that not only does the Union deny that it ever demanded that all employees pay 100% of dues, to the contrary, Compher and Provost both testified that they offered to explain nonmember and objector statuses to any interested employee.

In sum, the evidence shows that Respondent was trying to disrupt the bargaining process and frustrate any attempt to reach a common ground with the Union by repeatedly taking contradictory positions. Respondent continued to insist that higher Union officials could negotiate over agency fees, but then refused repeated offers to speak with these officials; Respondent repeatedly showed interest in bargaining over the amount of dues or fees, while at the same time expressing philosophical objections about employees having to pay dues in the first place; and Respondent's fixation with implying a "100%" requirement into the Union's contract proposals while ignoring established jurisprudence can only be colloquially described as missing the forest by focusing on the trees.

6. *Respondent Presents an Illegal Proposal that Prohibits Employees From Picketing Under All Circumstances.*

Respondent's Proposal B includes a provision stating that "[t]here will be no picketing of any kind by employees represented by the Union..." However, employees' right to picket is protected by Section 7 of the Act, and the Union cannot waive this right under all circumstances. In *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322 (1974), the Supreme Court held that a union cannot waive employees' Section 7 solicitation rights. Therefore, the Union could not lawfully agree to Respondent's proposal to eliminate employees' right to picket in all circumstances, and consequently, Respondent's proposal involved an illegal subject of

bargaining. Illegal subjects of bargaining are those which are unlawful or inconsistent with the basic policy of the Act. Parties are forbidden to bargain over illegal subjects, and may not lawfully be included in a collective-bargaining agreement. *National Maritime Union (Texas Co.)*, 78 NLRB 971, 981-982 (1948), *enfd.* 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950); *Massillon Community Hospital*, 282 NLRB 675, 676 (1987). Although the *mere proposal* of an illegal subject is not independently unlawful, the totality of the evidence in this case shows that this illegal proposal was part of Respondent's overall plan to frustrate agreement with the Union. *Register Guard*, 351 NLRB 1110, 1120 (2007). It is axiomatic that because an illegal subject may never be properly included in a collective-bargaining agreement, the proposal of such a provision demonstrates an unlawful intent to avoid good-faith bargaining.

While the judge did not explicitly pass on the substantive legality of Respondent's picking proposal, he properly concluded that this late proposal was an indicia of Respondent's bad-faith bargaining. As stated in his decision at page 31 in footnote 30, Judge Fine found that Respondent's first-time proposal of such an important and legally complex provision, without any justification, during a late stage of bargaining was "part and parcel of its conduct designed to frustrate agreement and constitutes strong indicia that it was engaged in surface bargaining."

7. *Respondent Unlawfully Conditions its Contract Proposals Upon Approval by the United States Government, and Withdrew its Proposals Because the Union Did Not Accept Them in Time to Be Approved by the Government.*

Respondent admits that it informed the Union during bargaining on November 6 that it was withdrawing its proposals *on all subjects* if the Union did not accept Respondent's contract offers before the December 1st deadline for government reimbursement. Respondent excepts to this finding by claiming the judge found that Respondent's proposals were never withdrawn. (Exception 1) Respondent has misread the judge's decision. The judge found that Respondent

withdrew its proposals as of December 1, which Mitchell admitted at trial, regardless of whether the Union representatives heard such a threat on November 6. The judge also found that Respondent wanted the Union to believe that its October 8 offer was withdrawn and supplanted by Proposal B. Neither of these facts are contradictory to the judge's findings that Respondent unlawfully withdrew its proposals because the Union did not accept them by December 1.

It is well-settled that employers subject to the Service Contract Act cannot condition bargaining on reimbursement from the government. *Dynaelectron Corp.*, 286 NLRB 302, 305 (1987). Although the United States government is not an "employer" within the meaning of Section 2(2) of the Act, Respondent admits that it is such an employer; therefore, it is solely Respondent's duty to bargain with the Union; *Management Training Corp.* 317 NLRB 1355, 1358 (1995). In *Dynaelectron*, the Board rejected the employer's argument that it could not bargain with the union because it would not be reimbursed by the Navy for the cost of increased wages. 286 NLRB at 304. As these cases make clear, the Service Contract Act only sets the minimum wages and benefits for the unit employees, and Respondent is free to provide any additional benefits it chooses. *Dynaelectron*, 286 NLRB at 302; *Management Training Corp.*, 317 NLRB at 1358. At trial, Respondent admitted that this was the case.

Respondent's withdrawal of its offers erased months' worth of bargaining between the parties. Further, even if Respondent arguably had some cause to retract its economic proposals, it has given no justification for withdrawing its proposals on *all* subjects. Respondent's withdrawal of all of its proposals provides evidence of its unlawful intent not to reach an agreement with the Union. Respondent was in complete control of the unlawful proposals it made on November 6, and by using the Union's predictable reaction as an excuse to withdraw all of its lawful proposals, Respondent seeks to escape the consequences of its bad-faith bargaining. Without the

reinstatement of Respondent's October 8 proposal, the Union would be forced to resume bargaining from a position created by Respondent's bad-faith conduct. It is respectfully urged that the Board should affirm the ALJ's findings to require that Respondent reinstate its October 8 proposal, including all tentative agreements, and thereby restore the lawful status quo.¹⁸

Finally, Respondent's incorrect claims in Exception 9 that the General Counsel did not seek the reinstatement of its October 8 proposal as a remedy for its violations. Moreover, Respondent's claim that the Board is "making contract proposals for the parties" is similarly unsupported. Rather, the General Counsel is requesting that Respondent return to the status quo, and that it should be denied any benefits that may have accrued as the result of its unlawful bargaining.

8. *Respondent Falsely Informed Employees that the Only Issue Preventing an Agreement was Union Security.*

An employer's conduct away from the bargaining table is relevant to whether it has engaged in good-faith bargaining. *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991). After negotiations on November 6 broke down, Respondent published a memorandum to employees informing them that all pay and benefits items were agreed upon, and that the only issue discussed was union security. The memo continued that because the Union was unwilling to compromise on union security, the negotiations broke down. The facts outlined above show that this memo is objectively false. At the conclusion of bargaining on November 6, there were several open subjects such as subcontracting, grievance-arbitration, and shoe allowance.

¹⁸ An order requiring Respondent to restore its October 8 proposal is not contrary to *H.K. Porter v. NLRB*, 397 U.S. 99 (1970) because the October 8 proposal was "formulated and voluntarily offered" by Respondent, and therefore its reinstatement does not amount to a compelled agreement of concession and is consistent with Section 8(d). *The Mead Corp.*, 256 NLRB 686, 687 (1981).

In its Exception 14, Respondent seeks to rely on a conversation on November 28 to show that its earlier memo was truthful. Not only is this illogical, it misrepresents the November 28 conversation. There was never any finding, and the testimony cited by Respondent does not support such a finding, that the only issue separating the parties was union security. In fact, *in that very same Exception*, Respondent cites where the Union believes there are *two* open issues. The record makes clear, and the judge properly found, that at the end of bargaining on November 6, there were several substantive open issues, and not the one issue that Respondent falsely told its employees.¹⁹

This memo is plainly designed to inject a wedge between the employees and the Union by creating an impression the Union only cares about getting dues from employees. This memo falsely states that all wages, benefits and other terms have been agreed to, and but for the Union's insistence that all employees pay dues, the employees would have a signed contract with its attendant benefits. The Board has found that publishing a false memo to employees that blames the union for events in bargaining is an indicia of bad faith. *Hydrotherm*, 302 NLRB at 996, 1004-1005 (memo falsely stated that union was responsible for a delayed wage increase.)²⁰

¹⁹ In fact, had there not been open issues, the General Counsel's position is that Respondent would have compounded its unlawful conduct by insisting on a permissive subject (the amount of fees paid by nonmembers) to the point of impasse.

²⁰ Respondent attempts to excuse its false memo by claiming the Union issued a response. (REx 6, 8, and 9; Tr. 114:14-24 "Your Honor, they reflect and put into context General Counsel's Exhibit 8, the company's communication, and show that the union was communicating with the employees, and the union responded fully and promptly to anything that it saw as miscommunications in General Counsel's Exhibit 8." Indeed, it is a perplexing defense to claim one's statements were not false because the other party corrected them for you. Additionally, Respondent presented no evidence that it ever disavowed or retracted any of the statements in its memo to employees.

B. The Relief Sought in the Amended Complaint is Necessary to Remedy Respondent's Unlawful Conduct.

1. An Extension of the Certification Year and a Bargaining Schedule are Warranted.

The General Counsel respectfully urges the Board to adopt the ALJ's Order granting the relief sought in the amended complaint to ensure a complete remedy for Respondent's unlawful bargaining. The General Counsel seeks an order that requires an extension of the certification year for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), and Respondent has not excepted to this remedy. Further, the General Counsel seeks an order that Respondent be required to bargain on a set schedule with the Union. Because this is a newly-certified bargaining unit, the relationship between the employees and the Union is particularly vulnerable to the effects of Respondent's unfair labor practices. A bargaining schedule will demonstrate to the employees that the Union is willing to bargain collectively on their behalf when given the opportunity, and that their selection of the Union as their collective-bargaining representative was not futile.

Respondent claims in its exceptions that a bargaining schedule is inequitable because it "is pure vindictiveness" to make Respondent travel to Maryland for negotiations. Yet, it is absurd for Respondent to complain about the costs to negotiate at a place where it has voluntarily chosen to do business. There is nothing vindictive in requiring Respondent to negotiate where all of the bargaining-unit employees work, where the Union is located, and, most importantly, where it has chosen to bid for and perform the work from which it derives its income.

Finally, an extension of the certification year and a bargaining schedule will help to ensure that meaningful bargaining takes place before the expiration of additional contract years between Respondent and the Navy. Thus, these remedies will improve the chances that a

collective-bargaining agreement can be reached before the next December 1 deadline and will, to some extent, make up for the set back in bargaining caused by Respondent's bad faith conduct.

2. *Respondent Should Be Required to Reinstate the Terms, Including All Tentative Agreements, from its October 8, 2008 Proposal.*

As also described above, Respondent's withdrawal of its offers erased months' worth of bargaining between the parties and, if permitted, would allow Respondent to escape the consequences of its bad-faith bargaining. Moreover, without the reinstatement of Respondent's October 8 proposal, the Union would be forced to resume bargaining from a position created by Respondent's bad-faith conduct. Therefore, it is respectfully urged that the Board should require Respondent to reinstate its October 8 proposal, including all tentative agreements, and thereby restore the lawful status quo.²¹

In its Exceptions 1 and 13, Respondent argues that if it is required to restore its last offer, without regard for the contractual approval process with the Government, Respondent will not have the financial means to maintain its proposals on wages and benefits. However, Respondent erroneously conflates bargaining with an agreement. The judge properly ordered that Respondent must restore the status quo by reinstating its last lawful offer (which the Union may or may not accept.) Respondent, in trying to avoid the consequences of its unlawful conduct, now tries to persuade the Board that: *if* it is forced to reinstate its last offer, and *if* the Union agrees to accept that offer, then Respondent argues that it will not be able to pay for the wages and benefits in such a contract. This "harm" is speculative: it is not for the Board to presume what the product of the parties' lawful bargaining will be. Rather, it is well within the Board's remedial authority to

²¹ Respondent has argued that any unlawful conduct was mitigated by its February 2009 proposal. This argument should be rejected. Respondent's February 2009 proposal does not disavow any of Respondent's November 2008 behavior. But most importantly, Respondent's February 2009 proposal seeks to place the onus of Respondent's unlawful conduct on the backs of its employees, by denying them a wage increase for another year.

try to put the parties back in the situation they would have been in but for Respondent's unlawful conduct. The most logical remedy, therefore, is to require Respondent to restore its last lawful offer. Is it conceivable that after bargaining resumes, a contract will be reached, and from the mere passage of time that Respondent's liability to its employees will be greater? Of course. However, it is equally conceivable that Respondent will have some change in circumstances or will devise a previously-unthought-of solution to its speculative problem. Instead, Respondent seeks to place the onus of its unlawful bargaining on the Union, and by extension, the unit employees, by forcing them to begin bargaining from scratch.

In sum, Respondent now claims there is a *possibility* that it will suffer financial consequences if it is forced to remedy its unlawful conduct. Even if this possibility were to eventually become reality, this hardship is more properly placed on Respondent, whose own volitional and unlawful conduct created this situation, rather than inflicting further punishment on the unit employees.

3. *Respondent Should be Required to Reimburse the Union For the Costs of Bargaining on November 6.*

As the record evidence demonstrates, Respondent required the Union to travel from Maryland to Alabama for the purpose of subjecting the Union to its unlawful conduct. Almost as soon as bargaining began, Respondent presented its unlawful Proposal B and continued on this path for the remainder of negotiations. The imposition of bargaining costs is particularly appropriate where the evidence shows that Respondent prepared its unlawful Proposal B in advance of bargaining on November 6, and then made the Union travel hundreds of miles away from Respondent's NAS Pax River facility, the Union hall, and all of the bargaining unit employees. It was entirely foreseeable that Respondent's prepared proposal would derail the

bargaining process, and it was likewise feasible that the Union would incur substantial costs to become the victim of Respondent's unlawful conduct. Therefore, it is respectfully urged that the Board affirm the ALJ's Order requiring Respondent to fully reimburse the Union for all costs and expenditures (with the exception of the meeting space), including reasonable salaries, monies lost due to absence from work, and travel expenses, incurred by it during the preparation for, and participation in, collective-bargaining negotiations on November 6, 2008.

V. CONCLUSION

In sum, Respondent has maintained its philosophical objection to union security throughout the course of bargaining with the Union. On November 6, Respondent made a "concession" by offering dues check-off. Yet, this sole concession was accompanied by regressive, unreasonable, unjustified, and even illegal proposals, most of which are completely unrelated to the issue of union security. After the Union predictably objected to Respondent's conduct, Respondent blamed the breakdown of negotiations on the Union, and informed employees that their awaited wage increases were being held hostage to the Union's insatiable appetite for dues. Moreover, Respondent chose to time its unlawful bargaining just before the renewal date of its contract with the government, thereby compounding its unlawful conduct by withdrawing its contract proposals, and allowing it to further profit from its refusal to bargain in good faith.

After examining the totality of the circumstances, Respondent's conduct during bargaining shows that Respondent was not approaching negotiations with the required "open mind and a sincere desire to reach an agreement" or an intent to "reach a common ground." Rather, the evidence shows that Respondent deliberately frustrated the bargaining process to

avoid reaching an agreement with the Union. The evidence shows that there is ample cause for the Board to affirm the judge's findings that Respondent has violated Section 8(a)(1) and (5) of the Act.

Respectfully submitted,

/s/ Patrick J. Cullen

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National Labor Relations Board

Dated this 21st day of December, 2009.

STATEMENT OF SERVICE

I hereby certify that on the 21st day of December, 2009, the Answering Brief of the Counsel for the General Counsel was been submitted by E-Filing to the Executive Secretary of the Board, and that copies were served by e-mail on the following parties:

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