UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

LANDMARK FAMILY FOODS, INC. d/b/a CHURCH SQUARE SUPERMARKET	
and	**CASE NOS. 8-CA-37667** **8-CA-38794**
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 880	

ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

JUN S. BANG, ESQ.
National Labor Relations Board
Region 8
1240 East 9th Street, Room 1695
Cleveland, OH 44199
Counsel for the General Counsel

DANIEL S. WHITE, ESQ.
Schwarzwald, McNair & Fusco LLP
616 Penton Building
1300 East 9th Street
Cleveland, OH 44114
Counsel for Charging Party

FRED S. PAPALARDO, Esq.
Reminger Co., L.P.A.
1400 Midland Bldg
101 Prospect Ave.
Cleveland, OH 44115
Counsel for Respondent

TABLE OF CONTENTS **Page**

TABLE OF AUTHORITIES **PAGE**

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

LANDMARK FAMILY FOODS, INC. d/b/a CHURCH SQUARE SUPERMARKET	
and	**CASE NOS. 8-CA-37667** **8-CA-38794**
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 880	

ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

This matter comes before the Board as a result of the decision issued by Administrative Law Judge Jeffrey Wedekind ("ALJD") on November 2, 2010. The hearing was the result of an Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 8 on April 30, 2010 alleging that Landmark Family Foods, Inc. d/b/a Church Square Supermarket (herein called Respondent, Landmark, or Church Square) violated Section 8(a)(5) and (1) of the Act, as amended. Respondent filed exceptions to the Administrative Law Judge's decision on November 29, 2010. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel submits this Answering Brief in response to Respondent's exceptions.

I. EXCEPTIONS

Respondent's Exceptions are as follows:

A. Whether the "Administrative Law Judge erred in finding, as set forth on page 8 of his decision, that Respondent had not reached valid impasse entitling it to make unilateral changes in benefits" (1st Exception);

B. Whether the "Administrative Law Judge erred in finding, as set forth on page 15 of his decision, that in light of all of the facts and circumstances, Respondent acted in bad faith and in violation of the Act in responding to the Union's requests for financial statements, and in failing to find that Respondent was justified in its delay in responding to these requests" (2nd Exception); and

C. Whether the "Administrative Law Judge erred in finding, as set forth on page 9 of his decision, that the Union remained flexible and willing to bargain in good faith through the negotiations process" (3rd Exception).

II. PORTIONS OF RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS SHOULD NOT BE CONSIDERED BECAUSE THEY GO BEYOND THE SCOPE OF THE EXCEPTIONS

Respondent has made broad claims in its supporting brief under the heading Statement of the Case which go beyond the scope of its exceptions, thereby making the claims inappropriate for consideration by the Board. Pursuant to Section 102.46(2)(c), the brief in support of the exceptions cannot contain any matter "not included within the scope of the exceptions." The statement of the case should contain "all that is material to the consideration of the questions presented." (Section 102.46(2)(c)(1).

A. Respondent's argument that there was a "handshake agreement" not to include every employee in the unit should be precluded from consideration by the Board.

Respondent asserts in its brief that the prior collective bargaining agreements "were entered into with the understanding that the Union would not require every employee of Landmark to be included in the unit." (Respondent's Brief p. 1). This argument is not appropriate for consideration because it does not relate to any exception filed by Respondent. Respondent's exceptions are limited to whether a valid impasse entitled it to make unilateral

changes in benefits, whether it engaged in bad faith bargaining and whether the Union remained flexible in negotiations. Whether certain employees were included in the bargaining unit does not address Respondent's limited exceptions. Even if the argument was properly asserted, the ALJ discussed this specific defense in determining that Respondent failed to make required benefit contributions for certain employees from September 6, 2007 through January 31, 2008 and thus violated Section 8(a)(5) of the Act. (ALJD p. 4). On Page 5 of his decision, the ALJ noted that Respondent's only defense to this specific allegation purported to be "an informal 'handshake' agreement or understanding not to sign up or include all employees in the unit." Respondent has not filed any exception to this specific Section 8(a)(5) violation thereby waiving this argument. "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived." Section 102.46(b)(2).

Furthermore, the evidence supports the ALJ's determination that Respondent's defense is without merit. The ALJ found that Si Harb's testimony could not alter the terms of the written contract under the parole evidence rule to show that the parties' intent was contrary to the plain language of the contract. (ALJD p. 5). Although parole evidence can, in certain cases, be used to show the parties' past practice, the ALJ discredited Si Harb's testimony and found that Respondent failed to show that the parties had a past practice of not including every employee in the bargaining unit. (ALJD 5-6). The ALJ credited the testimony presented by Mike Krzys and Bill Marks who testified that there was no "handshake" agreement. (ALJD p. 6; Tr. 453, 461-466, 1123, 1129-1130). Respondent's Counsel, David Levine, also testified that the contract required all the employees to be in the bargaining unit. (Tr. 1129-1130).

The ALJ's credibility determination is also supported by the evidence. Bill Marks testified that when he serviced Respondent as a Business Representative in the mid-1990's, he

performed random checks to determine whether or not all of Respondent's employees were signed up in the Union. (Tr. 1215-1216). Marks would bring an audit report with him which listed the bargaining unit employees reported by Respondent and match the list with the timecards at the store. *Id.* If he found employees had not been signed up, then Marks would sign up the employees while he was there. (Tr. 1217). Marks also testified that when he performed these spot checks, Harb would ask him what he was doing there. (Tr. 1217-1218). Marks told Harb that he was there to sign everyone up. *Id.* Marks testified that Harb would call David Levine and then Marks conversed with Levine. (Tr. 1218). Marks testified that Levine would comment, "Why are you picking on the little guy?" (Tr. 1218-1219). Marks testified that he told Levine that he was there to sign everyone up and that there were no deals. (Tr. 1219).

On cross-examination, Fred Papalardo, Respondent's Counsel at trial, questioned Marks about whether there were any deals with Respondent or other employers about not signing everyone up and Marks' testimony remained the same: "There are no deals." (Tr. 1267, 1269). Marks further testified on cross-examination that other independent stores such as Dave's, Zagara's, and Forest Hills also had problems signing people up but there were still no deals. (Tr. 1269).

Thus, even if it was appropriate to consider, there is no evidence to support Respondent's argument that a "handshake agreement" existed between the parties.

B. Respondent's argument that the Union audited Respondent as a strong arm tactic should be precluded from consideration by the Board.

Respondent also attempts to argue that the "Union used its powers and resources against this single store to conduct audits (the Union claims the audits are a fiduciary duty but in practicality are a strong-arm tactic to get the employer to agree to its terms as the Union already was aware of what the audits would show) and initiate litigation." (Respondent's Brief p. 1-2).

First, this argument goes beyond the scope of any identified exception and thus is not appropriate for consideration. Second, even if the argument was properly asserted, the facts do not support Respondent's argument. Landmark has not been audited by the Union but by the Health and Welfare Fund and the Joint Pension Fund[1] (collectively the "Funds").[2] (Tr. 522) Moreover, the audits have shown that Landmark has repeatedly failed to pay contribution benefits for its employees. In fact, Si Harb admitted on cross examination that the Funds found that he failed to pay on eligible employees in every audit conducted. (Tr. 856). The Funds initiated a payroll audit for calendar year 2005 against Landmark in June 2006, months before Krzys and Levine sat down for their first bargaining session on January 15, 2007.[3]

Thus, even if the issue were appropriate to consider, there is no evidence that the Funds initiated the June 2006 audit as a strong arm tactic against Respondent to influence negotiations.[4]

C. Respondent's argument that there was no communication for a year and a half subsequent to impasse should be precluded from consideration by the Board.

Respondent's factual assertion that there was no communication for a year and a half subsequent to impasse is not appropriate for consideration because it goes beyond the scope of the exceptions. Respondent has not filed any exception which addresses the time period asserted by Respondent which appears to be from February 2008 through August 2009. The ALJ's finding against Respondent for bad faith bargaining identified in the Second Exception is limited

[1] The full name of the Fund is the United Food and Commercial Workers Union Local 880 Retail Food Employer Joint Pension Fund ("Joint Pension Fund" or "Pension Fund").

[2] Dennis Vezzani, a Certified Public Accountant, was hired by the Funds to perform payroll audits of Respondent. (Tr. 488, 522). Vezzani testified that he began performing a payroll audit of Respondent for calendar year 2005 around June 15 2006. (Tr. 488-489; G.C. Exh. 33).

[3] Dennis Vezzani testified that he began performing a payroll audit of Respondent for calendar year 2005 around June 15, 2006. (Tr. 488-489; G.C. Exh. 33). The payroll audit looked at Respondent's payroll records to ensure that proper contribution amounts were being paid to the Health and Welfare and Pension Funds. (Tr. 489; 521-522; G.C. Exh. 33). Vezzani further testified that he had difficulty getting the records for the audit from Respondent's Counsel David Levine. (Tr. 493; G.C. Exh. 88). In fact, because of the delay in receiving records, Vezzani was unable to issue a final report until June 2008 for the 2005 calendar year payroll audit. (Tr. 496).

[4] Respondent may be confused with the audit performed at Forest Hills, which began during negotiations around January 17, 2008 for calendar year January 1, 2007 through December 31, 2007. (Tr. 498; G.C. Exh. 91).

to the time period after August 2009 (other than the February 1, 2008 unilateral changes). The ALJ's findings with respect to the Union's good faith bargaining discussed in the Third Exception is limited to the 2007-2008 negotiations before the February 1, 2008 unilateral changes.

Even if Respondent's argument was properly made, there is overwhelming evidence to contradict Respondent's argument. The parties bargained either by phone or in person several more several times after February 1, 2008. (ALJD p. 9; Tr. 298-309, 317-383, 393-394). After David Levine informed the Union that Respondent was losing money during a face to face bargaining session on April 2, 2008, the Union requested to see Respondent's financial statements. (Tr. 627-628). When no response was received, the Union followed up with Levine by phone on April 7, 2008 and by letter dated April 24, 2008 requesting Respondent to submit counterproposals and the financial information. (Tr. 384; G.C. Exh. 21). Levine never provided any proposals and never responded to the Union's request for financial information. (Tr. 384-385). The Union pursued these issues in a charge filed with the Regional Office and a hearing was scheduled for October 27, 2008.

Respondent's argument also ignores the fact that it breached the non-board settlement agreement reached between the parties on October 27, 2008, which led to subsequent federal litigation and was a reason for Respondent's failure to go back to the bargaining table. (ALJD p. 4 (Footnote 7) and 14; Tr. 995; G.C. Exh. 45). After execution of the non-board settlement agreement, the Respondent ignored the Union's repeated requests for Respondent to provide information and to return to the bargaining table. (Tr. 386-391; G.C. Exhs. 46, 47, 48, and 49) Therefore, the evidence shows that Respondent was the party responsible for any lack of

"communication" since Respondent failed to respond to the Union's request for information and to bargain.

III. RESPONDENT'S FIRST EXCEPTION IS WITHOUT MERIT BECAUSE THE UNILATERAL CHANGES WERE UNLAWFUL REGARDLESS OF WHETHER IMPASSE EXISTED AS OF FEBRUARY 1, 2008.

Respondent's First Exception attacks the Administrative Law Judge's ("ALJ") finding on page 8 that Respondent had not reached valid impasse entitling it to make unilateral changes. Respondent's exception improperly characterizes the ALJ's finding. On page 7 of his decision, the ALJ concluded that Respondent unlawfully ceased contributions to the Health and Welfare and the Joint Pension Fund and unilaterally changed the health insurance provider beginning February 1, 2008. As noted in the ALJ decision, it is undisputed that Respondent unilaterally ceased making benefit contributions and changed their health insurance provider. (ALJD p. 7).

The Respondent does not dispute that it made the unilateral changes but argues in its brief that it was entitled to make the unilateral changes after impasse was reached in January 2008. Respondent is under the mistaken belief that a finding of impasse would excuse Respondent's cessation of contributions to both Funds. Respondent fails to understand that its unilateral changes were unlawful regardless of impasse.[5] Although impasse is a generally recognized exception permitting unilateral changes, the ALJ found that it was "irrelevant whether there was an impasse in January 2008, as Respondent's unilateral changes would violate Section 8(a)(5) regardless." (ALJD p. 8). The ALJ found that the unilateral changes were unlawful not because the parties failed to reach impasse but because Respondent failed to submit any proposals during negotiations about ceasing payments to both the health and welfare and pension funds prior to

[5] The ALJ noted in his decision that Respondent's failure to pay benefit contributions on behalf of certain employees from September 7, 2007 through January 31, 2008 could also preclude an impasse argument. However, the ALJ found it unnecessary to determine whether these unilateral changes were sufficiently serious enough to preclude impasse since there was no impasse as of February 1, 2008 based on other relevant factors. (ALJD p. 8-9, Footnote 15).

the unilateral action. Respondent also failed to make any proposals concerning changing its health insurance carrier to Anthem Blue Cross. (ALJD p. 8;Tr. 324, 1147-1148, 1155-1156). In fact, "Respondent made no written proposals whatsoever during the first year of negotiations." (ALJD p. 7).

The ALJ's legal determination was proper pursuant to Board Law. It is well-settled Board law that impasse only allows an employer to implement proposals that are not substantially different from the ones proposed during negotiations. ***Atlas Tack Corp***., 226 NLRB 222, 227 (1976), *enf'd*, 559 F.2d. 1201 (1st Cir. 1977).[6] The Board found in ***Stone Board Yard***, 264 NLRB 981 (1982) that the employer violated the Act when it ceased making payments to the union's health and welfare and pension plans and implemented its company-funded health plan. In ***Stone Board Yard***, the Board found that the parties could not have bargained to impasse because the employer never provided the union with "any type of written or detailed proposal of changes in the expired contract." 264 NLRB at 982.

The facts also support the ALJ's determination. It is undisputed that Respondent did not make any proposals to the Union about changing health insurance carriers to Anthem or to just stop paying the contribution benefits. Levine admitted on cross-examination that he never proposed changing health insurance coverage for unit employees to an Anthem Blue Cross plan. (Tr. 1147). Union Bargaining Representative Mike Krzys confirmed that Respondent never made any proposals or provided any information before February 1, 2008 about changing health

[6] Respondent is different from the employer in ***Newcor Bay City Division of Newcor, Inc***., 345 NLRB 1229 (2005). The employer in ***Newcor Bay*** informed the union that they were at impasse and implemented the last proposal it had provided to the Union. Church Square, on the other hand, never declared impasse and never provided the Union with any proposals ceasing contributions to health and welfare and pension or changing the health insurance carrier before the unilateral changes.

and dental insurance to Anthem or withdrawing from the Union's Health and Welfare Fund.[7] (Tr. 324). Krzys testified that prior to the change in health and dental coverage, he did not receive any information from Respondent about changing insurance carriers, the name of the new insurance carrier or any costs associated with a new carrier. (Tr. 324, 326). In fact, Krzys testified that he did not know the name of the new insurance carrier until the trial in October 2008. (Tr. 326). Under the last signed contract, Respondent was required to pay monthly contributions on behalf of eligible employees to the Union's Health and Welfare Fund. (Tr. 325). Furthermore, there were cheaper plans under the Union's Health and Welfare Fund which Respondent could have proposed but did not. (Tr. 472). The Respondent did not notify the Union about any changes to health and welfare or pension either at the February 1, 2008 session or at any session before that date. (Tr. 1147).

It is also undisputed that Respondent never proposed changing Church Square's participation in the Pension Fund. (Tr. 1148). Levine admitted that he never made any proposal during negotiations to stop paying into the Pension Fund or to suggest an alternative to the Pension Fund. (Tr. 1148). Krzys also testified that Respondent never made any proposals during negotiations about ceasing contributions to pension. (Tr. 329). Under the last signed contract, Respondent was obligated to pay $.62 per hour for each eligible employee. (Tr. 204). Thus, even if Respondent did not agree with the Union's proposal to increase pension contributions by $.30 per eligible employee, it never proposed dropping participation in the Joint Pension Fund.

At best, Respondent made some oral proposals about changing coverage and payment contributions under the existing health insurance and pension benefit plan. (Tr. 224-295; ALJD

[7] February 1st is the date listed in G.C. Exh. 2(b) which Respondent states is the date that it changed health and dental insurance to a new carrier.

p. 7-8). However, Respondent never made any proposals ceasing employer contributions to the health and welfare and pension plan and/or changing the health insurance provider. (Tr. 1147-1148; 1155-1156; ALJD p. 7-8). Therefore, the ALJ's legal determination that Respondent's unilateral changes were unlawful because Respondent failed to make any proposals concerning the cessation of benefits or changing health insurance carrier prior to February 1, 2008 was proper and should not be overturned.

A. Respondent' argument of inability to pay or economic exigency is without merit.

Respondent's brief fails to address the ALJ's legal determination described above regarding the unilateral changes at all. Rather, Respondent argues that it was allowed to make the unilateral changes because it "did not have the resources to comply with the Union's demands" and contends that the unilateral changes were "necessary to maintain Respondent's financial viability, even if Respondent was not yet taking on new or increased obligations posed by the Union." (Respondent's Brief p. 4-5). Respondent is attempting to assert that it could not afford the Union's proposal with respect to the benefit contributions.[8] However, Respondent's inability to pay is not a defense to the unilateral action.

It is well settled Board law that financial inability to pay is not a defense to a charge that the employer violated Section 8(a)(5) and (d) of the Act. ***Navigator Communications Systems, LLC***, 331 NLRB 1056 (2000); ***Trojan Mining Processing***, 309 NLRB 770 (1992), *enf'd*, 993 F.2d 1547 (6th Cir. 1993); ***Crest Litho,*** 308 NLRB 108 (1992). More significantly, financial difficulty is not a defense when an employer fails to make required payments into the health and welfare and pension fund. ***Isratex Inc***., 316 NLRB 135 (1995) (holding that employer's

[8] The Union had proposed a pension contribution increase of $.30 on behalf of eligible employees. To offset the pension increase, the Union changed various portions of its proposals and agreed to changes proposed by Levine during negotiations.

bankruptcy filing was not a defense to make required payments to the welfare fund); ***Nick Robilotto, Inc***., 292 NLRB 1279 (1989) (finding that inability to pay was not a defense to employer's refusal to provide fringe benefit reports and make pension contributions); ***Air Convey Industries***, 292 NLRB 25 (1988) (finding that even though inability to pay was undisputed, employer's failure to pay fringe benefits funds was a violation of Section 8(a)(5) of the Act).

In further support of its First Exception, Respondent argues that the ALJ "suggest[ed] that there was no 'economic exigency' that prevented Respondent from maintaining current benefits." (Respondent's Brief p. 5). Respondent contends that the "ALJ erred in failing to recognize the pension fund contributions as a fundamental issue substantial enough to justify impasse" and thus "erred in finding that no valid impasse existed as of February, 2008." (Respondent's Brief p. 5). However, Respondent did not plead economic exigency as an affirmative defense in its Amended Answer.[9] (G.C. Exh. 1(x)). In Footnote 13, the ALJ found that Respondent had not contended that the February 1, 2008 unilateral changes were compelled by a dire financial emergency or other economic exigency. (ALJD p. 7). Therefore, Respondent is precluded from asserting an economic exigency argument post-hearing. *See* ***Anthony Motor Co., Inc***, 314 NLRB 443, 449 (1994) (holding that the employer was procedurally barred from raising a bad-faith affirmative defense when it failed to plead it in the answer or raise it as a defense during the unfair labor practice hearing).

Even if the economic defense was properly asserted, Respondent did not fall under any exception allowing a unilateral change: there was no evidence of economic exigency and Respondent never informed the Union about its proposed unilateral changes. In other words,

[9] Respondent's Counsel confirmed at the hearing that he had no amendments to the Answer. (Tr. 9).

there were no "economic exigencies [to] compel prompt action" in order to allow Respondent to make a unilateral change. ***Master Window Cleaning, Inc.***, 302 NLRB 373, 374 (1994), enf'd, 15 F.3d 1087 (9th Cir. 1994). The Board has limited this exception to "extraordinary events which are 'unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" ***RBE Electronics of S.D***, 320 NLRB 80, 81 (1995) (*quoting* ***Hankins Lumber Co***., 316 NLRB 837, 838 (1995). The Board has found that a decline in sales (even over many months) was not the type of unforeseen exigency that would excuse a unilateral action. ***Toma Metals***, 342 NLRB 787 (2004) (finding that an employer's 50 percent decline in sales revenue over 6 months was a chronic condition and did not excuse unilateral layoff). Respondent has the "heavy" burden of proof to show that Church Square experienced such dire and unforeseen circumstances. ***Alpha Associates***, 344 NLRB 782, 785 (2005).

Even if this exception was applicable to Respondent in the instant case, economic exigency only permits the employer to make unilateral changes after giving notice and an opportunity to bargain with the Union over the change. *See* ***RBE,*** 320 NLRB at 82**.** Since Respondent failed to provide any proposals ceasing contributions or changing health insurance, economic exigency is not a proper defense to the unilateral action.

Thus, Respondent's argument of inability to pay or economic exigency is without merit.

IV. RESPONDENT'S THIRD EXCEPTION IS WITHOUT MERIT BECAUSE THE EVIDENCE SUPPORTS THE ALJ'S DETERMINATION THAT THE UNION ENGAGED IN GOOD FAITH BARGAINING PRIOR TO RESPONDENT'S UNILATERAL ACTION ON FEBRUARY 1, 2008 AND AFTER FEBRUARY 1, 2008.

Even assuming arguendo that Respondent's oral proposals were sufficiently similar to the unilateral changes, the ALJD properly determined that Respondent failed to establish that a genuine impasse existed as of February 1, 2008. (ALJD p. 8). In pages 9-10 of his decision, the

ALJ found that "both parties demonstrated flexibility and a willingness to compromise on these issues during the negotiations." (ALJD p. 9). In its Third Exception, Respondent has excepted to the specific finding "set forth on page 9 of his decision that the Union remained flexible and willing to bargain in good faith throughout the negotiations process." The ALJ's determination should not be overturned because the evidence supports the ALJ's finding that the Union was flexible and willing to compromise during negotiations.

A. The evidence shows that impasse did not exist as of February 1, 2008 because the Union was flexible and willing to negotiate in good faith during the 2007-2008 negotiations.

Counsel for the General Counsel has already argued in this brief that Respondent's unilateral changes were unlawful regardless of impasse because Respondent failed to make any proposals ceasing benefit contributions or changing insurance carriers. Even assuming arguendo that Respondent's oral proposals were sufficiently similar to the unilateral changes, the ALJD properly determined that Respondent failed to establish that a genuine impasse existed as of February 1, 2008. (ALJD p. 8). Although Respondent did not specify the time period for the negotiations in its exception, the ALJ's finding with respect to the Union's good faith bargaining was limited to the 2007-2008 negotiations. (ALJD p. 8-10). Therefore, Respondent's Third Exception is limited to the 2007-2008 negotiations.

In ***Taft Broadcasting Co***., 163 NLRB 475, 478 (1967), *enf'd sub nom*. ***Television Artists, AFTRA v. NLRB***, 395 F.2d 622 (D.C. Cir. 1968), the Board found that a question of whether a valid impasses exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." It was Respondent's burden to show

the existence of impasse in order to allow it to implement its final bargaining proposal. ***Cotter & Co***., 331 NLRB 787, 787-788 (2000); ***L.W.D., Inc***., 342 NLRB 965 (2004).

The crux of Respondent's argument is that the Union "never modified its pension proposal even after Landmark told the Union that it would not agree to the thirty cent increase." (Respondent's Brief p. 2-3). In other words, Respondent maintains that the Union was inflexible on the pension issue. However, there is overwhelming evidence to support the ALJ's determination that the Union was flexible and willing to negotiate during the 2007-2008 negotiations including on the issue of pension. Counsel for the General Counsel would highlight the following aspects of the 2007-2008 bargaining sessions.

January 15, 2007

The Union informed Respondent of the $.30 increase to pension at the very first bargaining session on January 15, 2007. However, the Union also presented several proposals to offset the pension increase. The Union proposed increasing the full-time benefit hours to 37, so an employee had to work more than 37 hours in order to receive full-time benefits. (Tr. 222). This proposal gave Respondent more flexibility because Respondent could staff the store with more part-time employees to reduce costs. (Tr. 222). By raising the eligibility of part-time employees to 37 hours, Respondent could immediately change benefit coverage if an employee changed from full-time to part-time. (226-227). This method was referred to as "two up, two down" where, if an employee dropped down for 2 months from full-time to part-time, the full-time benefit coverage changed immediately to part-time coverage. In the past, an employer had to wait 6 months before dropping the employee down to part-time coverage. (Tr. 227).

In addition, holiday pay language was slightly changed; the Union's proposal required employees to submit a doctor's note immediately upon returning to work if they were absent the

day before or the day after a holiday in order to be eligible for holiday pay. (Tr. 235-236). The Union also proposed a freeze on wages for the first year and then yearly increases of $.30 and $.20.

May 7, 2007

At the next session on May 7, Levine proposed having full-time employees wait one year before being eligible for health care coverage. (Tr. 226). The Union eventually agreed to this proposal, which was included in the Union's November 30th Memorandum of Agreement sent to Respondent. (G.C. Exh. 20(a) and (b)).

July 2, 2007

During the session on July 2, 2007, Levine mentioned that business was down, the employers had not seen an increase in business even with the TOPS grocery stores closing, and the other stores such as Dave's and Save-A-Lot were affecting business. (Tr. 244). Levine mentioned that the employers could not pay the pension increase and questioned whether the employees could pay their pension or co-pay for the benefits. (Tr. 245). Krzys testified that Levine would not identify which store was having problems.[10] (Tr. 245-246). Krzys offered to negotiate for each employer separately but Levine refused. (Tr. 246-247). Although pension contributions may have increased, the Union was seeking a mere $.50 wage increase over 3 years whereas the last signed contract included a $.55 wage increase for the contract term. (Tr. 246). Levine said that he would go back and talk with the employers about wages, pension and health and welfare. (Tr. 248).

[10] Levine was negotiating contracts on behalf of all four employers in the Eagle Supermarket Group, including Landmark, Forest Hills, Mentor Family Foods and Holzheimer Family Foods. (Tr. 208-209, 1101-1102).

Counsel for the General Counsel notes that this was the first time Levine mentioned to the Union that the grocery stores may not be able to pay the pension increase. However, Levine refused to identify which store was having problems and to negotiate separately for each store. (Tr. 246-247). Even though Levine mentioned that business was down and the employers wanted to reduce their benefit costs, he never made any specific proposals to the Union on how it wanted to obtain those reductions. (Tr. 247).

August 20, 2007

On August 20, 2007, Mike Krzys was present at the bargaining meeting along with Union Representative Bill Marks, Respondent's Counsel David Levine and Landmark owner Si Harb.[11] (Tr. 252). Levine proposed having a new classification called part-time grocery clerk, a classification found in the Cleveland Food Industry Contract but not in the contract with Respondent or the other employers.[12] (Tr. 253). Adding a part-time grocery clerk classification would reduce pension costs since Respondent would only have to pay $.50 on behalf of new employees hired into this classification. (Tr. 254). Although this proposal would create an entirely new classification, Krzys told Levine that the Union would take it under consideration. (Tr. 255). The Union eventually agreed to Respondent's proposal, which was included in the November 30th Memorandum of Agreement. (G.C. Exh. 20(a) and (b). With respect to wages, Levine proposed a total $.40 wage increase over three years for the top tier employees (who were not affected by the minimum wage plus language) with a split of $.20 in 2008 and $.20 in 2009. (Tr. 255). For new hires affected by the minimum wage plus language, Levine proposed using minimum wage with gradual increases topping out at $10.80/hour. (Tr. 258-259).

[11] This was the only bargaining session in 2007-2008 attended by Si Harb and Bill Marks.
[12] All of Respondent's proposals were made verbally during this meeting. (Tr. 258).

Levine also proposed removing the bonus language for employees. (Tr. 255). Levine proposed paying the $.30 pension increase retroactively over time and not as a lump sum for the 2007 contribution payments and $.30 going forward.[13] (Tr. 256). By paying the pension retroactively, the employees would be getting their pension accrual benefit for all the hours they had worked since the contract expired. (Tr. 257-258). The Union was open to each of Respondent's proposals. (Tr. 257, 260).

Counsel for the General Counsel argues that Respondent's contention that it could not afford to the pay the thirty cent pension has been rebutted by the negotiations that took place on August 20, 2007. Si Harb was present at the August 20th meeting and never informed the Union that Respondent could not afford the pension increase, that it could not pay the health and welfare costs, or the wage increases. (Tr. 252-260). In fact, Harb was present when Levine proposed paying the pension increase retroactively. Therefore, Harb's silence showed that Respondent did not object to the pension increase or the health and welfare proposal.[14]

October 2, 2007

At the next session on October 2, 2007, the Union agreed to Respondent's proposal for a new part-time grocery clerk classification whereby those employees would only have $.50 contributed to their pension.[15] (Tr. 266; G.C. Exh. 11). In other words, Respondent did not pay the $.30 pension increase for new part-time grocery clerks. As of October 2nd, the Union also agreed to allow the employers to make retroactive pension payments. Levine proposed doubling up retroactive pension contributions over an 8 month period totaling $1.22/hour. (Tr. 266-267).

[13] The Union's initial proposal requested paying the additional $.30 pension increase beginning February 3, 2007. Respondent was paying $.62 for eligible employees towards their pension under the last signed contract. Respondent was proposing to pay the additional $.30 increase retroactively over time.

[14] In his testimony, Harb never specifically rebutted Krzys' testimony that Levine proposed paying the pension increase retroactively over time and paying the $.30 increase going forward.

[15] Current bargaining unit employees would have $.92 contributed to their pension but new part-time grocery clerks would only have $.50 contributed to their pension.

During the October 2, 2007 session, Levine admitted that pension could be worked out. (Tr. 268).

November 6, 2007

During the November 6, 2007 bargaining session, Levine proposed a wage freeze for the first year and then yearly increases of $.25 and $.25 in the second and third years. However, when Levine realized that his proposal equaled the same amount the Union had initially proposed, he agreed to the Union's original proposal of a wage freeze the first year and then yearly increases of $.30 and $.20 in the second and third years. (Tr. 272-273). Levine agreed to the health and welfare proposal submitted by the Union at the earlier session. (Tr. 274). As of November 6th, Respondent had agreed to pay retroactive pension over time. (Tr. 274-275). Levine ended the session by stating to Krzys, "Get it to me and I'll get everyone to sign it."[16] (Tr. 275). As a result, the Union believed that the parties had reached an agreement and forwarded the Memorandum of Agreement.

November 30, 2007 Memorandum of Agreement

Krzys mailed a Memorandum of Agreement to Levine on November 30, 2007. (G.C. Exh. 20(a) and (b)).[17] (Tr. 276). The Memorandum of Agreement included all of Respondent's requested proposals as well as other beneficial proposals:

1) removal of the bonus language (Tr. 277);
2) the new part-time grocery clerk classification which lowered costs for pension contributions (Tr. 277-278);
3) the wage proposal for new hires where new hires would begin at minimum wage of $6.85 and max out at $10.80 (Tr. 277);
4) wage freeze the first year and then $.30 and $.20 yearly increases in the 2nd and 3rd year (G.C. Ex. 12(b), p.1);

[16] Krzys' testimony about his conversation with Levine on November 6, 2007 was not rebutted by Levine during the hearing. Rather, Levine only made conclusory statements that there was no overall agreement. (Tr. 1119, 1141).

[17] Krzys only mailed a Memorandum for Church Square because the parties' practice was to use Church Square as the lead store; the parties would adjust the headings with the other employers' names later. (Tr. 276-277).

5) reducing the maintenance of benefit language from 8% to 5% to reflect the standard at that time (Tr. 278-279);
6) increasing part-time hours to 37 (Tr. 278); and
7) increasing eligibility for full-time health coverage from six months to one year[18] (G.C. Exh. 12(b), p. 9).

Levine responded to the Union's proposed Memorandum of Agreement in a letter dated November 30, 2007 informing the Union that there was no agreement.[19] (G.C. Exh. 13). Levine admitted that when he wrote the November 30, 2007 letter, the Union was notified that as of February 3rd, "they would no longer abide by the terms of the contract" and "that really would set the date for the impasse." (Tr. 1196). So, according to Levine, Respondent knew on November 30, 2007 (the date of Levine's letter to Krzys) that come February 3, 2008, the parties would either reach an agreement or be at impasse.

By setting an arbitrary deadline without looking at the status of negotiations before February 1, 2008, Respondent improperly sought to create the conditions for an impasse. The Board has found an impasse to be invalid where the evidence showed that that the employer was determined to unilaterally implement reductions immediately upon the expiration of the agreement regardless of the state of negotiations. ***CBC Industries***, 311 NLRB 123, 127 (1993); ***Duane Reade Inc.***, 342 NLRB 1016, 1033 (2004) (finding that Respondent was determined to declare impasse and implement its last offer despite continued movement by the Union and the Union's willingness to continue to bargain) ***Dust-Tex Service***, 214 NLRB 398, 405-406 (1974), *enfd. Mem*. 521 F.2d 1404 (8th Cir. 1975).

[18] The last signed contract allowed full-time coverage after 6 months. (G.C. Exh. 6).
[19] Levine wrote: "Despite protracted negotiations, we unfortunately have been unable to reach an agreement between the union and the above-captioned retailers [Church Square and Forest Hills]. The previous agreement expired on February 3, 2007, and although there was no extension of the agreement, the retailers had attempted to comply with the terms of the agreement during the negotiations. In order that there is no misunderstanding, this letter is to advise the union that there will be no extension of the 2004-2007 agreement as of February 3, 2008."

Shortly after Krzys received the November 30th letter, Levine informed him in a phone conversation that Mentor Family Foods and Holzheimer Family Foods wanted to pay retroactive pension but Forest Hills and Church Square did not. (Tr. 283). Krzys then sent Levine a response letter dated December 5, 2007. (G.C. Exh. 14). During a conversation between Krzys and Levine on December 13, 2007, Levine admitted that he did not terminate negotiations and that he was still willing to negotiate. (Tr. 285). Levine further stated that he was the negotiating representative for all four stores. (Tr. 286).

January 8, 2008

During a session on January 8, 2008, Krzys gave Levine a written proposal that was modified from the November 30th Memorandum because Respondent and Forest Hills were no longer willing to pay retroactive pension increases. (G.C. Exh. 15). The part-time grocery clerk classification was removed and the bonus language was added because Respondent changed its position and no longer wanted to pay retroactive pensions. (Tr. 292-293). At this session, Respondent was willing to pay the $.30 pension increase beginning on March 1, 2008 but no retroactive pension contributions.[20] (Tr. 290-291). Levine also proposed for the first time to exclude high school students from pension benefits. (Tr. 288-290, 295). Krzys informed Levine that there was already a one year eligibility wait for pension, Respondent had a high turnover rate for students, and the Union was obligated to pay a student's pension whether they worked at Respondent's store or went to another store, so students could not be excluded from pension contribution. (Tr. 291-292).

[20] By not paying retroactive pension contributions, Respondent was only willing to pay the existing $.62 pension contributions between February 3, 2007 through March 1, 2008 for eligible employees and not pay the $.30 increase until March 1, 2008.

February 1, 2008

Levine and Krzys met at Levine's office on February 1, 2008. Krzys testified that Levine agreed again to the wage increase of $.30 and $20 in the second and third years where Krzys marked on G.C. Exh. 15 "OK" next to wages. Levine also wanted the bonus language removed from the contract. (Tr. 299). Krzys told Levine again that he wanted bonuses for Church Square and Forest Hills because they were not getting retroactive pension contributions. (Tr. 299-300). Levine also made a counter to the minimum wage plus bracket but Krzys said that Levine counter was exactly what the Union had proposed now that the minimum wage had gone up to $7.00. (Tr. 300-301). Levine then agreed on the minimum wage plus language. (Tr. 301).

Then Levine proposed a new classification of part-time clerk position, where all new part-time hires would get a $.50 pension contribution and all new full-time hires would get a $.92 pension contribution.[21] (Tr. 301-302). Levine said that he would recommend that Respondent sign the contract if it obtained the new classification, no retroactive pension and no bonus language. (Tr. 301). All of Levine's proposals were made verbally. (Tr. 307). Krzys said that he would consider the new classification. (Tr. 304).

February 4, 2008

Krzys and Levine had a conference call on February 4, 2008. Krzys informed Levine that the bonus amount for Church Square employees was only $475 (in total) and $200 for Forest Hills employees, so the Union was still seeking bonuses. (Tr. 317-318). Levine still wanted a part-time clerk position with a $.50 pension contribution for new hires. (Tr. 318). The Union was not ready to give in on this position yet. (Tr. 318). Levine brought up the pension increase again and said that volume was down. (Tr. 319). Krzys asked Levine if the stores were losing

[21] The part-time clerk classification expanded the classification from just grocery clerks to all part-time clerks in meat, deli, produce, cashiers, etc.; this reduced the amount of pension contributions for all new part-time employees. (Tr. 303-304).

money but Levine would not answer. (Tr. 319). Instead, Levine brought up the audits and demanded that they be called off at both Forest Hills and Church Square. (Tr. 319). Krzys said audits were done on a cycle or if members question why they were not receiving any contributions. (Tr. 319-320). Levine wanted relief on pension but Krzys told him that he was already getting relief with the proposed part-time clerk classification. (Tr. 320-321). As of this date, Respondent wanted no retroactive pension for Church Square and Forest Hills but was willing to pay the $.30 pension increase going forward but wanted a part-time clerk position and no bonus language. (Tr. 322). Krzys was willing to consider this but Levine had to get back to him with respect to the bonus language. (Tr. 322). Levine was supposed to call the next day with a response but did not. (Tr. 322).

Krzys received a letter *via* facsimile from Si Harb and Basem Odetallah dated February 25, 2008 that stated: "Please be advised, as of February 1, 2008 – Landmark Foods dba – Church Square & Forest Hills Family Foods Have moved their Health and Dental Insurance Coverage to another Carrier. You will no longer be held liable for claims arising after February 1, 2008." (G.C. Exh. 2(b); Tr.324). Furthermore, because of Respondent's failure to make health and welfare payments, the employees lost health and welfare coverage effective April 30, 2008. (G.C. Exh. 22; Tr. 328).

On March 21, 2008, the Union sent Levine a Memorandums of Agreement for Church Square, Forest Hills, Mentor Family Foods and Holzheimer. G.C. Exh. 20(a). By this date, the Union had conceded and given Respondent its proposed changes: removing the bonus language, adding the new classification for part-time clerk, granting the $.50 pension contribution for all new part-time employees, accepting that there would be no retroactive pension payments for Church Square and Forest Hills, and including the agreed upon wages. (Tr. 341-343).

April 2, 2008

Levine, Krzys and Union Counsel Sandy McNair participated in a conference call on this date. Levine said that P.J. Conway (owner of Mentor Family Foods and Holzheimer) was going to sign the agreements but he, Levine, was having problems with Church Square and Forest Hills. (Tr. 380). Levine said the stores could not pay pension and health and welfare and that they were losing money. (Tr. 380). McNair stated that Levine used the "magic words" about Church Square and Forest Hills having an "inability to pay" the pension increase. (Tr. 534-535).

Levine said "that we are not at an impasse" and he was trying to get a contract with the two stores. (Tr. 380-381). McNair again requested the records regarding the financial condition to support the claim that the employers had an inability to pay. (Tr. 627-628). The conversation ended with Levine saying that he would get back to them. (Tr. 383, 537). Levine never responded to the Union's request for information. (Tr. 384-385).

During a conversation on April 7, 2008, Levine informed Krzys that he owed him a proposal and a counterproposal. (Tr. 384). The Union sent Levine a letter dated April 24, 2008 (G.C. Exh. 21) demanding that Respondent respond to the outstanding request for financial information because Respondent had claimed an inability to pay during the April 2nd conference call. The letter also informed Levine that the Union was still waiting for Levine's promised proposal. (G.C. Exh. 21). Both Krzys and McNair testified that Levine never responded to the April 24th letter. (Tr. 385, 929-630). Levine never provided a proposal and there were no further bargaining sessions with Levine. (Tr. 384).

Thus, the evidence supports the ALJ's conclusions that no lawful impasse existed as of February 1, 2008 and the Union bargained in good faith during negotiations in 2007-2008. The evidence also supports the ALJ's conclusion that negotiations failed to reach a bona fide impasse

even after February 1, 2008. (ALJD p. 10). Specifically, the ALJ notes that Levine had assured the parties on April 2nd that they were not at an impasse and the Union continued to request additional meetings after the April 2nd session. (ALJD p. 10). Therefore, Respondent's Third Exception is without merit.

B. Respondent's inconsistent defenses belie any assertion that the parties were at impasse before the unilateral action on February 1, 2008

Counsel for the General Counsel maintains that Respondent's inconsistent defenses belie any assertion that the parties were at impasse by February 1, 2008.

First, Si Harb was more worried about getting audited than he was about the increased costs to pension and health and welfare. Harb admitted that the number one issue going into the 2007 through 2008 negotiations was the issue of audits. (ALJD p. 12; Tr. 729, 814-815). Harb was concerned because in the past, if Respondent did not report all of the eligible employees on its contribution reports for health and welfare and pension, the Funds or the Union would discover the discrepancy. As a result, Respondent would ultimately get audited and make payments through a settlement agreement. (Tr. 856). Therefore, Harb ceased contributions to the Funds and changed insurance carriers in order to prevent from being audited again.[22] (Tr. 264-265, 388). Krzys testified that Levine made several requests to call the audits off during negotiations with Respondent and Forest Hills and when Krzys would not discuss the audits, Levine said that was a problem.[23] (Tr. 265, 319, 388). Levine even made a proposal to eliminate

[22] Harb testified that he knew that there was an audit against Church Square which was initiated on June 12, 2006. (Tr. 143, G.C. Exh. 33).

[23] Krzys testified that Levine "kept on bringing up that he wanted a resolve of the audit issue at Church Square and the pending audit that was going to happen…over at Forest Hills." (Tr. 388). Krzys informed Levine that they were negotiating a contract, not the audit. (Tr. 388). During the conference call on February 4, 2008, Levine told Krzys he wanted the audits called off at both Church Square and Forest Hills. (Tr. 319).

the clause that allowed the Union to assist the Funds if an employer became delinquent, which would allow Respondent to only be audited once every five years.[24] (Tr. 307, 1189).

Second, Si Harb admitted that he made the decision to switch to Anthem health insurance not because of an impasse but because he knew that the Health and Welfare Fund was terminating Basem Odetallah's health insurance on January 31, 2008.[25] Harb admitted on cross examination that he decided to change carriers because Basem was losing coverage under the Union's Health and Welfare Fund.[26] (Tr. 139-140). Counsel for the General Counsel maintains that Harb discovered during one of the weekly Board of Directors Meetings for Eagle Supermarket Corp. that Basem Odetallah and other family members and individuals were losing coverage under the Union's Health and Welfare Fund.[27]

The Health and Welfare Fund was terminating the coverage of Basem Odetallah, Amin Odetallah, Munira Odetallah, Louis Anzalone, and Mazhar Khan[28] on January 31, 2008 because they were either managers excluded from coverage or were not employees of Forest Hills.[29] (G.C. Exh. 87(a)-(d))[30]; (G.C. Exh. 108, G.C. Exh. 4(3)). Therefore, Si Harb and Basem Odetallah switched carriers to Anthem effective February 1, 2008 so that Basem Odetallah

[24] During negotiations on October 2, 2007 and February 1, 2008, Levine proposed eliminating language under Article 10, Section 5 of the contract that allowed the Union to assist the Funds to collect delinquent money. (Tr. 307; G.C. Exh. 17).

[25] Harb admitted that he knew Basem Odetallah was losing coverage under the Health and Welfare Plan. (Tr. 139). Basem Odetallah is associated with Forest Hills. Forest Hills and Landmark switched to Anthem health insurance on February 1, 2008. (Tr. 139-140).

[26] The transcript states on page 139, lines 22-25: Q. "So you changed from the Union's Health and Welfare Fund to Anthem because "Basem" – Basem Odetallah was losing his health -- was losing health insurance coverage under the Union; correct?

P. 140, line 1: A. Correct

[27] Harb admitted that he, Basem and P.J. Conway have a Board of Directors Meeting every Monday night. (Tr. 58-59). Si Harb, Basem Odetallah, and P.J. Conway have equal shares in Eagle Supermarket Corp. (Tr. 56).

[28] Mazhar Khan and Louis Anzalone are listed under Anthem's insurance as employees of East Cleveland Supermarket.

[29] Levine told Krzys on February 1, 2008 that Anzalone and Khan were not employees of Forest Hills. (Tr. 303).

[30] G.C. Exh. 87(a) is a letter to Basem Odetallah; G.C. Exh. 87(b) is a letter to Amin Odetallah; G.C. Exh. 87(c) is a letter to Munira Odetallah; G.C. Exh. 879(d) is a letter to Louis Anzalone; G.C. Exh. 87(e) is a letter to Mazhar Khan.

would not lose health coverage.[31] (Tr. 139-140). There was no evidence that Si Harb or Respondent's managers were going to lose their coverage as of February 1, 2008. Respondent Counsel David Levine testified that he thought employees of both Respondent and Forest Hills were losing coverage under the Union's Health and Welfare by January 31, 2008. (Tr. 1164, 1165). However, Harb admitted on cross-examination that he never received a letter from the Fund about losing coverage. (Tr. 140). Krzys confirmed that the Fund did not send termination of coverage letters to Church Square other than Cobra notices. (Tr. 337). It is undisputed that Harb and other family members of Respondent were covered under the Health and Welfare Fund because Harb signed a participation clause. (Tr. 91, 201). Unlike Harb, Basem Odetallah, as a manager of Forest Hills, was not covered under the Health and Welfare Fund. (Tr. 310; G.C. Exh. 87(a)). Therefore, impasse was not the reason why Respondent changed health insurance carriers on February 1, 2008.

Third, Respondent's belief that it did not have to make any contribution payments to health and welfare and pension after February 1, 2008 because the contract expired is without merit. Harb testified that he did not make any contribution payments to the Health and Welfare and the Pension Fund after February 1, 2008 because the contract expired. (Tr. 819, 870-871). However, an employer has a continuing obligation to bargain in good faith and not make any unilateral changes even after a contract expires. The Board has held that an employer's obligation to refrain from making unilateral changes to mandatory subjects of bargaining survives the expiration of the contract and its failure to meet that obligation is violative of Section 8(a)(5) and (1) of the Act. ***Newcor Bay City Division***, 345 NLRB 1229, 1237 (2005); ***Made 4 Film, Inc***., 337 NLRB 1152 (2002); ***Lafayette Grinding Corp***., 337 NLRB 832 (2002)

[31] Levine also testified on cross-examination that Respondent got Anthem because employees' benefits were being terminated. (Tr. 1166).

(finding that an employer's obligation to continue making payments to the union's health and welfare fund did not end after the expiration of the contract even though the employer had not signed the last collective bargaining agreement); *see also*, ***Ben Masuri***, 319 NLRB 437 (1995) (holding that the employer violated Section 8(a)(5) by ceasing health and welfare and pension contributions after the contract expired).

Fourth, Respondent's argument that it could not afford the increased costs to pension and health and welfare are rebutted by Respondent's own actions. The evidence shows that Harb made higher premium payments for himself and a select group of long term employees under Anthem than he had paid under the Union's Health and Welfare Fund.[32] It is undisputed that dental and vision coverage was included in the Union's Health and Welfare coverage.[33] (Tr. 91, 200). However, Harb admitted that after February 1, 2008, he was paying separately for dental and vision insurance to Principal Life Insurance Company in addition to the Anthem payments. (Tr. 91; G.C. Exh. 110). Therefore, Respondent was making three separate payments (which overall cost Respondent more money) after February 1, 2008 instead of making one payment to the Union's Health and Welfare Fund. Harb also admitted on cross-examination that neither the managers nor the employees contribute to the premium payments to Anthem and Principal Life Insurance Company. (Tr. 95).

[32] The Anthem Invoice admitted as G.C. Exh. 108 shows that Si Harb paid $1261.18 for himself and Jabra Kahoush where he only paid $758 for himself and $586 for Jabra Kahoush to the Health and Welfare Fund. (See Health and Welfare January 2008 Contribution Report, G.C. Exh. 34). Harb also paid $186 for April Crenshaw to the Health and Welfare Fund in January 2008 but Harb did not insure Crenshaw under Anthem even though she was still employed after February 1, 2008 based on the audit report. (G.C. Exh. 108; G.C. Exh. 34; G.C. Exh. 70(b) and (c)). Cost could not be a factor since Harb was paying a similar amount he had paid for Sonya Rosado and Carlin Webb under the Health and Welfare Fund to Anthem (G.C. Exh. 108, G.C. Exh. 34). Harb paid $573 to Anthem according to the February 2008 bill and paid $586 to the Health and Welfare Fund for both employees for coverage in January 2008. Initially, Harb paid around $573 for Rosado and Webb to Anthem effective February 1, 2008, but he reduced their payments by September 2008 to $388.62. (Tr. 132).

[33] Krzys testified that coverage also extended to hospitalization, prescription coverage, sick pay, etc. depending on the type of insurance for which employees were eligible. (Tr. 200).

C. **Respondent's conduct after February 1, 2008 is not a defense to the unilateral actions.**

Respondent argues in its brief that continuing negotiations "beyond February 2008 would have been a fruitless exercise and an unnecessary expense to an already financially distressed company." (Respondent's Brief. p. 6). Respondent further argues that "the parties were at impasse in February 2008 and any attempt by the Union to continue negotiations beyond that date was motivated to strictly harass Landmark and justify charges filed with the NLRB." (Respondent's Brief p. 3). Respondent's argument is without merit and is not within the scope of any filed exception. First, Respondent's First Exception is limited to whether a valid impasse was reached that entitled Respondent to make the unilateral changes on February 1, 2008. Respondent has already argued that it was entitled to make the unilateral changes because it could not afford the "Union's demands." (Respondent's brief p. 5). Respondent's Third Exception is limited to whether the Union engaged in good faith bargaining for the ALJ to determine that impasse was not reached as of February 1, 2008. Respondent is now attempting to argue that it was entitled to make the unilateral changes and then suspend its duty to bargain beyond February 1, 2008. Respondent's argument, however, goes beyond the scope of the First and Third Exceptions. Second, even if Respondent's argument was properly asserted, Respondent's bargaining actions are contrary to its own legal argument. Respondent's Counsel David Levine met and bargained with the Union on February 1, 2008 and February 27, 2008, and held several conferences calls on February 4, March 31st, April 2, and April 7, 2008. (Tr. 299-384).

The fact that Respondent's Counsel met and made proposals on February 1, 2008 shows there was no impasse before February 1, 2008. On February 1st, Levine made proposals to the

Union with respect to pension and the creation of a new part-time clerk classification. Krzys told Levine that he would consider Respondent's request for the new part-time clerk classification which shows that the Union was willing to negotiate beyond February 1st and consider Respondent's proposal. (Tr. 304). By March 21, 2008, the Union conceded and agreed to Respondent's proposal to remove the bonus language, to add the part-time clerk classification, and to not pay retroactive pension for Church Square and Forest Hills (Tr. 341-342; G.C. Exh. 20(c)). The give and take at the February 1 bargaining meeting demonstrates that the parties were willing to negotiate and had not reached the point where neither party was willing to move from its position. The Board has found impasse when the parties believe that further bargaining would be futile. ***Pillowtex Corp.***, 241 NLRB 40, 46 (1979), *enf'd*, 615 F.2d 917 (1980). "Both parties must believe that they were at the end of their rope." ***PRC Recording Co.***, 280 NLRB 615, 635 (1986), *enf'd*, 836 F.2d 289 (7th Cir. 19897); *See also* ***Duane Reade, Inc.***, 342 NLRB 1016, 1031 (2004) (finding the parties were not at impasse the day before the unilateral implementation because the parties "were still explaining their positions and asking for information"

Third, "impasse is only a deadlock or hiatus in negotiations, which in almost all cases is eventually broken, through either a change of mind or the application of economic force." ***Charles D. Bonanno Line Service v. NLRB***, 454 U.S. 404, 412 (1982). "It is well settled that parties have a continuing obligation to bargain even though they have reached lawful impasse." ***Roosevelt Memorial Medical Center***, 343 NLRB 1016, 1017 (2006). In ***McClatchy Newspapers, Inc***., 321 NLRB 1386, 1389-90 (1996), *enf'd*, 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied*, 118 S.Ct. 2341 (1998), the Board noted that impasse is always viewed as a temporary circumstance, and the impasse doctrine allowing implementation of employer proposals is

legitimated only as a method for breaking the impasse. The impasse doctrine is not a device to allow any party to continue to act unilaterally. *Id*.

D. Respondent's argument that the Union did not engage in good faith bargaining because of the Union's conduct in the 2009-2010 negotiations should be precluded from consideration by the Board.

Even though the Third Exception is limited to the 2007-2008 negotiations, Respondent includes a discussion of the 2009-2010 negotiations to argue that the Union did not engage in good faith bargaining when Sandy McNair requested financial records in 2009 and made an alleged threat to shut down the store. (Respondent's Brief p. 7). First, the 2009-2010 negotiations referenced in Respondent's brief are not appropriate for consideration because the argument goes beyond the scope of the time period pertaining to the Third Exception. Second, even if the argument was properly asserted, the Union bargained in good faith during the 2009-2010 negotiation session, which is discussed below in response to Respondent's Second Exception concerning Respondent's bad faith bargaining.

V. RESPONDENT'S SECOND EXCEPTION IS WITHOUT MERIT BECAUSE THE EVIDENCE SUPPORTS THE ALJ'S DETERMINATION THAT RESPONDENT HAD ENGAGED IN BAD FAITH BARGAINING AFTER AUGUST 2009.

In its Second Exception, Respondent excepts to the ALJ's finding that "as set forth on page 15 of his decision, that in light of all of the facts and circumstances, Respondent acted in bad faith and in violation of the Act in responding to [the] Union's requests for financial statements, and in failing to find that Respondent was justified in its delay in responding to these requests."

A. The ALJ did not find that Respondent failed to provide financial information or delayed in providing this information in violation of Section 8(a)(5) of the Act.

In its Second Exception, Respondent asserts that the ALJ erred in finding that Respondent acted in bad faith "in responding to [the] Union's request for financial statements, and in failing to find that Respondent was justified in its delay in responding to these requests." Respondent has incorrectly cited the ALJ's finding, thus rendering these exceptions without merit.

First, the complaint does not allege that Respondent violated Section 8(a)(5) by failing to provide financial information, delayed in providing financial information, or otherwise bargained in bad faith over a successor contract from April 2008 through August 2009. (G.C. Exhibit 1(q); ALJD p. 14). In fact, the ALJ noted in Footnote 11 that there was no such allegation in the complaint (ALJD p. 14). Therefore, Respondent has excepted to a bad faith bargaining allegation that does not exist.[34] In Footnote 19, the ALJ noted that the complaint did not specifically allege that Respondent's failure to timely provide financial information or to meet and bargain from April 2008 through August 2009 violated Section 8(a)(5). (ALJD p. 11). In fact, the Union withdrew the allegation from its charge when Respondent provided the financial information on October 1, 2009. (Tr. 577). Therefore, there was no ALJ finding that Respondent engaged in bad faith by failing to provide or delayed in providing financial information. Rather, the ALJ only considered Respondent's failure to provide the requested financial information in evaluating the existence of a bona fide impasse after February 1, 2008 (not before February 1, 2008). (ALJD p. 11-12). The ALJ was prompted to consider whether

[34] Rather, the complaint alleges that the Respondent engaged in bad faith bargaining by delaying in providing requested information on *bargaining unit employees* and failing to respond to the Union's request for information regarding bargaining proposals since January 5, 2010 (not financial statements). Since Respondent has not specifically excepted to these findings, Respondent has waived it right to except.

impasse existed after February 1, 2008 because Respondent had made those assertions in its position statements to the Regional Office. The ALJ found that requesting financial information was not done to strictly harass Respondent. (ALJD p. 10-11). The ALJ also determined that "impasse after February 1 is irrelevant to whether the February 1 unilateral changes were unlawful." (ALJD p. 10).

Second, Respondent's Second Exception to bad faith bargaining is limited to the negotiations between August 2009 through January 2010 after David Levine was replaced by Fred Papalardo as Respondent's Counsel. In its brief, Respondent attempts to lump the negotiations that occurred in 2007-2008 with the 2009-2010 negotiations and argue that it did not engage in bad faith bargaining. However, the ALJ noted in his decision that the complaint specifically "did not allege that Respondent bargained in bad faith over a successor contract during this first year of negotiations" other than a general bad faith bargaining allegation referencing the cessation of benefit contributions, unilateral changes to the health insurance providing, and conditioning a new agreement on the Union limiting or stopping the pension audit. (ALJD, p. 4). Therefore, the Second Exception must be limited to the 2009-2010 negotiations because there is no allegation that Respondent generally engaged in bad faith bargaining between April 2008 through August 2009.

Third, Respondent is limited to the bad faith exception specifically listed in its Second Exception addressing Respondent's failure to respond to the requests for financial statements and delay in responding to those requests. Although Page 15 of the ALJ's decision references the overall bad faith conduct that occurred after August 2009, Respondent has waived exception to the other findings because Respondent has failed to except to each separate finding. Specifically, Respondent has not excepted to the following findings: 1) that Respondent delayed in providing

the requested bargaining unit information (ALJD p. 20); 2) that Respondent failed to provide requested information about its proposals (ALJD p. 21); 3) and that Si Harb's statement that he would rather close the store before signing another contract violated Section 8(a)(1) of the Act (ALJD p. 24). In fact, Respondent failed to address any of these findings in its supporting brief.

Even if Respondent has properly asserted an overall exception to the ALJ's bad faith determination on page 15, the evidence supports the ALJ's finding that Respondent engaged in bad faith bargaining after August 2009.

B. **Respondent's argument that its bargaining conduct was in response to the Union filing of unfair labor practice charges is without merit.**

In support of its Second Exception, Respondent argues that its bargaining tactics were not in bad faith but were in response to the "Union's strong arm tactics and over-willingness to file charges against Respondent." (Respondent's Brief p. 8). With respect to filing charges, Respondent argues that the Union insisted that Respondent agree to the "Union's proposed increases to wages, pension benefits and health and welfare benefits or it would file charges with the NLRB." (Respondent's Brief p. 2). Respondent's argument is without merit. The filing of an unfair labor practice does not suspend the duty to bargain. In fact, it is well settled Board law that an Employer violates the Act by refusing to bargain until an unfair labor practice charge is resolved. ***J. Sullivan and Sons Mfg, Corp***. 102 NLRB 1, 18-19 1953) (finding that the employer violated 8(a)(5) when it "conditioned the continuation of bargaining upon the Union's withdrawal of the unfair labor practice charge"); s*ee also*, **G*loversville Embossing Corp***, 314 NLRB 1258, 1264 (1994), *citing* ***John Wanamaker Philadelphia***, 279 NLRB 1034 (1986) (finding a violation to condition execution of a collective-bargaining agreement on a party's willingness to withdraw or settle an unfair labor practice charge); ***Hilton's Environmental, Inc***., 320 NLRB 437, 455-456 (1995) (finding a violation to "condition any final agreement on

withdrawal [of the unfair labor practice charge] because the question of withdrawing charges is a non-mandatory subject of bargaining").

During the 2009-2010 negotiations, Respondent was unwilling to provide written proposals despite its prior agreement that it would because the Union had filed unfair labor practice charges. This exemplifies Respondent's refusal to bargain in good faith. In fact, Respondent's contradictory positions during negotiations showed that Respondent never intended to provide a written proposal to the Union because the Union filed a ULP charge.[35] In an email dated November 16, 2009 (G.C. Exh. 57), Papalardo informed McNair that he was unable to provide a written proposal because his first child had recently been born. He promised, however, to have a written proposal sent by the end of that week. (G.C. Exh. 57). Despite this promise, Papalardo never provided a written proposal by his imposed due date. (Tr. 570). In fact, Papalardo admitted on cross-examination that he did not provide a written proposal after writing the November 16th email because he was forced to provide a position statement to the NLRB in response to the charge filed by the Union. (Tr. 1013-1014).

Then Papalardo wrote in his December 15th email that he would only verbally provide a proposal at the next session (Tr. 575-576):

> "The problem I have with making you proposals is that everything that I submit (whether verbal or written) is used against my client. You filed an NLRB charge prior to us even sitting down to one bargaining session. I bring my client to the table and try and negotiate a deal and everything said during negotiations is reiterated to the NLRB attorney examiner and you have asked for a proposal either on the record or off the record, which makes me very leery as to your motivation." (G.C. Exh. 59; See also Tr. 1011).

When cross-examined about his December 15th email, Papalardo admitted that he had a problem with the Union providing information to the NLRB during the investigation of the charge. (Tr. 1011).

[35] Papalardo admitted that even though he had originally agreed to draft a written proposal, he never provided a written proposal to the Union. (Tr. 1009).

Papalardo further admitted that although he had drafted a written proposal and brought the written proposal to the meeting on January 5, 2010, he never showed it to the Union. (Tr. 1009-1010). Papalardo would not admit the reason that he did not provide the proposal was because the Union had filed charges with the NLRB. However, his statement that he did not "trust" the Union was based on the fact that the Union had filed 2 charges with the NLRB before the January 5, 2010 meeting. (Tr. 1010-1011). Papalardo testified that he knew that the Union had a right to file a charge but he still blamed the Union for bargaining in bad faith by filing a charge before the first negotiating session and by making his client spend money to respond to the charges. (Tr. 973-974).

Therefore, Respondent's argument is without merit. Respondent cannot excuse its bargaining conduct because the Union filed unfair labor practice charges.

C. The Union expressed a willingness to change its bargaining position with respect to pension contributions during the 2009-2010 negotiations.

In its brief, Respondent argues that the ALJ did not consider "how the Union's demands failed to take into account Respondent's dire financial straights and the importance of the demands over which the Union was unwilling to make concessions." (Respondent's Brief p. 7). Respondent argues that the Union should have been listening to Landmark and should have known of its inability to pay benefit contributions. (Respondent's Brief p. 7). The Respondent's argument is without merit because the Union changed its position on pension contributions after receiving Respondent's financial records.

Sandy McNair testified that had Levine responded to the Union's initial information request for financial documents on April 2, 2008, and those documents showed that Respondent was in financial distress, the Union would have withdrawn its proposal for the $.30 increase to

the pension contribution.[36] (Tr. 671). McNair's testimony shows that the Union was willing to change its position on the pension contribution had Levine produced the financial records in April 2008. In fact, the Union did change its position in January 2010 and withdrew its proposal for a $.30 pension increase retroactively and going forward for another contract term. (Tr. 593-594). In other words, Respondent would only be liable to pay the $.62 pension contribution plus contributions required under the newly enacted Pension Protection Act's Default Schedule, which was a nickel, nickel, dime increase for the 2007-2010 contract term but not going forward. (Tr. 593-594). McNair testified that the Union changed its position because Respondent's financial records, when finally received, showed financial distress. (Tr. 651).

Harb admitted on cross-examination that he was unaware of the Union's proposal in January 2010 to eliminate the $.30 pension contribution increase. (Tr. 846-847). Harb even admitted that was "one step, one hurdle to come over" and "you give and take in negotiating." (Tr. 847). Harb's testimony showed that Respondent's Counsel Fred Papalardo failed to communicate the Union's proposal in January 2010, even though it was a proposal which Harb admitted was a step in the right direction. The fact that Respondent's Counsel did not convey the proposal demonstrates that Respondent had no intention of reaching a contract or of bargaining in good faith, especially when the Union conceded on a major issue. Therefore, Respondent's argument that the Union did not consider Respondent's financial circumstances or was unwilling to make concessions is without merit.

D. The evidence supports the ALJ's determination that the Union did not threaten to shut down Respondent.

In its brief, Respondent argues that Respondent's bad faith actions were only in response to the Union's threat to strike after Sandy McNair threatened to shut down the store. Respondent

[36] Respondent did not provide the financial documents until October 1, 2009. (Tr. 562; G.C. Exh. 103).

argues that the ALJ failed to consider the Union's "unsavory motivations" behind its comments. (Respondent's Brief p. 7). Respondent cites ***Laborers' Local 125***, 260 NLRB 1082 (1982) to argue that the ALJ should have considered the Union's motivations when determining whether the Union engaged in good faith negotiations. The ***Laborers'*** case is distinguishable from the instant case. In ***Laborers'***, the ALJ considered the union's motivation because the legal issue was whether the union threatened an employee because the employee had filed unfair labor practice allegations against the Union. At issue in the instant case is whether Respondent engaged in bad faith bargaining and not whether the Union violated Section 8(b)(1)(A) of the Act

Respondent is attempting to excuse its bad faith conduct by asserting that it was only reacting to the Union's alleged threat. However, in his decision, the ALJ credited the testimony of Union Counsel Sandy McNair and did not view McNair's comments as threats. Rather, the ALJ found that McNair said during the October 12, 2009 meeting that "the Union could shut the store down if it wanted to, by putting up a picket line, but that was not what the Union was there to do." (ALJD p. 17; *see also* Footnote 30, ALJD p. 18 (crediting McNair's testimony over Papalardo with respect to direct differences in testimony). In his decision, the ALJ also rejected Respondent's argument that McNair's statement that it could shut down the store if it wanted to was evidence of "the Union's unconscionable conduct and failure to bargain in good faith." (ALJD p. 21-22). The ALJ found that the evidence showed that the Union "vigorously pursued a new collective bargaining agreement with Respondent by repeatedly requesting further bargaining sessions; timely providing Respondent with requested information; educating Respondent's new counsel regarding applicable labor laws and policies; submitting detailed

written proposals to Respondent; and substantially modifying its proposals to address Respondent's financial problems and concerns." (ALJD p. 22).

Counsel for the General notes that Respondent has not specifically excepted to the ALJ's credibility determination regarding McNair's testimony and thus should be precluded from presenting this argument in its supporting brief. Even if Respondent's argument was properly asserted in its brief, it is well-established Board policy not to overrule an ALJ's credibility findings unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are incorrect. ***Standard Dry Wall Products***, 91 NLRB 540 (1950), *enf'd*, 188 F.2d 363 (3rd Cir. 1951). In the instant case, the evidence supports the ALJ's credibility determinations.

E. The evidence supports the ALJ's overall finding that Respondent engaged in bad faith bargaining during the 2009-2010 negotiations.

Even if Respondent properly asserted in its Second Exception an overall exception to the bad faith determination, there is overwhelming evidence to support the ALJ's finding.

1) Si Harb's statement on October 2, 2009 was evidence of bad faith and was an independent violation of Section 8(a)(1) of the Act.

During the October 2, 2009 session, Harb was agitated and angry when he said that he would never sign a collective bargaining agreement and that he would rather close the store. (Tr. 565-567). At the beginning of the session, Harb stated that the parties were just too far apart, that he would spend all of his money in court and not get an agreement. (Tr. 564). Neither Si Harb nor Fred Papalardo denied that Harb made these statements. When questioned on direct examination about whether he recalled anything discussed during the October 12, 2009 negotiations, Papalardo did not rebut McNair's testimony regarding the unlawful statements made by Harb. In fact, Papalardo initially said that he could not recall anything of any

significance other than his "marching orders" and the discussions on health and welfare, pension and wages. (Tr. 933). Papalardo later tried to soften Harb's statements by stating that Harb was "upset". (Tr. 964-965). Papalardo, however, did not deny that Harb made the statements about going to court or about closing the store. He claimed that it was just taken out of context in order to support the charge filed by the Union. (Tr. 964-965).

Therefore, the ALJ properly determined that Harb's statement constituted a threat to close the store, was an independent violation of Section 8(a)(1) and was evidence of bad faith bargaining. (ALJD p. 24).

2) Respondent engaged in bad faith and regressive bargaining by asserting that negotiations would begin from scratch and by repudiating tentative agreements entered into before August 2009. [37]

Although an employer's refusal to abide by a tentative agreement does not automatically constitute bad faith bargaining, an employer engages in bad faith bargaining when its new counsel reneges on prior tentative agreements without a valid excuse. ***Barclay Caterers***, 308 NLRB 1025 (1992); ***Wisconsin Steel Industries***, 318 NLRB 212 (1995). The facts in ***Wisconsin Steel*** can be applied to the instant case. In ***Wisconsin Steel***, the employer switched its bargaining representative three times during negotiations, and the third representative (Brown) reneged on all the tentative agreements previously reached between the union and the employer's second counsel. The Board found that that the third representative's "claimed lack of knowledge about the prior bargaining provides no excuse at all for Brown's insistence on bargaining from scratch." ***Wisconsin***, 318 NLRB at 320. The Board noted that Brown could have obtained the necessary information from the second representative but did not. ***Id***.

> "It is one thing for an employer, during the course of bargaining, to change its position regarding a particular contract provision. One

[37] Although the ALJ did not make specific findings on regressive bargaining, the ALJ considered the "totality of Respondent's conduct" to find that Respondent engaged in bad faith bargaining. (ALJD p. 22-23).

> can even imagine a change in circumstances that might justify a withdrawal by the employer from its tentative agreements regarding numerous proposed contract provisions. But here Brown (and thereby WSI), without valid excuse, reneged on every tentative agreement the representatives of WSI and the Steelworkers had achieved over the course of months of bargaining. That alone constitutes bad-faith bargaining**"** ***Wisconsin***, 318 NLRB at 322.

This is the same conduct engaged in by Respondent's second Counsel Fred Papalardo.[38] Papalardo did not verify the status of negotiations with the Union before he wrote his August 25, 2009 letter.[39] Papalardo assumed that there had been no communication between the parties from April 2008 until September 2009. (Tr. 922-923). He based his assumption that the parties had not communicated or negotiated for a year and a half on what happened in mediation in federal court and not on any conversations he had with David Levine. (Tr. 903, 912, 990). Papalardo admitted on cross-examination that he never verified with David Levine that the Union had sent letters to Levine after the non-board settlement, including a letter to resume negotiations. (Tr. 989-990). In fact, Papalardo did not write a letter to Levine requesting his file until October 21, 2009, after two negotiating sessions had already occurred with the Union. (G.C. Exh. 122). Papalardo further admitted that he did not verify with Levine as to whether agreements had been reached in prior sessions.[40] (Tr. 904).

[38] Respondent's Counsel Fred Papalardo began representing Respondent in June 2009 with respect to federal court litigation and any subsequent litigation, including charges filed with the Regional Office. (Tr. 890-891).

[39] The Union provided Papalardo with copies of the correspondence between the Union and Levine from the prior negotiations, which Papalardo acknowledged in his response letter (G.C. Exh. 51 (cited enclosures); G.C. Exh.36).

[40] Papalardo's testimony is full of contradictions. Papalardo testified that he had talked to Levine before the October 2009 negotiation about the prior negotiations involving Respondent, Forest Hills, Holzheimer and Mentor Family Foods. (Tr. 943). Then he contradicted himself on cross-examination by stating that he learned that there was no agreement between the Union and Respondent based on the federal court litigation and not based on any conversations with Levine. (Tr. 983). In fact, Papalardo said he could not recall when he first talked to Levine about the negotiations. (Tr. 984-985).

As such, Papalardo began negotiations in August 2009 without verifying the bargaining history between the Union and Respondent's former Counsel David Levine and engaged in bad faith conduct when he informed the Union that negotiations would in essence begin from scratch.

McNair sent Papalardo a letter dated August 18, 2009 along with copies of correspondence addressed to Respondent's former Counsel David Levine concerning his lack of response to resume negotiations and to provide the financial documents pursuant to the non-board settlement. (G.C. Exh. 51). McNair also informed Papalardo about the status of negotiations with Levine, where the Union believed that the parties had reached an agreement on the major issues until Levine told them on April 2, 2008 about Respondent's inability to pay the pension increase. (Tr. 532-533; G.C. Exh. 51). McNair requested that Papalardo provide the Union with Respondent's bargaining position in writing and to resume bargaining.

In his response letter dated August 25, 2009, Papalardo wrote:

> "you appear to be operating under the assumption that all representations made by Attorney Levine with respect to negotiating the collective bargaining agreement are in place and the only open issue is a 30 cent pension increase. I can assure you that the entire collective bargaining agreement will need to be negotiated. Attorney Levine is no longer representing Church Square and therefore, all negotiations regarding the collective bargaining agreement will need to go through me." (G.C. Exh. 36).

McNair testified that Papalardo's August 25th letter told the Union that Respondent was engaging in regressive bargaining.[41] (Tr. 541-542). McNair wrote a letter dated August 27, 2009 to Papalardo informing him that Respondent was engaging in regressive bargaining as evidenced in the August 25th letter and requested a response within 5 days or the Union would file a ULP

[41] Respondent will argue that it bargained in good faith and was not engaging in regressive bargaining because it suggested to the Union to have Judge Polster act as a mediator for the bargaining session. (Tr. 910). Respondent will also argue that the Union bargained in bad faith because the Union rejected this suggestion. (Tr. 910). Whether the parties used Judge Polster as a mediator is not evidence of bad faith bargaining. Also, McNair testified that he rejected Papalardo's suggestion to use Judge Polster as a mediator because Judge Polster had no labor background, using a mediator was premature at that time, and he preferred using a mediator from the Federal Mediation and Conciliation Service which cost the parties nothing. (Tr. 542).

charge. (Tr. 543-544; G.C. Exh. 52). When no response was received, the Union filed a charge on September 8, 2009.[42] (Tr. 545-546; G.C. Exh. 102).

In a response dated September 4, 2008, Papalardo maintained his earlier position by stating that "[m]y fiduciary duty to my client is to represent its best interest in negotiating a new collective bargaining agreement. Thus all the terms of the new collective bargaining agreement should be on the table for negotiations so I can advise my client." (G.C. Exh. 37). Papalardo also requested the Union to provide him with authority as to how he was violating the Labor Act. (G.C. Exh. 37). McNair testified that although the letter was dated September 4th, his office did not receive the letter until September 10, 2008, which was two days after the Union had filed the ULP charge. (Tr. 546-547).

McNair wrote a letter dated September 15, 2009 responding to Papalardo's request for legal authority and to clarify his role and Mr. White's role concerning Respondent, since Mr. White was handling the federal court litigation and McNair was handling negotiations. (Tr. 550; G.C. Exh. 53). McNair testified that it was clear to him that Papalardo was not a labor lawyer and that although it was not the Union's job to do legal research for the employer, the Union provided him with the requested authority. (Tr. 549-550).

"It is settled that the withdrawal of previous proposals does not *per se* establish the absence of good faith, but rather represents one factor in the totality of circumstances test." ***White Cap, Inc***., 325 NLRB 1166, 1169 (1998) (citing ***Aero Alloys***, 289 NLRB 497 (1988).[43] In ***White Cap, Inc.***, (1998), the Board analyzed whether the employer had a good faith explanation for changing its bargaining position and whether the change was made in bad faith and to impede

[42] The charge alleged that Respondent was engaging in regressive bargaining, refusing to bargain in good faith, and refusing to provide financial statements and tax returns.

[43] The Board has looked at the totality of circumstances to determine whether a party's overall bargaining conduct satisfied its duty to bargain in good faith. ***Atlanta Hilton & Tower***, 271 NLRB 1600, 1603 (1984).

an agreement. ***White Cap***, 325 NLRB at 1169-1170. Counsel for the General Counsel argues that Church Square did not have good cause to revoke tentative agreements or engage in regressive bargaining. To the contrary, there is overwhelming evidence that Church Square did not intend to reach a contract or bargain in good faith.

The ALJ also properly found that Papalardo's inexperience as labor counsel was not an excuse for engaging in bad faith bargaining.[44] (ALJD p. 16, Footnote 28). As stated in ***Wisconsin Steel***, Papalardo could have contacted Levine and verified whether Respondent had made a claim of financial inability to the Union during negotiations, whether the Union had requested financial documents from Levine and verified the status of negotiations. This type of inquiry did not require experience but due diligence.

3) Respondent delayed in providing requested bargaining unit information to the Union in violation of Section 8(a)(5) of the Act.

The Board has held that a refusal to provide information regarding bargaining unit employees is similar to a flat refusal to bargain with the employer. ***The Brooklyn Union Gas Co., 220 NLRB 189, 191 (1975)***; ***The Procter & Gamble Mfg. Co.,*** 237 NLRB 747, 751 (1978)***,*** *enf'd*. 603 F.2d 1310 (8th Cir. 1979)***.*** It is undisputed that the bargaining unit information is necessary for and relevant to the Union's duty as the collective bargaining representative for the employees. (G.C. Exhibit 1(q) and (x), Paragraph 13(C)).[45]

It is also undisputed that the Union made its initial request for information regarding bargaining unit employees on September 28, 2009. (Tr. 553, 557, 1007; G.C. Exh. 1(q) and (x), Paragraph 13(A)). In fact, Papalardo testified on cross examination that his notes (G.C. Exh. 119) reflect that the Union had requested information on bargaining unit employees including

[44] Papalardo admitted that representing Respondent was his first experience negotiating any collective bargaining agreement. (Tr. 990).

[45] Respondent admitted in its Amended Answer that the information sought by the Union "is necessary for, and relevant to the Union's performance of its duties as the exclusive bargaining representative of the Union."

wages. (Tr. 1007). It is undisputed that Respondent did not provide the information until December 14, 2009. (Tr. 1016; G.C. Exhibit 1(q) and (x), Paragraph 13(B). Therefore, the issue properly determined by the ALJ is whether Respondent unlawfully delayed in providing the information on bargaining unit employees to the Union.

In ***Good Life Beverage Co***., 312 NLRB 1062 fn 9 (1993), the Board stated:

> "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *See also* ***Allegheny Power, 339 NLRB 585, 587 (2003)***.

Respondent's two and a half month delay in providing the information was not reasonable. The information requested by the Union was not complex and was readily available from Respondent's payroll and/or personnel records.

The Board has held that an unreasonable delay in furnishing relevant information to the statutory bargaining agent is as much a violation of the Act as a refusal to furnish any information at all. ***Bundy Corp***, 292 NLRB 671 (1989) (finding a violation of the Act to ignore or delay supplying the union with necessary information for 2 and1/2 months); *See also* ***Crittendon Hospital and Local 40***, 343 NLRB 717, 745 (2004) (finding a violation when the employer delayed by over 2 months in providing employee information to the Union and only after the union had filed an unfair labor practice); *See* ***Woodland Clinic***, 331 NLRB 735 (2000) (finding a 7 week delay unreasonable); ***Zikiewicz, Inc***., 314 NLRB 114 (1994) (finding 2 month delay unreasonable).

Respondent has not offered any evidence to establish that its delay in providing bargaining unit information was reasonable. Rather, Respondent has maintained inconsistent positions by initially agreeing to provide the information, then arguing to both the Union and to

the Regional Office that the information was not relevant, and then eventually providing the information.

It is undisputed that Papalardo agreed to provide the information during the bargaining session on September 28, 2009.[46] (Tr. 557, 1031). Then, on October 12th, Papalardo said he was at fault for not getting the information and he would get the Union the information at the next bargaining session. (Tr. 566). Papalardo admitted that he had marching orders from the October 12th meeting to provide information on employees and to draft a proposal. (Tr. 933). Respondent never maintained to the Union during either session that the information was not relevant to bargaining. When no information was received, McNair wrote a letter to Papalardo dated November 10, 2009 inquiring about the information request.[47] (G.C. Exh. 55).

Soon after, Respondent changed positions and began questioning the relevance of the bargaining unit information after Papalardo had already agreed to provide it. In an email dated November 16, 2009, Papalardo asked McNair to "explain to me one more time the relevance of the request as it relates to negotiating a collective bargaining agreement." (G.C. Exh. 57[48]). McNair promptly responded stating "I do not know what could be more relevant than the terms and conditions of employment of the existing bargaining unit members – I guess its self-evident." (G.C. Exh. 57).

The Union filed a charge with the Regional Office on November 27, 2009 alleging among other things that Respondent refused to provide bargaining unit information to the Union. (G.C. Exh. 104). In its position statement dated December 8. 2009, Respondent argued to the

[46] Papalardo testified on cross examination that he told McNair on September 28, 2008 and October 12, 2008 that he would provide the information. (Tr. 1031).

[47] In the same letter, McNair also inquired about the status of the production of Respondent's written proposal to the Union.

[48] In a prior email on the same date, Papalardo had agreed to provide a proposal to the Union but failed to mention anything about providing a response to the bargaining unit information request.

Region that the requested bargaining unit information had no bearing on making a collective bargaining agreement proposal. (G.C. Exh. 39). Soon after, Respondent produced the information on December 14, 2009. It thus took Respondent more than 2 months to produce a list of only 9 bargaining unit employees. (G.C. Exh. 58(c)). Therefore, the evidence supports the ALJ's finding that Respondent violated the Act by delaying in providing requested bargaining unit information. (ALJD p. 20-21).

4) Respondent has neither bargained with the Union nor responded to the Union's request for information since January 5, 2010 to the present.

Respondent's Counsel provided a verbal proposal to the Union during the January 5, 2010 negotiating session. McNair made specific requests for information in response to Respondent's proposal during the January 5th meeting and in subsequent written emails and correspondence. [49] Specifically, the information requested by the Union relates to bargaining issues raised by the Respondent as to whether 1) new hires and students should only receive minimum wage, 2) all family members of Si Harb should be excluded from any health and welfare and pension contributions, 3) Respondent had an "equal right" to terminate employees, 4) Respondent would switch to a 401(k), and 5) employees would lose their benefits under the Joint Pension Fund. (Tr. 584-587).

Therefore, all of the information requested by the Union during the January 5th bargaining session and in the April 10, 2010 letter was relevant and necessary for the Union to perform its duty as the statutory bargaining representative.[50] An employer is obligated upon

[49] The Union requested Respondent to: Identify all new hires and students by name; provide the names and a description of the familial relationship of the family members excluded from health and welfare and pension; clarify Respondent's proposal that the employer shall have equal rights regarding terminations; provide whether there was any maximum regarding contributions to a 401(k); and provide pension and health and welfare contribution reports from February 1, 2008 through the present. (Tr. 584-587).

[50] When Respondent did not respond to the January 18th email or the February 10th letter, McNair wrote another letter dated March 18, 2010 requesting the information and clarifying that the contributions reports mentioned in the

request, to furnish the Union with information that is potentially relevant and would be useful to the Union in discharging its statutory responsibilities under the Labor Act. ***NLRB v. Acme Industrial Co***., 385 U.S. 432 (1967). The test for relevance is a liberal "discovery-type standard so even potential relevance is sufficient to give rise to an employer's obligation to provide requested information. ***Acme***, supra at 438; ***U.S. Postal Service,*** 332 NLRB. 635, 636 (2000); ***Caldwell Mfg Co***., 346 NLRB 1159, 1160 (2006).

The Union's information requests are presumptively relevant, because the information affects a benefit or privilege that an employee receives under the collective bargaining agreement. The names of unit employees, rates of pay, other pay-related data and "any other benefit or privilege that employees receive" are presumptively relevant triggering an employer's obligation to provide the requested information. ***Dyncorp/Dynair Services,*** 322 NLRB 602 (1996), *enf'd*, 121 F.3d 698 (1997); ***International Protection Services, Inc***., 339 NLRB 701 (2003); *see* ***Coca Cola Bottling Co***., 311 NLRB 424, 425 (1993) (finding certain types of employee information pertaining to wages, hours, benefits and working conditions are the core of the employer-employee relationship and presumptively relevant). The Board has found that no specific showing of relevance is required where the information is considered to be presumptively relevant, and the employer has the burden of proving lack of relevance. ***Marshalltown Trovel Co***., 293 NLRB 693 (1989) (finding that the Union is not required to articulate its purpose in requesting presumptively relevant information); *see also*, ***Ohio Power Co***., 216 NLRB 987, 991 (1975), *enf'd*, 531 F.2d 1381 (6th Cir. 1976); ***Grand Rapids Press***, 331 NLRB 296 (2000);***Contract Carriers Corp***., 339 NLRB 851, 858 (2003).

February 10th letter referenced both pension and health and welfare contributions. (Tr. 602; G.C. Exh. 64). Again, Papalardo did not respond to this letter. (Tr. 602).

Respondent has not argued that the information requested on January 5, 2010 was irrelevant. Rather, Respondent only argued in its April 12, 2010 position statement to the Regional Office that "Church Square has not provided them [other documents requested] because the Union has not bargained in good faith and never wanted to bargain in good faith." (G.C. Exh.42, Page 3). This argument is without merit and Respondent had an obligation to provide the information requested by the Union.

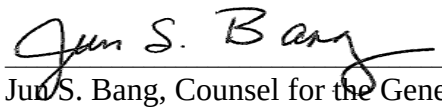
Respondent has neither provided the information nor responded to the Union's proposal because Respondent has arbitrarily ended negotiations based on its unfounded belief that the Union breached the terms of the federal court settlement agreement by not bargaining in good faith. Papalardo testified that after the January 4th conference call with Judge Polster regarding the federal court litigation, he recommended to his client not to pay any more money to the Union because the Union breached the federal court settlement agreement by not bargaining in good faith. (Tr. 972). Papalardo also initially testified he went to the January 5th negotiations in good faith and presented verbal proposals to the Union, but Papalardo later testified that he was done negotiating by January 5, 2010. (Tr. 973, 976). Papalardo testified that it was his position that "it wasn't going to work anymore" so he did not have to bargain with the Union after January 5, 2010. (Tr. 1026-1027). Papalardo further admitted that he did not send anything to the Union after January 5, 2010 (Tr. 1038-1039).

Thus, the evidence supports the ALJ's finding that Respondent unlawfully failed to provide requested information about its proposals and otherwise bargained in bad faith with no intention of reaching a successor collective-bargaining agreement after August 2009 in violation of Section 8(a)(5) and (1) of the Act. (ALJD p. 21-22).

VI. CONCLUSION

Accordingly, Counsel for the General Counsel submits that the Respondent's exceptions are without merit and that the ALJ's decision should be affirmed in its entirety.

Respectfully submitted this 13th day of December, 2010.



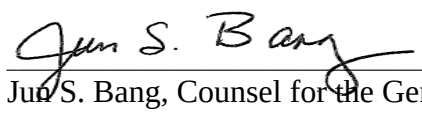
Jun S. Bang, Counsel for the General Counsel
National Labor Relations Board
Region 8
1240 East Ninth Street, Room 1695
Cleveland, OH 44199

PROOF OF SERVICE

Copies of the foregoing Answering Brief of Counsel for the General Counsel To The Board in Response to Respondent's Exceptions were sent by electronic mail to the following Counsel this 13th day of December, 2010:

Fred Papalardo, Esq. fpapalardo@reminger.com
Reminger Co., L.P.A.
1400 Midland Bldg
101 Prospect Ave.
Cleveland, OH 44115

Dan White, Esq. dwhite@smcnlaw.com
Schwarzwald, McNair & Fusco LLP
616 Penton Bldg
1300 East 9th Street
Cleveland, OH 44114



Jun S. Bang, Counsel for the General Counsel
National Labor Relations Board
Region 8
1240 East Ninth Street, Room 1695
Cleveland, OH 44199