Camelot Terrace *and* Service Employees International Union Healthcare Local 4 and Service Employees International Union Healthcare Illinois and Indiana

Galesburg Terrace *and* Service Employees International Union Healthcare Local 4 and Service Employees International Union Healthcare Illinois and Indiana. Cases 33–CA–15584, 33–CA–15669, 33–CA–15781, 33–CA–15587, 33–CA–15670, and 33–CA–15780

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On December 31, 2009, Administrative Law Judge John H. West issued the attached decision. The Respondents filed exceptions and a supporting brief, and the Charging Party and the General Counsel filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified and restated in full below, to adopt the recommended Order as modified and restated in full below, and to modify the remedy.

The Respondents except only to the judge's order granting the General Counsel's request that the Respondents reimburse the Union "for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with [all of the instant cases]." In addition, the Respondents except to the judge's order that they reimburse the Board and Charging Party Service Employees International Union Healthcare Illinois and Indiana (the Union)[1] for "all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the Board and courts." We find that, as modified below,[2] the requested remedies will effectuate the policies of the Act.

1. Procedural background

Respondents Camelot Terrace (Camelot) and Galesburg Terrace (Galesburg) operate nursing homes in Streator, Illinois, and Galesburg, Illinois, respectively. Both corporations are owned by Michael Lerner. The Union was certified as the exclusive representative of the employees at each location in 2007. The conduct at issue in this proceeding involves the parties' 2008–2009 bargaining for an initial contract at each facility.

The October 29, 2008 amended consolidated complaint in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670 alleged that the Respondents, in violation of Section 8(a)(5) and (1), failed and refused to bargain in good faith by restricting the dates and length of bargaining sessions, repeatedly canceling and shortening sessions, reneging on or withdrawing from tentative agreements without good cause, refusing to bargain on economic subjects, and refusing to make economic proposals. After the November 2008 hearing in these cases, the judge approved settlement agreements between the Union and the Respondents that required, among other things, that the Respondents would bargain for at least 20 hours per month per facility and at least 5 hours per session, until an agreement or good-faith impasse was reached in each unit. The consolidated proceeding was therefore continued indefinitely.

On May 29, 2009, however, the General Counsel issued a consolidated complaint in Cases 33–CA–15780 and 33–CA–15781, which alleged that, subsequent to the settlement agreements, the Respondents further violated Section 8(a)(5) and (1) by restricting the length of bargaining sessions, failing and refusing to provide requested information to the Union, dealing directly with Union-represented employees at Camelot, making unilateral changes to employees' terms and conditions of employment without notice to the Union or an opportunity to bargain,[3] and discharging Camelot employee Kathy Rhodes based on a unilaterally implemented attendance policy. On June 18, 2009, the General Counsel moved to reopen the record, set aside the settlement agreements, and consolidate the cases covered by those settlements with Cases 33–CA–15780 and 33–CA–15781. The judge granted the General Counsel's motion. In an August 11, 2009 amendment to the consolidated complaint, the General Counsel requested the relief that is the subject of the Respondents' exceptions.

[1] The Union was formerly known as Service Employees International Union Local 4.

[2] See fn. 8, infra.

[3] These alleged 8(a)(5) allegations included, at Galesburg, the Respondent's reduction of hours for housekeeping and laundry employees and the extension of the probationary period for some employees. At Camelot, the unilateral change allegations included implementation of a new attendance policy, stricter enforcement of that policy, and the grant of incentive wage increases to some unit employees. Both Respondents were additionally alleged to have unilaterally changed their employees' health insurance carrier.

2. Negotiation expenses

The Respondents do not challenge the judge's finding that they committed the numerous and serious violations of Section 8(a)(5) and (1) alleged in the consolidated complaint. Nor do they contest the judge's finding that Lerner's conduct as the Respondents' negotiator for the Galesburg and Camelot units displayed "nothing but contempt for the [bargaining] process" and a willingness to violate the law in order to frustrate the Union's efforts to represent employees in both units. The judge's findings concerning the Respondents' violations of the Act amply support his recommended Order that the Respondents reimburse the Union for its negotiation expenses.

As the judge found and the record makes plain, Lerner and Director of Operations Deborah Kipp viewed bargaining with the Union as an interference with their normal work. Therefore, Lerner assiduously sought to restrict the dates and times when the parties met to negotiate, consistently rejecting the Union's requests to schedule more frequent and longer sessions. As a result, the parties held only 9 bargaining sessions for Galesburg and 12 for Camelot, between January and September 2008. Moreover, Lerner refused to schedule more than one session at a time, as the Union also repeatedly requested. Rather, he insisted that the parties, at the end of each meeting, schedule only the next session, a process that caused delays due to previous commitments. At one point in the negotiations, Lerner declared that he would only negotiate during one afternoon every 2 weeks. Further illustrating his disdain for both the Union and his bargaining obligation, Lerner informed the Union on at least three occasions that he was only available to meet on dates and at times when he already knew that the Union's representatives could not be present. On other occasions, Lerner canceled meetings the day before they were scheduled to occur, citing as reasons that his son had become engaged and that his car was in the shop for repair.

The time limitations that Lerner placed on bargaining sessions only exacerbated the impediments caused by his restrictions as to dates and frequency. Despite the Union's repeated requests for full-day negotiations, Lerner was adamant that they be scheduled for 3 to 4 hours. In his view, his available time for bargaining on a particular day was reduced by the driving time to and from the facility, his performance of his regular responsibilities, and preparation for the session. In fact, bargaining for both facilities totaled less than 60 hours during the period of January–September 2008, an average of 3 hours per session, with no meeting exceeding 4 hours. Even after entering into the settlement agreements requiring bargaining for a minimum of 20 hours per month and 5 hours per session for each facility, the Respondents failed to satisfy either obligation for Galesburg or Camelot for any month or session during the entire period of December 2008–May 2009 covered by the settlement agreements. Rather, the sessions typically ended prematurely because the Respondents refused to answer the Union's questions or offer proposals, rendering further bargaining impossible.

Lerner also exhibited his contempt for bargaining and prolonged the process by abruptly ending negotiating sessions. On July 22, 2008, Union Chief Negotiator Ronald Neimark was not present and Julie Kwiek, the Union's director of collective bargaining and representation, served in that role. Kwiek complained to Lerner about his refusing to meet weekly and reneging on agreed-upon contract provisions. Lerner called Kwiek a liar, and Kwiek lost her temper. After bargaining for an additional 10 minutes, the Respondents' negotiators left the room only to return and inform the Union that the session was over, just 30 to 45 minutes after it had begun. Similarly, the March 18, 2008 session began at 2 p.m., and at 4:10 p.m. the Respondents asked for a caucus to review a proposal that the Union had revised to include the Respondents' changes. Ten minutes later, Lerner informed the Union that they were not going to be able to complete the review that day and that the meeting was over. The most flagrant incident, however, occurred at the April 30, 2008 session. Respondents' negotiator Deborah Kipp had to leave early for a medical appointment, and Lerner said that he had to get something for her from his car. Lerner never returned, leaving the Union negotiators waiting until they realized that he had abandoned the meeting. That session, which lasted 2 hours and 15 minutes, was the only meeting between the parties that month.

The Respondents' bad-faith conduct at the bargaining table precluded any progress toward reaching agreements. On numerous occasions, Lerner reneged on or withdrew from tentative agreements, forcing the Union to renegotiate subjects on which agreement previously had been reached, often after lengthy discussion. At the hearing, Lerner neither denied this conduct nor asserted any good cause for it. In fact, the judge found that Lerner and Kipp were "lying under oath" when they testified that the parties had agreed that tentative agreements would be nonbinding. Moreover, the Respondents, after agreeing that tentative agreements would apply to both facilities, reversed course at a later session and insisted that the tentative agreements pertained only to Galesburg. This tactic not only protracted the parties' bargaining generally; it specifically delayed their negotiation of economic terms, which, as detailed below, the

Respondents refused to discuss until non-economic matters were resolved.

On May 7, 2008, the Union attempted to provide the Respondents a copy of its first economic proposal, but Lerner refused even to accept the document, saying that he would not consider economic matters until the parties completed bargaining over noneconomic terms. Over the Union's objections, the Respondents continued this refusal until the August 14, 2008 session, at which Kipp read to the union representatives a list of issues that included economic terms and the parties began talking about the economic package. In subsequent meetings, however, the Respondents presented additional noneconomic proposals, including on topics already discussed or agreed to, and Lerner stated that he would continue to do so. Moreover, Lerner refused to provide to the Union requested information that he viewed as pertaining to economic subjects until he was ready to discuss those topics.[4]

Even after the settlement agreements, the Respondents persisted in refusing to provide economic and other requested information relevant and necessary to the Union's role as exclusive representative of unit employees. The information requested by the Union and denied by the Respondents included: proof that background checks had been performed for Galesburg certified nursing assistants (CNAs), in order to evaluate Lerner's assertion that he was able to find sufficient qualified employees at the current wage rate; attendance information for Galesburg employees; patient census information for both facilities; and the personnel file of discharged employee Kathy Rhodes. The Respondents' refusals to provide this information severely impeded the Union's preparation for bargaining, and Respondent Camelot's refusal to provide Rhodes' personnel file hindered its ability to represent Rhodes by evaluating the basis for her discharge.

While the parties were engaged in negotiations, the Respondents also blatantly circumvented the bargaining process and disregarded their statutory bargaining obligation by unilaterally implementing numerous changes in the employees' terms and conditions of employment and engaging in direct dealings with employees. During the period of December 2008–March 2009, Respondent Galesburg reduced the hours of its housekeeping and laundry employees; increased the length of the probationary period for certain returning employees; and changed the health insurance carrier. During this same period, Respondent Camelot similarly changed its employees' health insurance carrier; granted incentive raises to certain employees; implemented a new attendance policy; began more strictly enforcing that policy; and discharged employee Rhodes under its new policy. Lerner defended his unilateral actions, and perhaps revealed his purpose in obstructing negotiations, when he baldly told Neimark that, as long as no contract was in place, he could do what he wanted. Administrator Marna Anderson admitted that she dealt directly with unit employees by polling them concerning the selection of a health insurance carrier at a time when the parties were negotiating initial agreements that would cover that subject.

In *Frontier Hotel & Casino*,[5] the Board held that

> [i]n cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

Relying on *Frontier Hotel*, the Board in *Teamsters Local No. 122 (August A. Busch & Co.)*[6] reversed the judge sua sponte and ordered that the respondent union reimburse the employer for financial losses incurred as a direct result of the union's conduct in bargaining. The Board found that the union had refused to bargain at reasonable times and for reasonable periods of time, failed to confer in good faith about wages, hours, and other terms and conditions of employment, and refused to provide the employer with requested information that was relevant and necessary for bargaining, in an effort to

[4] As further support for his findings of bad faith, the judge cited the patent unreasonableness of the Respondents' proposals, including that the Union be prohibited from leafleting within 5000 feet of the Respondents' facilities and from organizing the Respondents' clerical, professional, or licensed or degreed employees, and that the Respondents be permitted to resolve grievances with employees without the Union's involvement.

[5] 318 NLRB 857, 859 (1995), enfd. in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

[6] 334 NLRB 1190 (2001).

pressure the employer to sell the facility to another employer.

Such a remedy is also warranted here. The many egregious unfair labor practices found by the judge and not contested by the Respondents manifest an intent to waste the Union's time and resources and to avoid reaching agreement. The Respondents employed a wide variety of overt tactics in this endeavor, both before and after executing settlement agreements establishing firm bargaining requirements. If they could not evade bargaining altogether by obstructing the scheduling of sessions, they forestalled progress toward agreement by minimizing the length of the sessions, reneging on tentative agreements without good cause, breaching procedural agreements that agreed-upon terms would apply to both locations, and refusing to discuss economic subjects or furnish relevant requested information.

The Respondents' conduct away from the bargaining table further impeded agreement. Unilateral changes concerning wages, hours, benefits, and other important terms and conditions of employment, as well as direct dealings with unit employees, tainted the parties' relationship and would predictably undermine both the Union's leverage in bargaining and its support among employees.

Under all of these circumstances, we find, as did the judge, that the Respondents' aggravated unlawful conduct "infected the core" of the bargaining process. Their numerous instances of overt and deliberate bad-faith conduct directly caused the Union to waste considerable resources on protracted and futile bargaining. Further, the Respondents' violations of the Act deprived the Union of any real opportunity to achieve contracts that would be acceptable to unit employees; in fact, an agreement eventually reached for the Galesburg facility was not ratified.[7] In these circumstances, the Board's traditional remedies are insufficient to eliminate the deleterious effects of the Respondents' conduct. Only by ordering the reimbursement of the Union's negotiating expenses can the Board reasonably restore the Union's previous financial strength and consequent ability to carry out effectively its responsibilities as the employees' representative. Accordingly, we adopt the judge's recommendation to order this reimbursement remedy.

3. Litigation expenses

We also adopt, for the reasons discussed below, the judge's recommendation that the Respondents be required to reimburse the General Counsel and the Union for their costs and expenses incurred in the investigation, preparation, and litigation of Cases 33–CA–15780 and 33–CA–15781 before the judge and the Board.[8] Specifically, we find that the Respondents' abrogation of their settlement agreements, defiance of their legal obligation to bargain, refusal to resolve Cases 33–CA–15780 and 33–CA–15781 short of trial, and reliance on transparently nonmeritorious defenses caused the General Counsel and the Union to expend resources needlessly and burdened the Board's processes unnecessarily.[9]

As we have held previously, the Board has inherent authority to control its own proceedings, including the authority to award litigation expenses through the application of the "bad-faith" exception to the American Rule.[10] Under the American Rule, parties are generally responsible for their own litigation expenses. The bad-faith exception to the rule, however, permits the reimbursement of litigation expenses when a party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[11] The requisite bad faith may be demonstrated in the unsuccessful party's actions giving rise to the litigation, in the conduct of the litigation itself, or in both.[12]

As the Supreme Court has explained, the Federal courts possess the authority to impose sanctions for conduct that abuses the judicial process; such authority emanates from the courts' "inherent authority" to preserve

[7] We reject Respondent Galesburg's assertion that the Union's presentation of an agreement to its employees for a ratification vote bars a finding that the Respondent engaged in egregious conduct that would justify reimbursement of negotiating expenses. Neimark testified that he agreed to submit the agreement to a vote because the wage increase provided was 10 cents above the upcoming increase in the minimum wage, and he thought that "[i]f ever there was a time that [employees] would agree to what Mr. Lerner was proposing, this was the time." Neimark added that he "decided to take it forward because . . . Mr. Lerner had been so evasive in his bargaining that it would—we weren't going to get it any further" and "so that the union could live to fight another day." Based on this evidence, we find that the Union presented the agreement for a ratification vote despite its view that the Respondents had engaged in flagrant and pervasive bad-faith conduct. In short, capitulation in the face of protracted, unlawful conduct does not render the conduct lawful. *Henry I. Siegel Co. v. NLRB*, 340 F.2d 309 (1965) ("But when the issue has been pressed throughout, the party unable to force the other to bargain . . . does not 'waive' a completed refusal to bargain simply by signing up for the best it can get. It would seriously contravene the basic objective of industrial peace to place such a party in the predicament where it could make a valid charge of an unfair labor practice only if it forewent a contract altogether.")

[8] Although the judge also recommended ordering the reimbursement of litigation expenses in the event that this proceeding is reviewed by a court of appeals, we leave that determination to the discretion of the court.

[9] *Care Manor of Farmington*, 318 NLRB 330, 330–331 (1995).

[10] See *Teamsters Local No. 122*, supra at 1193; *Alwin Mfg. Co.*, 326 NLRB 646 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999). In view of this holding, we find it unnecessary to pass on the Respondent's argument that the Board's remedial authority under Sec. 10(c) of the Act does not encompass the award of litigation expenses.

[11] Id. at 864, quoting *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

[12] *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

the integrity of their proceedings and manage their own affairs. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–46 (1991). See, e.g., *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (upholding district court's dismissal of action for failure to prosecute). As the Court stated in *Chambers*:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L.Ed. 242 (1821); see also *Ex parte Robinson,* 19 Wall. 505, 510, 22 L.Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.,* 370 U.S. 626, 630–631, 82 S.Ct. 1386, 1388–1389, 8 L.Ed.2d 734 (1962).

501 U.S. at 43. Thus, the courts' imposition of attorneys' fees as a sanction for a party's bad-faith conduct represents an appropriate exercise of the courts' inherent authority, as it serves the purpose, inter alia, of "vindicating judicial authority." Id. at 46 (citation omitted).

As distinguished from those of the Federal courts, the powers of administrative agencies are derived solely from statutory authority expressly granted or necessarily implied. See, e.g., *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587, 598 (1934); *B.B. & V.B. v. Tacoma School District*, 2009 WL 159204, slip op. at *4 (W.D. Wash 2009). Nevertheless, the courts have recognized as a general matter that administrative agencies possess inherent power to protect the integrity of their administrative processes. See, e.g., *Checkosky v. SEC*, 23 F.3d 452, 455–456 (D.C. Cir. 1994) (upholding agency authority to protect the integrity of its processes by adopting a rule for the purpose of policing the conduct of practitioners before it); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581–582 (2d Cir. 1979) (same); see also *Polydoroff v. Interstate Commerce Commission*, 773 F.2d 372, 375 (D.C. Cir. 1985) ("Whether agency or court, any institution engaging in the adjudicative process must have the power to police the professionals who practice before it."); *Alberta Gas Chemicals, LTD v. Celanese Corp.*, 650 F.2d 9, 12–13 (2d Cir. 1981) (holding that agency had inherent authority to reconsider its earlier decision—particularly in light of allegations of fraud perpetrated against the agency in that proceeding—based on its inherent power to protect the integrity of its proceedings).

Moreover, although the Board is an administrative agency, it functions as a quasi-judicial body.[13] In unfair labor practice proceedings, the Board's administrative law judges conduct trials similar to those conducted by judges in Federal district courts. Indeed, the statute itself provides that unfair labor practice proceedings are to "be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts." 29 U.S.C. § 160(b). Accordingly, it is manifest that, similar to their colleagues in the judiciary, the Board's administrative law judges must possess the authority to control, and to preserve the integrity of, their proceedings. Indeed, in light of the Act's express grant of power to the Board to conduct trials, it cannot be gainsaid that the authority to preserve the integrity of those trials is "necessarily implied" in the grant.[14]

Our dissenting colleague does not cite to any authority holding that the Board (or other adjudicative agencies) lacks the power to award litigation expenses as a function of the inherent authority to preserve the integrity of its processes. Indeed, the only Federal court of appeals that has considered whether the Board possesses such authority has merely declined to resolve the issue. See *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 fn. 13 (D.C. Cir. 1999) (finding it unnecessary to determine whether the Board has inherent authority to order payment of

[13] See *NLRB v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253, 257 (2d Cir. 1968); *NLRB v. J.S. Popper, Inc*., 113 F.2d 602, 603 (3d Cir. 1940).

[14] Although our dissenting colleague makes much of the fact that the Board, as distinguished from art. III courts, is comprised of political appointees, he fails to explain how this distinction renders the Board unfit or incapable of properly exercising the inherent authority to preserve the integrity of its proceedings through the imposition of litigation expenses. Indeed, in our view, the Board and its administrative law judges are no less capable of recognizing an abuse of the Board's processes than is a judge appointed to an art. III court. Moreover, to the extent that our colleague suggests that such authority is more susceptible to disparate application or abuse in the hands of political appointees, we note as an initial matter that the Board's administrative law judges—who would make the initial determination to award litigation expenses based on an abuse of the Board's processes—are career civil servants possessing job tenure that is not altogether dissimilar from the lifetime tenure afforded Federal judges. In addition, and more significantly, our colleague's suggestion in that regard is without foundation; there is no basis for the dissent's apparent assumption that the Board would be more likely to abuse the inherent authority to award litigation expenses to protect against the abuse of its processes than it would any other power at its disposal, whether express or necessarily implied.

litigation expenses under bad-faith exception to the American Rule, but stating that Board order was not "obviously *ultra vires*"); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800 fn. * (D.C. Cir. 1997) (finding it unnecessary to decide issue). Further, the court's decision in *Electrical Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), cited by our dissenting colleague, has no bearing on this issue, as the court there merely upheld the Board's authority under Section 10(c) to award litigation expenses, based on then-extant precedent; indeed, the excerpt quoted by our colleague is taken from Judge MacKinnon's dissenting footnote, in which none of the other panel members joined. Accordingly, we adhere to and rely on our extant precedent in awarding litigation expenses to the Union and General Counsel here.

The Board has ordered reimbursement of litigation expenses in cases presenting striking similarities to the Respondents' conduct here. In *Teamsters Local No. 122*, supra, the Board relied on the union's bad faith in bargaining as well as its litigation conduct in ordering reimbursement of the employer's and the General Counsel's litigation costs pertaining to the 8(b)(3) allegations of the complaint. The Board found that the union purposely delayed negotiations in violation of Section 8(b)(3) by insisting on separate bargaining for the two units involved, limiting the number and length of sessions, using its counsel to engage in protracted negotiations involving bargaining over every sentence, making onerous information requests, and refusing to provide information requested by the employer. The Board further found that the union's litigation conduct, as the judge observed, "made the Board into an instrument of its own unlawful conduct." Id. at 1194. The union not only failed to present any defense to the 8(b)(3) allegations in the complaint, but also undertook to prolong the proceeding through an "abusive" 10-day cross-examination of the employer's general manager, using a detailed cross-examination approach reminiscent of its bargaining behavior.

Similarly, in *Frontier Hotel*, the Board applied the exception in ordering the respondent to reimburse the charging parties and the General Counsel for their litigation expenses based on the bad faith shown in its egregious surface bargaining and its adherence to frivolous defenses presented through the transparently false testimony of the individual who served as its chief negotiator and counsel.[15] In awarding reimbursement of litigation expenses in *Alwin Mfg.*, supra, the Board relied on both the respondent's bad-faith conduct, including its failure to remedy previous unfair labor practices and its maintenance of unilaterally implemented terms and conditions of employment, and its further bad faith in forcing the General Counsel and the Union to litigate issues that had largely been adjudicated already.[16]

In this proceeding, as in the above cases, we find ample proof that the Respondents have displayed bad faith both in their underlying unlawful conduct and in their conduct related to the litigation.

The Respondents' pervasive bad faith in bargaining is summarized above and detailed in the judge's decision. From the start, the Respondents, through Lerner, turned collective bargaining into a cat-and-mouse game of evading bargaining, abruptly ending negotiating sessions, and reneging on tentative agreements, thus forcing the Union to rehash subjects previously resolved and obstructing discussion of economic terms. In support of his finding of bad faith, the judge also noted that some of the Respondents' proposals were blatantly unreasonable, such as a prohibition on leafleting within almost a mile of the facilities. The Respondents' defiance of its bargaining obligation compelled the Union to resort to Board proceedings in order to vindicate employees' rights under the Act.

The initial unfair labor practice proceedings, however, failed to deter the Respondents' pattern of bad faith. After the close of the hearing, the parties appeared to have resolved the matter by entering into settlement agreements that prescribed the minimum length of bargaining sessions and their frequency. The Respondents immediately reneged on those commitments, failing to satisfy the requirements of the settlement agreements for even a single session or month. Instead, the Respondents persisted in bad-faith and unlawful conduct, both at and away from the bargaining table. Therefore, the judge withdrew his approval of the settlement agreements, and the consolidated unfair labor practice proceeding re-

[15] *Frontier Hotel*, supra at 864.

[16] The Board has also awarded litigation expenses under the bad-faith exception based solely on the assertion of frivolous defenses or other extreme bad-faith conduct related to the litigation. See, e.g., *Lake Holiday Manor*, 325 NLRB 469 (1998) (Board ordered reimbursement of litigation costs when respondent repeatedly reneged on settlement agreements and made last-minute attempts to delay the proceedings in contravention of the judge's instructions); *675 West End Owners Corp.*, 345 NLRB 324 (2005) (respondent violated the judge's instructions and abused the Board's processes by serving subpoenas that had previously been revoked and issuing subpoenas after the close of the hearing); cf. *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059 (2003) (no reimbursement of litigation expenses when Board vote divided as to whether union organizer's conduct toward managers, supervisors, and guards violated Sec. 8(b)(1)(A)); *Sunshine Piping*, 351 NLRB 1371 (2007) (no reimbursement when employer's alteration of attendance records was amenable to conflicting explanations and did not necessarily demonstrate that defense was wantonly or vexatiously asserted).

sumed with the additional 8(a)(5) allegations in Cases 33–CA–15780 and 33–CA–15781. It is indisputable that, had the Respondents complied with their obligations under the agreements, the General Counsel and the Union would never have incurred the additional expense of the resumed litigation.

The Respondents' bad faith was equally evident in its conduct during the hearing in this proceeding. Lerner, the owner and president of the Respondents, served as the Respondents' chief negotiator, representative, and key witness at the hearing. Because he participated in the parties' bargaining and personally engaged in the conduct here found unlawful, Lerner possessed full knowledge of the events at issue. Nonetheless, throughout the hearing he presented testimony, personally and through the Respondents' other witnesses, that the judge broadly discredited as replete with "contradictions, inconsistencies, and outright lies under oath." As a result, the resources of the General Counsel and the Union were squandered not only in the investigation of the additional allegations, but in the preparation and conduct of the resumed hearing, when the Respondents' only expectation of success was based on their apparent hope that the judge would not detect the obvious untrustworthiness of their evidence. The bad-faith exception to the American Rule protects litigants from the significant economic consequences of such wanton misuse of legal processes in support of a party's unlawful objectives.

Accordingly, we adopt the judge's Order that the Respondents reimburse the General Counsel and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the Board.

AMENDED CONCLUSIONS OF LAW

1. Respondent Camelot Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act by: restricting the dates for bargaining sessions; restricting the lengths of bargaining sessions; repeatedly canceling and shortening scheduled bargaining sessions beyond its unreasonable stated intention not to bargain for more than 4 hours per session; reneging on or withdrawing from tentative agreements without good cause; refusing to bargain over economic subjects; and refusing to make economic proposals.

2. Respondent Camelot Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act by failing and refusing to furnish the Union with census information regarding its patient population and the personnel file of employee Kathy Rhodes without Rhodes' written authorization.

3. Respondent Camelot Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act by: unilaterally changing the employee health insurance carrier; giving incentive raises to certain bargaining unit employees; implementing a new attendance policy; more strictly enforcing the attendance policy; and restricting the length of bargaining sessions, without providing the Union prior notice and the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects.

4. By discharging Kathy Rhodes pursuant to the new more strictly enforced attendance policy, Respondent Camelot Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. By bypassing the Union and dealing directly with employees by polling them regarding a change in insurance carrier, Respondent Camelot Terrace been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent Galesburg Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices within the meaning of Section 2(6) and (7) of the Act by: restricting the dates for bargaining sessions; restricting the lengths of bargaining sessions; repeatedly canceling and shortening scheduled bargaining sessions beyond its unreasonable stated intention not to bargain for more than 4 hours per session; reneging on or withdrawing from tentative agreements without good cause; refusing to bargain over economic subjects; and refusing to make economic proposals.

7. Respondent Galesburg Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in vio-

lation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices within the meaning of Section 2(6) and (7) of the Act by failing and refusing to furnish the Union with requested information: proof that background checks had been performed for its certified nursing assistants, attendance information, and census information regarding its patient population.

8. Respondent Galesburg Terrace has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and has thereby engaged in unfair labor practices within the meaning of Section 2(6) and (7) of the Act by: unilaterally reducing the hours of its housekeeping and laundry employees; increasing the length of the probationary period for certain returning employees; changing the employee health insurance carrier; and restricting the length of bargaining sessions, without providing the Union prior notice and the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects.

AMENDED REMEDY

We amend the judge's recommended remedy to provide that employee Kathy Rhodes is to be made whole for any loss of earnings and other benefits suffered as a result of her discharge. Backpay will be computed in accordance with *F.W. Woolworth*, 90 NLRB 289 (1959), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

In addition, having found that the Respondents made unlawful unilateral changes to employees' terms and conditions of employment we shall require the Respondents, to the extent requested by the Union, to rescind those or any of those unilateral changes and to make the unit employees whole for any loss of earnings and other benefits attributable to their unlawful conduct. This make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

With respect to the 9-month extension of the certification year at Camelot Terrace and the 6-month extension at Galesburg Terrace, as ordered by the judge in accordance with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), we amend the remedy to clarify that these periods begin on the dates when the Respondents begin to bargain in good faith with the Union. We shall also modify the remedy to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Camelot Terrace, Streator, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union over terms and conditions of employment for bargaining unit employees by: restricting the dates for bargaining sessions; restricting the lengths of bargaining sessions; repeatedly canceling and shortening scheduled bargaining sessions beyond its unreasonable stated intention not to bargain for more than 4 hours per session; reneging on or withdrawing from tentative agreements without good cause; refusing to bargain over economic subjects; and refusing to make economic proposals. The appropriate bargaining unit is:

> All full-time and regular part-time certified nurses assistants (CNAs), dietary employees, cooks, housekeeping employees, laundry employees, unit aides (assistants), activity aides, medical records, and rehab aides employed by the Employer at its facility currently located at 516 W. Frech St., Streator, Illinois; but excluding all other employees, department heads, casual employees, LPN's, RN's, managers, maintenance workers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

(b) Failing and refusing to furnish the Union with requested census information regarding its patient population and the personnel file of employee Kathy Rhodes without Rhodes' written authorization.

(c) Without providing the Union prior notice and the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects, unilaterally: changing the employee health insurance carrier; giving incentive raises to certain bargaining unit employees; implementing a new attendance policy; more strictly enforcing the attendance policy; and restricting the length of bargaining sessions.

(d) Discharging Kathy Rhodes pursuant to the new more strictly enforced attendance policy, without providing the Union prior notice and the opportunity to bargain

[17] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

with respect to the change of a mandatory subject of bargaining and its effects.

(e) Bypassing the Union and dealing directly with employees by polling them regarding a change in insurance carrier.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union, on request, as the recognized bargaining representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Bargain in good faith with the Union not less than twenty-four (24) hours per month, at least six (6) hours per session for this facility or, in the alternative, twenty-four (24) hours per month, at least six (6) hours per session for the same contract(s) for both the Camelot Terrace and the Galesburg Terrace facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

(c) Reimburse the National Labor Relations Board (Board) and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Case 33–CA–15781 before the Board.

(d) Reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33–CA–15781, 33–CA–15584, and 33–CA–15669.

(e) Furnish to the Union in a timely manner the information that the Union requested: census information regarding its patient population and Rhodes' personnel file without requiring her written authorization.

(f) On request by the Union, and to the extent sought by the Union, rescind the changes in terms and conditions of employment described above, and restore the status quo ante.

(g) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral changes, in the manner set forth in the remedy section of the decision, as amended.

(h) Within 14 days from the date of this Order, offer Kathy Rhodes full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(i) Make Kathy Rhodes whole for any loss of earnings and other benefits suffered as a result of her discharge, in the manner set forth in the remedy section of the decision, as amended.

(j) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at its facility in Streator, Illinois, copies of the attached notice marked "Appendix A."[18] Copies of the notice, on forms provided by the Regional Director for Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2008.

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

B. Respondent Galesburg Terrace, Galesburg, Illinois, its officers, agents, successors, and assigns, shall

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

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union over terms and conditions of employment for bargaining unit employees by: restricting the dates for bargaining sessions; restricting the lengths of bargaining sessions; repeatedly canceling and shortening scheduled bargaining sessions beyond its unreasonable stated intention not to bargain for more than 4 hours per session; reneging on or withdrawing from tentative agreements without good cause; refusing to bargain over economic subjects; and refusing to make economic proposals. The appropriate bargaining unit is:

> All full-time and regular part-time certified nurses assistants, dietary aides and cooks, laundry aides, activity aides, housekeeping, and social service aides, employed by the Employer at its Galesburg, Illinois facility; EXCLUDING office clerical employees, professional employees, guards, supervisors as defined in the Act, registered nurses, licensed practical nurses, confidential employees, casual employees, and all other employees.

(b) Failing and refusing to furnish the Union with information that the Union requested: proof that background checks had been performed for its certified nursing assistants, attendance information, and census information regarding its patient population.

(c) Without providing the Union prior notice and the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects, unilaterally: reducing the hours of its housekeeping and laundry employees; increasing the length of the probationary period for certain returning employees; changing the employee health insurance carrier; and restricting the length of bargaining sessions.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union, on request, as the recognized bargaining representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Bargain in good faith with the Union not less than twenty-four (24) hours per month, at least six (6) hours per session for this facility or, in the alternative, twenty-four (24) hours per month, at least six (6) hours per session for the same contract(s) for both the Galesburg Terrace and the Camelot Terrace facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

(c) Reimburse the National Labor Relations Board (Board) and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Case 33–CA–15780 before the Board.

(d) Reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33–CA–15780, 33–CA–15587, and 33–CA–15670.

(e) Furnish to the Union in a timely manner the information that the Union requested: proof that background checks had been performed for its certified nursing assistants, attendance information, and census information regarding its patient population.

(f) On request by the Union, and to the extent sought by the Union, rescind the changes in terms and conditions of employment described above, and restore the status quo ante.

(g) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral changes, in the manner set forth in the remedy section of the decision, as amended.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Galesburg, Illinois, copies of the attached notice marked "Appendix B."[19] Copies of the notice, on forms provided by the Regional Director for Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

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

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2008.

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

IT IS FURTHER ORDERED that the settlement agreements that the Union and the Respondents entered into on December 4, 2008, concerning Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670 are set aside.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

> "The courts are interpreters, not creators, of legal rights to recover and if there is a need for recovery of attorney's fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by this Court."[1]

Justice Black's statement, although referring to the Securities Exchange Act of 1934, applies with equal force to the Board's authority under the National Labor Relations Act (NLRA). As the D.C. Circuit put it succinctly and definitively, because the American Rule, pursuant to which parties bear their own litigation expenses, is "'deeply rooted in our history and congressional policy,'" an agency must establish "clear [statutory] support" for its claim of congressional authorization to impose fee awards, either to a party or the agency itself.[2] The D.C. Circuit, in accordance with controlling Supreme Court precedent, has held, and I agree, that no such support can be found in either the text of the Act or its legislative history.[3] Consequently, the Board lacks the authority under Section 10(c) to impose a fee-shifting order.[4]

Moreover, because the Agency is a creature of statute, and not an article III court, its remedial powers are limited to those established by Congress. Therefore, we are not free to invoke principles of "inherent authority" in order to unilaterally vest the Board with powers beyond those contemplated by the legislature. Indeed, while my colleagues rely on some Board precedent imposing fee awards pursuant to the "bad faith" exception to the American Rule, they cite not a single court decision, post *Alyeska*, in which *any* agency order shifting responsibility for attorney fees based upon a theory of "inherent authority" has been upheld. Because the decision whether to shift fees is beyond our delegated purview and expertise, prior Board decisions on the issue are entitled to no deference.[5] In my view, if we plainly lack the statutory authority to shift fees, whether for deterrent or make whole purposes, no reasonable construction of the Act would permit us, as political appointees not vested with life tenure, to invoke the inherent powers of article III courts to award fees whenever a majority of the Board (which may or may not consist of members confirmed

[1] *Mills v. Electric Auto-Lite*, 396 U.S. 375, 397 (1970) (Black, J., concurring in part and dissenting in part).

[2] *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997), citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975).

[3] Id. ("Finding no such support in the terms or the legislative history of Sec. 10(c) of the National Labor Relations Act, we conclude that the Board lacks [the] authority . . . to shift[] responsibility for attorney's fees in an agency proceeding), citing *Alyeska*, supra at 272; *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717, 726 (1982) (holding with respect to Sec. 303 of the Labor Management Relations Act, 29 U.S.C. Sec. 187, that a court may award attorney's fees only when expressly authorized by the legislature, and "[i]n the absence of clear support for [that] construction in the language or legislative history of Sec. 303 we decline to adopt such a broad exception to the American Rule.").

[4] Id.; accord: *Quick v. NLRB*, 245 F.3d 231, 256–257 (3d Cir. 2001) ("However, absent 'clear support' for an award of attorneys fees, either in the language or legislative history of the [NLRA], we cannot infer congressional intent to override the historic presumption against an award of attorney's fees in the circumstances here."), citing *Summit Valley Industries, Inc.*, supra, 456 U.S. at 726.

[5] See *Unbelievable, Inc.*, supra, 118 F.3d at 805 ("[T]he Board strays from its area of expertise when it determines whether fee shifting is appropriate in a particular case," and such decisions are not entitled to judicial deference), citing *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (court does not defer to agency decision in matter outside of agency's expertise).

with the advice and consent of the Senate) believes a litigant has acted in bad faith.

Almost 40 years ago, Judge George MacKinnon stated that:

> Absent statutory authority, courts may, in the exercise of their inherent equitable powers, award attorney fees in certain carefully circumscribed situations where "overriding considerations indicate the need for such a recovery." *Hall v. Cole*, supra at 4–5. An administrative agency possesses no such inherent equitable power, however, for it is a creature of the statute that brought it into existence; it has no powers except those specifically conferred upon it by statute. *Electrical Workers v. NLRB*, 502 F.2d 349, 352–353 fn. * (D.C. Cir. 1974).

My colleagues do not dispute this observation and acknowledge that "[a]s distinguished from those of federal courts, the powers of administrative agencies are derived solely from statutory authority expressly granted or necessarily implied." They nonetheless maintain that because the Board functions as a "quasi-judicial body," its administrative law judges must possess the authority to control their proceedings. In my colleagues' view that authority must extend to the award of litigation expenses, including attorneys fees, when a party has acted in bad faith in a Board proceeding. I disagree.

First, my colleagues cite no judicial authority for their position. Second, an administrative agency differs fundamentally from an article III court. We lack inherent equitable powers, and while we have broad authority to fashion remedies, and for that matter to control our own proceedings,[6] the confines of our authority are delimited by our authorizing statute. As noted above, at least two Federal courts of appeals have concluded that Section 10(c) does not authorize fee shifting, and have reiterated the Supreme Court's admonition that there must be "clear support" in either the text or legislative history of the authorizing statute to establish such power.[7] That should effectively end the inquiry. It makes no sense to acknowledge that the broad grant of remedial authority to fashion remedies under Section 10(c) fails to establish the necessary "clear support," but to then divine such power from the vagaries of "inherent authority" vested in article III courts—a subject matter on which we have absolutely no expertise. In short, my colleagues' award of fees in the instant case exceeds our statutory authority, trenches on the well established parameters of the American Rule, and raises the specter of the imposition of punitive sanctions for litigation conduct deemed by political appointees, not article III judges, to constitute bad faith.[8] I therefore dissent.[9]

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[6] The Board and its administrative law judges certainly have alternative means to control our proceedings short of the post hoc imposition of litigation costs in contravention of the American Rule. Among other things, the judge may limit the scope of litigation, preclude evidence, strike pleadings, draw adverse inferences from lack of party cooperation, demand decorum, remove counsel or other persons from the hearing for good cause, and report instances of attorney misconduct for investigation.

[7] In light of the Supreme Court's requirement of this heightened showing to permit fee shifting, the court cases cited by my colleagues recognizing the "inherent authority" of administrative agencies to police professionals who appear before them are simply inapposite; none of those cases dealt with awards of attorney's fees.

[8] My colleagues contend that they are just as fit and capable as art. III judges of making fee-shifting awards, and that there is nothing inherent in their status as political appointees which undermines their impartiality. This contention is irrelevant to the issue at hand. What distinguishes an administrative agency from an art. III court is the fact that our remedial authority is expressly limited by statute; as noted herein, nothing in the Act demonstrates Congressional intent to vest the Board with authority to overcome the American Rule. Likewise irrelevant is the fact that our administrative law judges are career civil servants, as their remedial authority is also limited by statute and does not encompass fee-shifting power. Moreover, they would not act as a check on the Board's political appointees in any event, as the Board can and does impose remedies not first awarded by administrative law judges.

[9] Though I dissent from the award of attorney's fees and litigation expenses, I join my colleagues in finding that the Union should be reimbursed for its negotiation expenses due to the Respondent's failure and refusal to bargain in good faith, a remedy long sanctioned by both the Board and courts.

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Service Employees International Union Healthcare Illinois and Indiana (the Union) over your terms and conditions of employment by restricting the dates for bargaining sessions; restricting the lengths of bargaining sessions; repeatedly canceling and shortening scheduled bargaining sessions beyond our unreasonable stated intention not to bargain for more than 4 hours per session; reneging on or withdrawing from tentative agreements without good cause; refusing to bargain over economic subjects; and refusing to make economic proposals. The appropriate bargaining unit is:

All full-time and regular part-time certified nurses assistants (CNAs), dietary employees, cooks, housekeeping employees, laundry employees, unit aides (assistants), activity aides, medical records, and rehab aides employed by the Employer at its facility currently located at 516 W. Frech St., Streator, Illinois; but excluding all other employees, department heads, casual employees, LPN's, RN's, managers, maintenance workers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT fail and refuse to timely furnish the Union with census information regarding our patient population or the personnel file of employee Kathy Rhodes without her written authorization.

WE WILL NOT, without providing the Union prior notice and the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects, unilaterally change your health insurance carrier; give incentive raises to certain bargaining unit employees; implement a new attendance policy; more strictly enforce the attendance policy; or restrict the length of bargaining sessions.

WE WILL NOT discharge you pursuant to a unilateral change in the terms and conditions of your employment.

WE WILL NOT bypass the Union and deal directly with you by polling you regarding a change in a term and condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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

WE WILL bargain in good faith with the Union not less than twenty-four (24) hours per month, at least six (6) hours per session for this facility or, in the alternative, twenty-four (24) hours per month, at least six (6) hours per session for the same contract(s) for both this and the Galesburg Terrace facility, or another schedule mutually agreed upon, until a complete collective-bargaining agreement or a bona fide impasse is reached.

WE WILL reimburse the National Labor Relations Board and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Case 33–CA–15781 before the Board.

WE WILL reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33–CA–15781, 33–CA–15584, and 33–CA–15669.

WE WILL furnish the Union in a timely manner the information it requested: census information regarding our patient population and Rhodes' personnel file without requiring her written authorization.

WE WILL, on request by the Union, and to the extent sought by the Union, rescind the unilateral changes in terms and conditions of employment we unlawfully made, and restore the status quo ante.

WE WILL make you whole for any loss of earnings and other benefits you suffered as a result of our unlawful unilateral changes to your terms and conditions of employment.

WE WILL, within 14 days from the date of the Board's Order, offer Kathy Rhodes full reinstatement to her former job, or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kathy Rhodes whole for any loss of earnings and other benefits resulting from her discharge, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kathy Rhodes, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CAMELOT TERRACE

APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Service Employees International Union Healthcare Illinois and Indiana (the Union) over your terms and conditions of employment by restricting the dates for bargaining sessions; restricting the lengths of bargaining sessions; repeatedly canceling and shortening scheduled bargaining sessions beyond our unreasonable stated intention not to bargain for more than 4 hours per session; reneging on or withdrawing from tentative agreements without good cause; refusing to bargain over economic subjects; and refusing to make economic proposals. The appropriate bargaining unit is:

> All full-time and regular part-time certified nurses assistants, dietary aides and cooks, laundry aides, activity aides, housekeeping, and social service aides, employed by the Employer at its Galesburg, Illinois facility; EXCLUDING office clerical employees, professional employees, guards, supervisors as defined in the Act, registered nurses, licensed practical nurses, confidential employees, casual employees, and all other employees.

WE WILL NOT fail and refuse to furnish the Union with the information it requested: proof that background checks had been performed for our certified nursing assistants, attendance information, and census information regarding our patient population.

WE WILL NOT, without providing the Union prior notice and the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects, unilaterally reduce the hours of our housekeeping and laundry employees; increase the length of the probationary period for certain returning employees; change your health insurance carrier; or restrict the length of bargaining sessions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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

WE WILL bargain in good faith with the Union not less than twenty-four (24) hours per month, at least six (6) hours per session for the Galesburg Terrace facility or, in the alternative, twenty-four (24) hours per month, at least six (6) hours per session for the same contract(s) for the Camelot Terrace and Galesburg Terrace facilities, or on another schedule mutually agreed upon, until a complete collective-bargaining agreement or a bona fide impasse is reached.

WE WILL reimburse the National Labor Relations Board and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Case 33–CA–15780 before the Board.

WE WILL reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33–CA–15780, 33–CA–15587, and 33–CA–15670.

WE WILL furnish to the Union in a timely manner the information it requested: proof that background checks had been performed for our certified nursing assistants, attendance information, and census information regarding our patient population.

WE WILL, on request by the Union, and to the extent sought by the Union, rescind the changes in terms and conditions of employment we unlawfully made, and restore the status quo ante.

WE WILL make you whole for any loss of earnings and other benefits you suffered as a result of our unlawful unilateral changes to your terms and conditions of employment.

GALESBURG TERRACE

Melissa M. Olivero, Esq., for the General Counsel.
Michael Lerner, of Chicago, Illinois, for Respondents.
Joel A. D'Alba, Esq. and *Ryan Hagerty, Esq. (Asher, Gittler, Greenfield, D'Alba, Ltd.),* of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Service Employees International Union Healthcare Local 4 (the Union) filed

charges and amended charges against Respondents Camelot Terrace (Camelot) and Galesburg Terrace (Galesburg), beginning May 16, 2008. An order consolidating cases and amended consolidated complaint and notice of hearing was issued on October 29, 2008, in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670 alleging that at various times from January through September 2008, the Union met with Respondents and Respondents, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), failed and refused to bargain in good faith in that they engaged in the following conduct: (i) restricted the dates for the bargaining sessions; (ii) restricted the lengths of bargaining sessions; (iii) repeatedly canceled and shortened scheduled bargaining sessions beyond their unreasonably stated intention not to bargain for more than 4 hours per session; (iv) reneged on or withdrew from tentative agreements without good cause; (v) refused to bargain over economic subjects; and (vi) refused to make economic proposals.[1] Respondents deny violating the Act as alleged.

These four cases were tried in Peoria, Illinois, on November 12 and 13, 2008. Briefs were to be filed by December 19, 2008. However, on December 4, 2008, the General Counsel filed a Recommendation to Approve Settlement Agreements between the Union and the Respondents in the above-entitled cases. Among other things, both the settlement agreement with Camelot and the settlement agreement with Galesburg specified as follows:

> WE WILL immediately proceed to set a bargaining date, not to exceed fourteen days from the date below and thereafter bargain in good faith until full agreement or bona fide impasse is reached. Such bargaining shall be held totaling not less than twenty (20) hours per month, *per facility*, at least five (5) hours per session, or, at Respondents' option, totaling no less than twenty (20) hours per month for the same contract(s) for both facilities, at least five (5) hours per session, or another schedule mutually agreed to by the parties, until a complete collective-bargaining agreement, or good-faith impasse is reached in both units. [Emphasis added.]

The settlement agreements (GC Exh. 94) were approved and it was ordered that (a) the consolidated proceeding be continued indefinitely pending the filing of a motion by the General Counsel indicating that compliance with the terms of the settlement agreements has been achieved, and also requesting that the charges be withdrawn, the amended consolidated complaint be dismissed, and the record closed, and (b) the briefing schedule be suspended.

By pleading dated June 18, 2009, the General Counsel moved to reopen the record in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, set aside the settlement agreement in these cases, and consolidate these cases with Cases 33–CA–15780 and 33–CA–15781. The General Counsel alleged that this action should be taken because subsequent to signing the settlement agreements described above Respondents engaged in conduct which violated the agreements. More specifically, the consolidated complaint in Cases 33–CA–15780 and 33–CA–15781, issued May 29, 2009, which cites two original and two amended charges filed by the Service Employees International Union Healthcare Illinois and Indiana (the Union), collectively alleges, among other things, that Respondents Camelot and Galesburg violated Section 8(a)(1) and (5) of the Act from December 2008 through May 2009 by (a) restricting the lengths of bargaining sessions, (b) failing and refusing to provide requested information to Union, (c) engaging in direct dealing with Camelot bargaining unit members, (d) making unilateral changes to unit employees' terms and conditions of employment without providing the Union notice or an opportunity to bargain,[2] and (e) discharging Camelot employee Kathy Rhodes pursuant to a unilaterally changed attendance policy. Counsel for the General Counsel points out that these allegations all pertain to specific conduct that is in direct violation of the settlement agreement entered into by the parties in the above-captioned matter, and in violation of the Respondents' obligation to bargain in good faith with the Union pursuant to the Act.

In their response, dated June 19, 2009, Respondents asserted that "Respondent is confident that it has faithfully complied with the Agreement and the NLRA rules"; and that "[o]nly after a hearing is held to determine whether any violations occurred, should the issue of vacating [the settlement agreement] be considered. . . ."

By order entered June 30, 2009, my approval of the settlement agreements in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670 was withdrawn pending my findings with respect to the new allegations. The record in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670 was reopened, those cases were consolidated with Cases 33–CA–15780 and 33–CA–15781, and the resumption of the trial was scheduled.

By Amendment to Consolidated Complaint issued August 11, 2009, the following prayers for relief were inserted:

> WHEREFORE, as part of the remedy for the unfair labor practices alleged … in Cases 33–CA–15780 and 33–CA–15781, the General Counsel seeks an Order requiring that

[1] As part of the remedy, the General Counsel seeks an order requiring Respondents to bargain in good faith with the Union not less than 24 hours per month, at least 6 hours per session for each facility or, alternatively, 24 hours per month, at least 6 hours per session collectively for both facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached. Furthermore, the General Counsel seeks an order requiring Respondents to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1062), as the recognized bargaining representative in the appropriate units. Specifically, the General Counsel seeks an order extending the Union's certification year for an additional 6 months at Galesburg and for an additional 9 months at Camelot.

[2] It is alleged that Galesburg reduced the hours of its housekeeping and laundry employees; that Galesburg increased the length of the probationary period for certain bargaining unit employees; that Galesburg and Camelot changed their employee health insurance carrier; that Camelot gave incentive raises to certain bargaining unit employees; that Camelot implemented a new attendance policy; and that Camelot began more strictly enforcing its attendance policy.

Respondent Camelot Terrace promptly reinstate Kathy Rhodes to her former position. The General Counsel also requests that Respondent Camelot Terrace be ordered to make Kathy Rhodes whole for any loss of earnings, including quarterly compound interest on such lost earnings, and other benefits, suffered as a result of her discharge until such time as she is reinstated.

WHEREFORE, as part of the remedy for the unfair labor practices alleged … in Cases 33–CA–15780 and 33–CA–15781, the General Counsel seeks an Order requiring Respondents to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the National Labor Relations Board and the courts.

WHEREFORE, as part of the remedy for the unfair labor practices alleged … in Cases 33–CA–15780 and 33–CA–15781, and as previously alleged in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, the General Counsel seeks an Order requiring Respondents to reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session.

WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, and as previously alleged in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, the General Counsel seeks an Order requiring Respondents to bargain in good faith with the Union not less than twenty-four (24) hours per month, at least six (6) hours per session for each facility or, in the alternative, twenty-four (24) hours per month, at least six (6) hours per session collectively for both facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, and as previously alleged in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, the General Counsel seeks an order requiring Respondents to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate units. Specifically, the General Counsel seeks an order extending the Union's certification year for an additional 6 months at Respondent Galesburg Terrace and for an additional 9 months at Respondent Camelot Terrace.

By "ANSWERS TO AMENDMENT TO CONSOLIDATED COMPLAINT CASES 33–CA–15780, 33–CA–15781, 33–CA–15584, 33–CA–15669, 33–CA–15587, 33–CA–15670" filed August 17, 2009, Respondents "Agrees" regarding paragraphs 1 through 6(a) and paragraph 7(a), and "Denies" paragraphs 6(b–d) and 7(b) and (c), and paragraphs 8 through 15. As noted above, the amendment to consolidated complaint merely amended the above-described consolidated complaint issued May 29, 2009, to include the above-described prayers for relief. The record does not appear to contain a timely filed response to the consolidated complaint in Cases 33–CA–15780 and 33–CA–15781 issued on May 29, 2009, or an explanation why a response was not filed before August 17, 2009. As noted above, by pleading dated June 19, 2009, Respondents replied to the General Counsel's motion to reopen the record and set aside the settlement agreement in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670. That pleading contains the following: "5. The Charges recently made by the union are merely unsubstantiated accusations made by the Union, and they are in fact, completely untrue." Respondents' June 19, 2009 pleading does not mention the consolidated complaint issued on May 29, 2009, in Cases 33–CA–15780 and 33–CA–15781, notwithstanding the fact that the General Counsel's motion to reopen the record in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670 indicates " . . . on May 29, 2009, the Region issued a Consolidated Complaint [Footnote omitted] under case numbers 33–CA–15780 and 33–CA–15781." Individuals at both Galesburg and Camelot signed return receipt green cards addressed to Michael Lerner at those facilities on May 30 and June 1, 2009, respectively, for the consolidated complaint issued on May 29, 2009. Section 102.20 of the Rules and Regulations of the National Labor Relations Board (the Board) indicates as follows:

> The respondent shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

Respondents' June 19, 2009 pleading does not comply with the requirements of this section of the Board's Rules. Consequently, as stated in the rule " All allegations in the complaint, if no answer is filed, . . . shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown." Here, it does not appear that a timely answer was filed. And no good cause has been shown for not deeming all of the allegations in the consolidated complaint in Cases 33–CA–15780 and 33–CA–15781 to be admitted to be true. The General Counsel did not pursue this matter.

The resumed trial in this consolidated proceeding was held on August 25 and 26, 2009.

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

FINDINGS OF FACT

I. JURISDICTION

Camelot, a corporation, with an office and place of business in Streator, Illinois, has been engaged in the business of operating a nursing home, where during the calendar year preceding

the issuance of the above-described consolidated complaints it derived gross revenues in excess of $100,000, and it purchased and received at its facility materials or services valued in excess of $5000 directly from points outside the State of Illinois. Galesburg, a corporation, with an office and place of business in Galesburg, Illinois, has been engaged in the business of operating a nursing home, where during the calendar year preceding the issuance of the above-described consolidated complaints it derived gross revenues in excess of $100,000, and it purchased and received at its facility materials or services valued in excess of $5000 directly from points outside the State of Illinois. Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As here pertinent, Michael Lerner is the president of Gem Healthcare Management, Inc. (Gem), of Chicago, Illinois, Galesburg, and Camelot. The Union was certified as the bargaining representative for certain employees at Galesburg on May 24, 2007, and at Camelot on October 10, 2007.[3]

Lerner testified that he is the shareholder of Galesburg; that he is the owner of Camelot; that Gem does not have any ownership interest in either Camelot or Galesburg; that Gem does not pay any of the employees of Galesburg or Camelot; and that Gem does not manage Galesburg.

When called by Lerner, Deborah Kipp, who has been director of operations of Galesburg, Camelot, and two other of Lerner's facilities since 1997, testified that in 2004 she negotiated a contract with another union, the UAW, for Lerner's Forest Hill facility; that the negotiations took 2.5 months; that the parties spent about 4 hours (afternoons) on each session and they met every other week; that the contract was written from scratch; that no one saw a need to meet more than 4 hours a day to get the contract agreed to and signed; that the negotiations with the UAW occurred in an extremely calm atmosphere with a lot of give and take; that she and Lerner are negotiating with SEIU; that the negotiations with SEIU have been at times very stressful, very negative; that it took management so much less time to get a contract done with UAW than it is with SEIU because with the UAW there was an immediate rapport, things were calm, and there weren't demands; that only two people negotiated for the UAW; that SEIU has employees participating in negotiations; that she tries to visit the four nursing homes she oversees once a week; that management typically has been giving 3 to 4 hours to SEIU for each bargaining session; and that it is not easy for her to give up her time for negotiations, and she could not give up a whole day of her time for negotiations.

On cross-examination, Kipp testified that management's negotiations with the UAW were amicable; that she was not aware of any charges being filed with the Board over management's negotiations with the UAW for the Forest Hill contract; that General Counsel's Exhibit 59 is an affidavit that she signed and gave to the Board but she could not say that it was provided to the Board with respect to a charge that was filed against Forest Hill; that her affidavit begins with: "[a]t the initial meetings between the UAW and Forrest Hill, it was agreed to meet every two weeks, for one and a half hours. This time frame was set to allow each side to review the issues and formulate positions and responses" (Tr. 306); that she did not recall any complaints issued against Forest Hill; and that General Counsel's Exhibit 61 is a charge which she does not exactly read to be a charge against Forest Hill Health and Rehab Center alleging, among other things, that the employer has bargained in bad faith by renegotiating tentatively agreed to proposals. General Counsel's Exhibit 61 is a charge filed on "2/14/05" with the Board in Case 33–CA–14793 by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) against Forest Hill Health and Rehab Center, Inc. (Forest Hill), which as noted is owned by Lerner. This charge alleges the following with respect to Forest Hill:

> 1. Since August 2004, the above-named employer has bargained in bad faith by refusing to meet at reasonable times and confer in good faith, and has caused unreasonable delay in meeting to negotiate a first agreement.
>
> 2. Since August 2004, the above-named employer has bargained in bad faith by refusing to show proposals tentatively agreed to at the table to their attorney. By this action, the employer refuses to actually tentatively agree to any proposal.
>
> 3. Since December 21, 2004, the above-named employer has bargained in bad faith by renegotiating tentatively agreed to proposals.
>
> 4. Since December 21, 2004, the above-named employer has bargained in bad faith by engaging in undue delay in providing to the union requested information that is relevant to the bargaining process.

General Counsel's Exhibit 62 is a Board complaint in Case 33–CA–14793 issued March 30, 2005, which alleges that Forest Hill violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith by engaging in dilatory bargaining tactics, namely (1) refusing to meet and bargain with the Union more frequently than once every 2 weeks for about 2 hours; (2) canceling scheduled negotiation sessions and refusing to reschedule them any sooner than 2 weeks later; (3) refus-

[3] The Galesburg unit is as follows:

> All full-time and regular part-time certified nursing assistants, helping hands, dietary aides and cooks, laundry aides, activity aides, housekeeping, and social service aides, employed by the Employer at its Galesburg, Illinois facility; EXCLUDING office clerical employees, professional employees, guards, supervisors as defined in the Act, registered nurses, licensed practical nurses, confidential employees, casual employees, and all other employees.

The Camelot unit is as follows:

> All full-time and regular part-time certified nurses assistants (CNAs), dietary employees, cooks, housekeeping employees, laundry employees, unit aides (assistants), activity aides, medical records, and rehab aides employed by the Employer at its facility currently located at 516 W. Frech St., Streator, Illinois; but excluding all other employees, department heads, casual employees, LPN's, RN's, managers, maintenance workers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act. [GC Exhs. 1(rr) and 1(xx).]

ing to be bound by tentative agreements reached during negotiations by insisting on reserving the right to have its attorney "review and refine" all tentative agreements, and then refusing to show said agreements to its attorney until all provisions of a proposed contract have been completely negotiated. The complaint alleges that owner Lerner and Director of Operations Kipp have been supervisors and agents of Forest Hill within the meaning of the Act. General Counsel's Exhibit 63 is an unsigned (If there was a cover letter, it was not included in the exhibit.) position statement of Forest Hill in Case 33–CA–14793 which opens with "[t]his employer has not bargained in bad faith in any which way. The union continues to fabricate these frivolous charges in retaliation of the employer's charge made against them, and when negotiations aren't going their way. Their charges are simply untrue." And General Counsel's Exhibit 64 is an (If there was a cover letter, it was not included in the exhibit.) supplemental position statement of Forest Hill in Case 33–CA–14793 which opens with the following:

> This employer has not bargained in bad faith in any which way. It has faithfully met with the union on the reasonable biweekly schedule that was initially agreed to and has done nothing to intentionally delay the negotiating process. The union, feeling unsuccessful at the bargaining table, is attempting to badger the employer, by continuously bombarding the NLRB with frivolous, contrived, and untruthful charges of unfair bargaining.

Kipp further testified that General Counsel' Exhibit 64 includes an affidavit from her and Lerner (both dated February 27, 2005); that the complaint in Case 33–CA–14793 apparently was withdrawn due to a settlement between Forest Hill and the UAW because she did not have to go to a Board hearing in that matter; and that she is also director of operations for Forest Hill just as she is for Camelot and Galesburg, and she held that position with respect to Forest Hill between August and December 2004. Kipp also testified on cross-examination that she is familiar with the contract between UAW and Forest Hill; that she was at the collective-bargaining sessions for that contract; and that the contract, Charging Party's Exhibit 1 (the cover page and pages 14 and 15 of the collective-bargaining agreement), contains provisions that state (1) "Employer shall have the right to discipline employees by verbal or written reprimand, suspension, or discharge for just cause" (Tr. 314 and 315), and (2) employees will be able to file grievances to contest their discharge and submit those grievances to final and binding arbitration, in the event that grievances are not resolved.

On redirect, Kipp testified that when she started working at the Forest Hill facility in 1989 Beverly Enterprises was the owner of the facility; and that Lerner purchased the facility in 1996.

Lerner, who opened the door regarding Forest Hill by asking Kipp about it on direct but then objected to cross-examination of Kipp on this topic arguing that it had no relevance to the negotiations involved here and it was a separate corporation totally unrelated to Respondents, testified on cross-examination that he is president of Forrest Hill; that he negotiated and signed the collective-bargaining agreement between Forest Hill and the UAW; that the contract contains provisions that employees would be disciplined for just cause and employees are allowed to challenge discipline under the grievance procedure by asserting that the discipline was without just cause; that possibly the final step of the grievance procedure is final and binding arbitration; and that he did not recall negotiating that.[4]

By letter dated November 14, 2007 (GC Exh. 2), Hal Ruddick, who was the president of Local 4 of the Union, advised Lerner, regarding Galesburg and Camelot, that the Union proposed that they bargain the two facilities jointly, with negotiations at the facilities, alternating the location with a meeting at Galesburg one week followed by a meeting at Camelot the next week. The letter specifically proposed that bargaining be scheduled weekly. The letter also requested specified information, including—but not limited to—the employee handbook, any and all disciplinary policies and/or memos describing the application of the discipline policies or informing employees thereof, and any and all work rules.

By letter dated November 15, 2007 (GC Exh. 3), Lerner responded, as here pertinent, that there would be two separate agreements and each home intends to seek different terms in certain areas; that neither home has an objection to engaging in coordinated bargaining to some extent; that there is no agreement to merge the bargaining units; that Respondent's would make every effort to hold weekly negotiations in different locations as Ruddick suggested; that some of the information requests will be complied with but some of the other information requests must be shown to be relevant and explained before that information is provided; and that he was available to meet on November 27, 2007, at Galesburg and December 5, 2007, at Camelot.

By letter dated December 13, 2007 (GC Exh. 4), Ruddick wrote Lerner indicating what information the Union had received, what information it had not received, and why it requested certain information. Ruddick also advised Lerner that the Union's chief negotiator would be its director of collective-bargaining and representation, Julie Kwiek. Dates, when the Union was available were provided. Ruddick indicated that the Union proposed picking one date each week for the purpose of bargaining, reserving the right to request a more frequent schedule if necessary. Also, the Union proposed the first meeting for Galesburg, the following week in Streator, and alternating thereafter.

By letter dated December 14, 2007 (GC Exh. 5), Lerner advised Ruddick, as here pertinent, that certain of the information requested had been forwarded and certain of the information was being gathered to be shipped to the Union. Additionally, the letter indicates as follows:

> In regard to negotiation scheduling, you are quite aware of my inability to be out of the Chicago area on Fridays, due to my religious observance. So, offering Fridays as an alternate day is at best, being disingenuous. In addition, please be advised that I will be on vacation from 01/03/07–01/14/07. . . .

[4] CP Exh. 1 (excerpts from) and CP Exh. 2 (the full collective-bargaining agreement between Forest Hill and the UAW) demonstrates that the contract calls for final and binding arbitration. Lerner signed the last page of the latter.

> We therefore can meet 12/27 or 1/15 in Galesburg, and 1/24 in Streator. Please confirm your intentions to us.

By letter dated December 19, 2007 (GC Exh. 6), Kwiek advised Lerner, as here pertinent, that

> The offering of Friday bargaining was not disingenuous at all; we could meet in Streator on Fridays and if you will let us know what time you'd have to leave, we can accommodate that.
>
> Unfortunately, we are already scheduled to be in negotiations on December 27 with the Illinois Association of Health Care facilities—if we had been available that day, we would have offered it. However, we are still available on December 28, and suggest we meet at 9 am and go until noon or so, if your schedule permits. We do however agree to meet with you on January 15 in Galesburg and January 24 in Streator. Please do review the other days we offered and let us know until what time you can meet on those dates.

By facsimile dated December 20, 2007 (GC Exh. 7), Lerner advised Kwiek that "1/15 Galesburg and 1/24 Streator is confirmed. Fridays are never available. We need to prepare before each meeting, so all meetings need to be between 1–4 PM."

Kwiek testified that based on her experience in negotiating 40 to 50 collective-bargaining agreements (all but 5 were in the nursing home industry), 3-hour meetings are not standard when trying to reach a first contract for a healthcare facility; that it is complicated to write a contract from scratch, and for a first contract it takes a lot more time; and that the Union usually tries to schedule (and it is the standard in Illinois) all day sessions at least once a week with respect to first contracts in the nursing home industry.

By facsimile dated January 2, 2008 (GC Exh. 8), Lerner asked Kwiek to "Please confirm our meetings at 1 PM—in Galesburg on 1/15 and in Streator on 1/24."

By letter dated January 3, 2008 (GC Exh. 9), Kwiek advised Lerner, as follows:

> We will accept the times you have offered. Please note that it is over our objection, in that we believe full day sessions are more appropriate and that these short sessions will have the effect of delaying negotiations. While we will meet with you at the times you suggest, we urge you to reconsider your position and engage in longer sessions.

Kwiek testified that she attended the first bargaining session on January 15, 2008; that the session took place at Galesburg, beginning at approximately 1:15 p.m.; that she and a group of employees of the facility were present for the Union; that Lerner and Kipp were present for Galesburg and Camelot; that the parties exchanged proposals (GC Exh. 52)[5]; that the parties did not reach any tentative agreements at this session; that the session ended before 5 p.m.; that Lerner could not meet from January 3 to 14, 2008, because he was on vacation; and that the parties had already scheduled a session for January 24, 2008.

On cross-examination, Kwiek testified that the Union's proposed contract is representative of the master contract or collective-bargaining agreement the Union has with the Illinois Association of Healthcare Facilities, which encompasses about 120 facilities; that in almost every contract she has negotiated in Illinois the current agreement between the Union and the Association is almost always the Union's first proposal; that if the employer does not agree to that, then the parties are starting over from scratch; that Lerner indicated that he was not willing to follow the Union's first proposed contract; and that Lerner went through the Union's proposal and rejected standard language out of hand.

On cross-examination, Neimark testified that while the Union was certified by the Board to represent a unit of employees at Galesburg on May 24, 2007, bargaining did not begin until January 2008 because the Union took the position that management had to follow the master contract of the Association because Galesburg had not provided timely notice that Galesburg wanted side letter negotiations; and that the Union first asked for negotiations on the Galesburg contract right after Lerner indicated in November 2007 that Galesburg, as here pertinent, was withdrawing from the Association for subsequent bargaining.

On redirect, Neimark testified that whether (a) Camelot and Galesburg belonged to the Illinois Association of Healthcare Facilities; (b) the master contract between the Union and the Association applied to Camelot and Galesburg; and (c) a request for letter bargaining was timely filed, is presently pending before a Federal court; that after it was certified by the Board,

[5] The Union's complete contract proposal consists of 45 pp., with 29 pp. of appendices and 2 pp. of letters of agreement. The Respondents' proposal consists of 1 p. which reads as follows:

MANAGEMENT RIGHTS

> The parties to this Agreement hereby unequivocally recognize and declare that Management has the exclusive right to manage the Nursing Home and all its facilities in accordance with its own policies and procedures. Management has the sole right to manage the Nursing Home. The only restrictions to Management's rights to operate the Nursing Home are specifically detailed in this Labor Agreement. No other constriction will be recognized as a limitation to Management's right to direct the work force to operate the Nursing Home for the best possible service to the community.
>
> A few of Management's rights include the establishment of policies and procedures, establishing operation levels, and staffing requirements. Management had the exclusive right to create jobs, job descriptions, job function requirements, job performance standards and to hire, terminate, lay off, schedule, transfer, promote, suspend, discipline, the right to relieve employees from duty because of lack of work, the right to schedule operations, shifts, and all hours of work, the right to assign work and overtime hours, and the right to establish rules pertaining to the operation of the Nursing Home and permissible conduct of employees. Management retains the absolute right to close all or part of the Nursing Home or to sell, relocate, transfer work, or in any other way to dispose of or alter the facility and work performed therein.
>
> Should the Nursing Home's Management fail to exercise any one of its particular rights to manage, it will not be considered that the right or rights are waived.

the Union requested that management apply the terms of the master agreement; that management refused; that litigation was then launched with respect to that request; that the Union requested bargaining after Lerner indicated that the employers were withdrawing from the master contract for the purpose of renegotiating that contract, and this was the reason that bargaining did not start until months after the certification; and that the Union was operating under the assumption that the master contract was legally binding on the employers involved here prior to that time.

On recross, Neimark testified that Galesburg and Camelot were part of the Illinois Association of Healthcare Facilities; and that it is his understanding that the Union has an agreement with the Association and the members of the Association are bound by the agreement that the Union has with the Association.

Lerner testified that Galesburg and Camelot "were not part of the association," which was described in the question by Kipp as the "Nursing Home Association." (Tr. 367.) As noted above, the group in question was described earlier in the trial by Neimark as the "Illinois Association of Healthcare Facilities" and not the "Nursing Home Association" as in Kipp's question to Lerner. Lerner testified further that Galesburg and Camelot were not part of the association because Galesburg and Camelot did not sign the contract with SEIU, they did not pay dues, he never withdrew them from the Association, and they were never part of it.

Kipp testified that in the negotiations with SEIU there was a verbal agreement about not starting negotiations over the economic issues until the noneconomic issues were finished; that at either the first or second bargaining session Kwiek said that tentative agreements "were not 'an agreement' or "we would have put agreed. They were tentative in nature." (Tr. 253); that Respondent's Exhibit 1 is the proposed contract given to management by the Union at the outset; that it has economics and noneconomics in it; that Respondent's Exhibit 2 consists of the noneconomic issues and it was the document the parties used for 4 or 5 months at the beginning of negotiations; and that SEIU wanted it to be one contract and management rejected this proposal, indicating that there would be two contracts.

On cross-examination, Kipp testified that she gave an affidavit to the Board (GC Exh. 58) on June 18, 2008, in Galesburg; that it is her testimony that a ground rule was established at one of the first two bargaining sessions between management and the Union that tentative agreements are merely that, tentative and "open to renegotiation at any time" (Tr. 297)[6]; that in her affidavit she indicated, "I do not recall ground rules being set" (Ibid.), and so in June 2008 she swore that she did not remember any ground rules being set; that in her affidavit she indicated that Lerner asked that the parties get all of the noneconomic issues bargained and settled before moving on to economic issues but she did not indicate in her affidavit that the Union agreed to take this approach; that she did not have the authority to enter into an agreement with the Union and bind either Camelot or Galesburg; that her employer is Gem Healthcare, which is a management company owned by Lerner; that in her affidavit she indicated that "bargaining sessions generally lasted between two and a half and three hours" (Tr. 301); that the employer cannot meet for longer sessions because "[i]t would impede our business. . . ." (Id. at 302); that she did not believe that longer sessions would be productive; that she told Neimark that she would ask Lerner if longer sessions would be possible; that she did ask Lerner but she did not recall when; that she asked Lerner with his responsibilities would there be a possibility of longer sessions; that Lerner told her that "he had his hands full ['with other business matters'], at this time" (Id. at 303); and that she believed that the bargaining sessions between January and September 2008 were productive even though there had not been agreement reached on even one-half of a contract.

Lerner testified that he oversees four nursing homes; that normally he goes to each nursing home every other week or, in other words, he goes to two of the facilities one week and the other two facilities the following week; that he normally arrives at the facilities about 11 a.m. or 12 noon; that he checks on maintenance, housekeeping, bookkeeping, and anything that might be improved; that he is usually at the facility until 6 p.m.; that in deciding how many hours he would give to negotiations, he took into consideration that he would have 2 to 3 hours at the facility to do what he normally did in 6 or 7 hours before negotiations commenced; that at the first bargaining session on January 15, 2008, Kwiek gave management what the Union called a master contract; that the parties "made some agreements . . . as to how we would proceed during this negotiating process" (Tr. 340); that the parties agreed to (a) meet one week at Camelot and one week at Galesburg, and (b) negotiate noneconomic issues first and then discuss the economic issues; and that he believed that the first bargaining session started at 1 p.m.

On cross-examination, Lerner testified that the agreement management allegedly reached with Kwiek regarding tentative agreements was verbal and not memorialized by a signed agreement; and that he thought that there was written correspondence in his file between management and the Union with respect to tentative agreements. When asked where in General Counsel's Exhibit 65 (not offered) does it indicate that a tentative agreement could be opened at any time, Lerner testified as follows:

> we discussed the tentative agreement was tentative in the sense, that the agreement on the issue was tentative pending an agreement on the entire document. That means, if there is not agreement on the entire document, then it is tentative and it is able to be opened. [Tr. 378.]

It appears that the portion of General Counsel's Exhibit 65 read into the record on transcript pages 377–379 is the first response on page 1 of General Counsel's Exhibit 55, which is an e-mail from Neimark to Lerner dated May 14, 2008, and which is set forth below. Also, with respect to the following language cited in General Counsel Exhibit 66 (a May 5, 2008 e-mail from

[6] It is noted that Kipp gave the following testimony at p. 269 of the transcript:

> Q. BY MR. LERNER: Are you knowledgeable with NLRA rules, regarding negotiations?
>
> A. Yes.

Lerner to Neimark): "We need an agreed upon definition of a TA before we agree to use them in the future," it is noted that General Counsel's Exhibits 66 and 54 are the same exhibit. Lerner was asked on cross-examination why if the parties already agreed at the first session that tentative agreements could be opened at any time, he was, on May 5, 2008, arguing in his e-mail that the parties had to agree to allow tentative agreements to be opened at any time. His response, at best, was equivocal. Lerner testified that Galesburg and Camelot, which are jointly negotiating, choose not to bargain more than 4 hours a day "because it hurts our business." (Tr. 382.)

On rebuttal, Crystal Lopez testified that for 18 months before she testified at the trial herein she became an employee of Service Employees International Union; that prior to that she worked at Camelot; that she was terminated by Camelot in February 2007; that she has been part of the Union's bargaining team for the contracts at Galesburg and Camelot; that she attended the first bargaining session, which was held at Galesburg; that she, Kwiek, and several members from the nursing home were present for the Union; that Lerner and Kipp were present for management; that Kwiek gave Lerner the Union's proposal which was a master contract; that the parties reviewed the Union's proposal at this session, indicating yes or no; that she did not recall anything else being discussed by the parties at this first session; that Kwiek did not ever discuss the meaning of the words "tentative agreement" at this session; that no one at this session discussed the meaning of "tentative agreement"; that there was no sort of agreement reached at this session as to the meaning of "tentative agreement"; that no one at this session said words to the effect that tentative agreements are subject to be reopened at any time; and that there was no ground rule established at this session that tentative agreement meant only tentative agreement.

On cross-examination, Lopez testified that Camelot did not give her a reason for her termination. As noted below, it was ultimately decided by the Board that Camelot violated the law in terminating Lopez.

General Counsel's Exhibit 11 is an exchange of e-mails between Lerner and Kwiek, both dated January 21, 2008. First, Lerner, with an e-mail sent at "1:12 PM," advised Kwiek as follows: "Unfortunately *I have to have* surgery this week, and will have to reschedule the Thursday meeting for next week. We could be available to meet next Monday morning at 10AM, or Tuesday 1:30PM in Streator." (Emphasis added.) Kwiek responded as follows:

> I am sorry to hear about your surgery and am glad you will be available the following week to negotiate. Tuesday, January 29 . . . [at] 1:30 works best for me.
>
> While we are scheduling this make-up date, I would like to schedule some more dates. I . . . [am] available the following dates:
>
> Tuesdays:February 5, 12, 19, 26
>
> Thursdays:January 31, February 14, 21, 28
>
> Since we are only meeting 1/2 days, I suggest we try to meet twice a week
>
> Please let me know what dates work for you.

By letter dated January 21, 20087 (GC Exh. 10), Lerner advised Kwiek as follows:

> I wanted to reiterate in writing what we informed you at our meeting on 1/15/08, that Camelot Terrace and Galesburg Terrace are two separate corporations and two separate bargaining units. This issue was clearly conveyed to the union in the enclosed letter on 11/15/07 [see above], and is not a negotiable item.
>
> This letter clearly stated that they are two distinct bargaining units, and the negotiations would be coordinated just to provide the efficiencies for everyone.
>
> If you are unwilling to agree to this point, please let me know as soon as possible, so that we can reschedule our negotiating meetings separately, for each facility.

Lerner testified that he canceled the January 24, 2008 session because he had surgery that week; that Respondent's Exhibit 7, which he retrieved from a pass coded web site of the North Shore University Health System on "11/11/08" shows that he had surgery on January 21, 2008 (The only entry on the document referring to January 2008 reads as follows: "Monday 01/21/2008 11:45 am Office Visit with JOSEPH MULDOON, MD GENERAL SURGERY OLD ORCHARD")[7]; that the painful procedure was done on an outpatient basis and he was unable to attend a bargaining session "two days later" (Tr. 351) (If the surgery was performed on Monday, January 21, 2008, Thursday, January 24, 2008, would not have been "two days later."); that he notified Kwiek on January 23, 2008, that he was still in pain and unable to make the January 24, 2008 session; and that he did not turn over this document to counsel for the General Counsel in response to her subpoena for, inter alia, any document supporting Respondents' denial that they unreasonably canceled bargaining sessions.

Kwiek testified that the January 29, 2008 session was canceled because Lerner called her and told her that there was a snowstorm and driving conditions were dangerous; that she agreed to the cancellation of this session; and that she believed that she and Lerner agreed to meet on February 4, 2008.[8]

Lerner testified that the session scheduled for January 29, 2008, was not held because there was a snowstorm being predicted and he and the Union agreed that it would be unsafe to travel that day; and that the session was rescheduled for February 5, 2008.

General Counsel's Exhibit 12 is an exchange of e-mails between Lerner and Kwiek on February 4, 2008. At 7:34 a.m. Lerner advised Kwiek as follows:

> Unfortunately we will need to reschedule this Tuesday's session. My son just got engaged in NY, and I won't be back until Wed. I'm available Thursday, if that works for you. Please let me know.

[7] Lerner did not attempt to explain why if he had outpatient surgery during an office visit at 11:45 a.m. on January 21, 2008, later that same day (at "1:12 PM") he would send an e-mail to the Union indicating "I have to have [speaks to the future] surgery this week" and not "I have had [speaks to the past] surgery earlier today."

[8] Subsequently, Kwiek testified that she misspoke and they had agreed to meet on February 5, 2008.

> Please don't take these rescheduling as delaying tactics; we would like to get this agreement completed as quickly as possible. However, both my surgery and this engagement were unavoidable. We intend to meet with you every week until an agreement is worked out that is beneficial to both sides.

Kwiek responded at 3:39 p.m. as follows:

> The Union is very disappointed the Employer has to cancel tomorrow's scheduled bargaining date. We appreciate the assurances that the Employer is not trying to delay. But between your surgery, your suggestion we cancel last week due to weather (which the Union agreed to) and to this, we are 3 weeks behind where we should be.
>
> Therefore, we are rearranging our schedules to accommodate the employer's suggestion that we meet this Thursday, February 7th. We can be in Streator to start negotiations at 1:30 and request that we go until around 6pm. Ron Neimark will be the chief negotiator for the Union on that day.
>
> While each of the reasons for delays/cancellation has some merit on its own, the collective effect of the combination is to inappropriately delay the bargaining. Additionally, postponements such as this last minute from tomorrow until Thursday, interfere with the Union's ability to effectively represent its members; we have several other negotiations going on in the Union (in fact this Thursday, we're meeting with the IAHCF, of which you are a member) and when we schedule bargaining dates with an employer we look at all the bargaining we have going on and work very hard to ensure we make ourselves available on a regular basis for all those negotiations. So I will also take this opportunity to follow up with you on our other scheduled days. Using the alternating site schedule and meeting every Tuesday puts us at Galesburg on the 12th and 26th of February, as well as the 11th and 25th of March, and February 19, and March 4 and 18 in Streator. We ask that the Employer reconsider its position regarding the time of negotiations and agree to meet form 10am–4pm on those dates. The schedule of once per week four hours has gotten us exactly 1 date in the last 4 weeks.

Lerner testified that he canceled the February 5, 2008 session because there was a religious ceremony for his son's engagement; and that the session was rescheduled for 2 days later during the same week.

Neimark testified that his bargaining notes (GC Exh. 53) show that the first bargaining session he attended with Respondents occurred on February 7, 2008; that he wrote most of his bargaining notes at the sessions and some were written shortly after the bargaining sessions; that he kept the notes as part of regularly conducted business activity and in the ordinary course of business; that General Counsel's Exhibit 57 is a 2008 calendar which shows the days which the parties held bargaining sessions from February 7 through September 25 and whether the session involved Galesburg or Camelot; that he, Crystal Lopez and two employees were present for the Union at the February 7, 2008 session at Camelot; that management was represented by Lerner and Kipp; that all of the Union's contract proposals (GC Exh. 52) were reviewed for the benefit of the Camelot employees and Lerner responded to the proposals; that a tentative agreement occurs when the parties sign off on language that would become effective once the entire contract is agreed upon, and they are binding agreements that is going to be language in that contract once it is settled; that at this session the parties talked about having the sessions together for Galesburg and Camelot; that while the parties did not agree that the contract would be the same for both facilities, they agreed that language would be the same for both facilities and for efficiency purposes the parties would negotiate them together; that the Union insisted that the 4-hour sessions that Lerner insisted upon were not sufficient; that they discussed article 14 on voting, article 15 on the grievance procedure, paid meals, shift differential, weekend pay, and they set times for future bargaining sessions; that neither Lerner nor Kipp made any written proposals at this session; that no tentative agreements were reached at this session; that the parties already agreed to holding sessions on every Tuesday in February and March 2008; that while the Union proposed all day sessions ending at 5 p.m., Lerner insisted on sessions lasting 3 to 4 hours; and that this session lasted 2 hours and 15 minutes, ending at 5 p.m.

On cross-examination, Neimark testified that he did not recall if the February 7, 2008 session started at 2:45 p.m. because he was caucusing with his employees.

On rebuttal, Lopez testified that she, Neimark, and a couple of members were present for the Union at the second session on February 7, 2008, which was held at Camelot; that Lerner and Kipp were present for management; that Neimark was the Union's chief negotiator; that no one discussed the meaning of "tentative agreement" at this session; that no rule was established that tentative agreements are merely tentative and can be backed out of at any time; that nothing to this effect was established; and that she did not remember what else was discussed at this session.

On February 12, 2008, the bargaining session was held at Galesburg. Neimark testified that he and named employees, including Lopez, were present for the Union at this session and Lerner and Kipp represented management; that the parties continued to work off the contract proposal that was given to Respondents by Kwiek at the first session; that General Counsel's Exhibit 51 is a separate copy of the Union's initial proposal on which he recorded the tentative agreements, with their dates; that as indicated on General Counsel's Exhibit 51, on February 12, 2008, the parties reached a number of tentative agreements; that the original contract proposal submitted to Respondents by Kwiek contained 29 articles and 35 rules; that on February 12, 2008, the parties tentatively agreed to at least portions of 11 articles and 20 work rules, or, in other words, 57 percent of the proposed rules and 38 percent of the proposed articles; that both he and Lerner initialed the tentative agreements in General Counsel's Exhibit 51; that he believed that the Employer introduced its proposed absenteeism policy at this meeting; that while he could not remember how long this session lasted, he did recall that the parties never had a session that was longer than 4 hours; and that subsequent meetings had already been scheduled.

On February 19, 2008, the bargaining session was held at Camelot. Neimark testified that he and Lopez were present for the Union; that Lerner and Kipp represented management; that the Union presented a series of package proposals or, in other words, the Union had taken some of the things that the facilities had agreed to and combined them with (a) some of the things that the facilities had not agreed to, and (b) some of the things the facilities requested; that the Union asked Respondents to agree to all of the package which included some of the things the Union wanted and some of the things the Respondents wanted; that the parties went through the package proposal at this session; that the parties then discussed the drug policy and unsafe work; that the parties did not reach any agreements that day; that the session lasted no longer than 2.5 hours; and that a session had been scheduled for February 26, 2008.

Neimark and Lerner exchanged e-mails on February 25, 2008 (GC Exh. 13). Neimark advised Lerner that "[g]iven the predictions of 6–9 inches of snow, I think it would make sense to cancel bargaining tomorrow and move next week's session to Galesburg. . . . ." Lerner responded, "I will agree to cancel tomorrow; but I will have to get back with you on a rescheduled time and place."

By e-mail dated February 29, 2008 (GC Exh. 14), Lerner advised Neimark as follows: "We won't be able to make it to Galesburg next week, since your cancellation of this weeks session altered our schedules. However, we would be able to meet in Streator on Tuesday 3/4 at 1:30PM. Please let me know your availability."

With respect to the bargaining session on March 4, 2008, Neimark testified that it was held at Camelot in Streator; that he and Lopez were present for the Union; that Lerner and Kipp represented management; that the session started on time, he believed at 1:30 p.m.; that the parties discussed some of the work rules and seniority; that this session did not go beyond 5 p.m. so it lasted no more than 3.5 hours; that the parties did not reach any tentative agreements at this session; and that the parties confirmed that there were additional sessions scheduled on March 11, 18, and 25, and April 1, 2008.

On March 4, 2008, Administrative Law Judge Lawrence Cullen issued a decision in *Camelot Terrace, Inc.*, 353 NLRB No. 20, Cases 13–CA–43936 and 13–CA–44044 concluding that Camelot violated Section 8(a)(3) and (1) of the Act by its issuance of warnings to employee Cheryl Henson and its discharge of Henson but that it did not violate the Act with respect to its discharge of employee Lopez.

Regarding the bargaining session on March 11, 2008, Neimark testified that it was held at the Galesburg facility; that he, Lopez, and Chastity Babcock were present for the Union; that Lerner and Kipp represented management; that the parties discussed the drug, alcohol, and absenteeism policy; that he believed that the session started at 2 p.m. but he did not recall when the session ended; that the session definitely lasted less than 4 hours; and that the parties did not reach any tentative agreements at this session.

With respect to the bargaining session on March 18, 2008, Neimark testified that he believed that it started at 2 p.m.; that the parties discussed the Union's new package proposal which was similar to the Union's previous package proposal and which had been revised to include additional changes at the request of management; that the parties reviewed the package and made changes at the request of management; that at 4:10 p.m. management asked for a caucus to review the proposals and about 10 minutes later management returned from its caucus and Lerner said that they were not going to be able to complete the review and the session was over for the day; that since it seemed that the parties had reached an agreement on proposal package 3, he asked Lerner if they could TA (tentatively agree) that and they TAed that at that point; that this is reflected in the package proposal, namely article 26, Credit Union; that this session ended no later than 4:30 p.m.; that the session had been scheduled to last until 5 p.m.; and that the parties only reached that one tentative agreement.

On cross-examination, Neimark testified that on March 18, 2008, the Employer said that their caucus would take longer than the allotted time until 5 p.m. and it did not pay for the Union to wait; and that management did cut this meeting short by indicating that they would not be available.

Regarding the bargaining session on March 25, 2008, Neimark testified that it was held at the Galesburg facility; that General Counsel's Exhibit 53(jj) are his notes for this bargaining session, which notes were made at or near the time listed for March 25, 2008, and which notes accurately reflect what transpired that day; that he, Lopez, and Babcock were present for the Union; that Lerner and Kipp represented management; that they discussed the package which the Union presented on March 18 and Lerner indicated that he would be willing to agree to package 1, as modified at their request if the Union agreed to add the Employer's management-rights proposal (the one given to Kwiek on January 15, 2008, as set forth above) and their drug testing policy; that Respondent's had not given the Union a written drug and alcohol policy but rather Respondents took the Union's proposal and added language that indicated that it would not be grievable; that the Union did not agree to Lerner's proposal; that the parties did not reach agreement on any of the package proposals or management rights that day; that the parties did not reach any tentative agreements that day; that he advised Lerner and Kipp that he would not be able to attend the scheduled April 1, 2008 bargaining session because there was a mandatory meeting for union employees in Chicago; that they discussed alternate dates and the only one that the Employer would agree to was April 16, 2008; and that this session lasted 4 hours or less.

On April 15, 2008, Neimark received a telephone call from Lerner. Neimark testified that the parties were supposed to meet at Galesburg on April 16, 2008; that Lerner called to say that his car had broken down, it was in the shop, he was going to have to cancel the April 16, 2008 bargaining session, and he would get back to him; that he suggested to Lerner that he rent a car or use public transportation, and Lerner said that he would get back with him; and that General Counsel's Exhibit 15 is an exchange of e-mails he had with Lerner on April 15 and 16, 2008, regarding Lerner's car problem.

Lerner testified that he canceled the April 16, 2008 session "due to my car being unable to start at the end of the day, and I wasn't sure if I could make it the next day, so I cancelled the meeting." (Tr. 358.) Respondent's Exhibit 8 is a document on

the letterhead of Cal-Pete Service of Chicago, Illinois with "Lerner, M" on the "NAME" line, "4/15/08" on the "DATE" line, and with "DOESN'T START—STARTER CONNECTION CLEANED" for $25 under the "DESCRIPTION OF WORK PERFORMED." "Paid C.C, 4–16–08" is handwritten on the document and there appears to be a signature with this notation.

On cross-examination, Lerner testified that, when asked if the car did not start how it got to the service facility, the car did not start and 4 hours later, at 7 p.m. he went back and it did start; that on April 15 he got a telephone call from his wife who told him that the car does not start and it in on Devon Avenue; that when he first went to the car it would not start; that when he returned to the car 4 hours later it started and he drove it to the mechanics shop and left it there overnight; that a night person took the keys and told him that a mechanic would look at the car in the morning; and that he and his wife had switched cars on April 15 and the car with the starting problem was actually his car. As noted above, General Counsel's Exhibit 15 is an exchange of e-mails between Lerner and Neimark regarding Lerner's alleged car problem. The exchange began with the following:

> From: "Michael Lerner" <gemhealth@juno.com>
> To: ronniemark@gmail.com
> Sent: 4/15/2008 1:34 PM
>
> Just spoke to the mechanic, and they need to keep my car overnight. Sorry, but we'll need to cancel tomorrow's meeting.

Neimark replied and then Lerner sent the following e-mail:

> On Tue, Apr 15, 2008 at 5:08 PM Michael Lerner <gemhealth@juno.com> wrote:
>
> . . . .
>
> As I indicated to you on the phone, the mechanic hasn't been able to diagnose why my car didn't start yesterday, and I might have to take it to another shop tomorrow for diagnosis and repair. I simply cannot leave town tomorrow.

Lerner further testified that the 1:34 p.m. e-mail described above does not contradict his testimony; that his wife called him about 2 (apparently referring to p.m.); that with respect to how he got home from the gas station, which is less than a mile from his office, on the night of April 15, 2008, "[m]y wife must have picked me up"; and that he did not recall when he picked the car up at the gas station.

General Counsel's Exhibit 16 is an e-mail Neimark sent to Lerner on April 17, 2008, regarding what Neimark perceived to be Respondents' "Dilatory Bargaining." The e-mail opens with "[y]our unilateral decision not to participate in the bargaining session on Wednesday, April 16 is part of a pattern of behavior in bargaining that has been dilatory and without good faith." It goes on for over a page describing what Neimark views as Respondent's dilatory practices. The e-mail proposes adding additional all day (10 a.m. to 4 p.m.) bargaining sessions and indicates that the Union is available on April 23, 25, 28, and 29, 2008, on May 1, 2, 5, 7, 8, and 9, 2008. Neimark also indicates that after May 9, 2008, he was available nearly every weekday to hold additional all-day sessions. He points out that the Union still has not received the information requested on March 19, 2008, regarding drug testing, disciplinary actions, and new hires at Galesburg. The e-mail closes with the following:

> We are expecting a prompt response to these proposed bargaining dates and to all of our outstanding information requests. If you fail to promptly respond to these demands, it is our intention to file charges with the National Labor Relations Board due to your continued pattern of dilatory bargaining.

General Counsel's Exhibit 17 is Lerner's April 18, 2008 e-mail response to Neimark's April 17, 2008 e-mail. In the e-mail, Lerner indicates that there is no alternative spokesman to him; that the Union canceled the April 8 and 22, 2008 sessions; that he has a business to run and he cannot dedicate full days to bargaining; that bargaining four times a month exceeds "NLRB" requirements; that neither Camelot nor Galesburg have ever been found guilty of unfair labor practices; that the information sought took considerable time to gather, some has been provided to the Union, and the remainder will be provided to the Union shortly; and that the only day he can reschedule the missed session is April 24, 2008, in Streator. Neimark testified that bargaining sessions were never scheduled for April 8 and 22, 2008.

On cross-examination, Neimark testified that Lerner did offer April 24, 2008, to replace the April 16, 2008 session which Lerner canceled but Lerner made the offer of April 24, 2008, only after Lerner was put on notice that the Union was not available on April 24, 2008.

General Counsel's Exhibit 18 is an April 19, 2008 e-mail from Neimark to Lerner which reads as follows:

> I gave you four days between now and April 30 . . . [and] April 24 was not one of them. Please select from the list. Your assumption that the only thing we have to do is negotiate is simply false.
>
> I am willing to negotiate either at one of the facilities or anywhere you choose, including your office.

General Counsel's Exhibit 19 is an April 21, 2008 e-mail from Lerner to Neimark which reads as follows:

> As you've been told, negotiations require myself and Debby Kipp to be there. At the short notice you provided on Friday, Debby and I were only able to alter our schedules to mutually find one date this week, to make up for the date you cancelled. That was 4/24.
>
> We therefore can only go back next week to the once a week schedule we have attempted to keep. We can't find the time to meet twice a week, due to the necessity of running our businesses.

General Counsel's Exhibit 20 is, as here pertinent, an April 24, 2008 e-mail exchange between Lerner and Neimark. First, Lerner advised Neimark "[w]e haven't bargained over Camelot in a long time, so we'd prefer to meet in Streator next Wed. at 2PM. Please confirm availability for that." Neimark responded, "[w]e have already posted notice and have had some commit to being at the bargaining session in Galesburg." And Lerner responded, "I can't be in Galesburg next week, and you told me

the last time we met that you're OK meeting in either place. It's also not fair to Camelot that they haven't negotiated for a long time."

With respect to the April 30, 2008 bargaining session, Neimark testified that it was held at Camelot in Streator; that he and Lopez were present for the Union; that Lerner and Kipp were present for management; that at this session Lerner indicated that all of the tentative agreements that the parties had previously signed were just for Galesburg and that he wanted to go over all of them to approve them for Camelot as well; that one of the items that Lerner wanted to reopen for further discussion was regarding settlements, namely that while language had been tentatively agreed upon which indicated that settlements which were agreed upon by the Union, the employee, and the employer were binding, Lerner wanted to make it so that the employer could make a binding settlement with either the employee or the Union; that the Union objected to Lerner's proposal and further objected to the reopening of that agreement, namely Article 15 which was tentatively agreed to on February 12, 2008; that the Union did not want employees to be able to resolve grievances and set precedent for the rest of the bargaining unit; that while the parties had also tentatively agreed to language on February 12, 2008, regarding bringing weapons into the facility, the Union allowed Lerner to modify the language on April 30, 2008, but the Union objected to Lerner attempting to bring up and modify things that had already been "TA-ed"; that the parties discussed union security and dues checkoff, with Respondents indicating that they were agreeable to union security if the Union agreed to change the period from 30 to 90 days for employees being required to join the Union; that Lerner said that he was not going to agree to check-off because "we are not a collection agency" (Tr. 90); that dues checkoff is standard in almost every industry that he knows of; that at 4:15 p.m. Kipp left and Lerner indicated that he had to get something for her from his car; that Lerner never returned to the bargaining session; that the union representatives waited for Lerner for about one-half hour and no one came into the room to tell them that the session was over; that the session lasted 2 hours and 15 minutes; that the parties did not reach any tentative agreements in April 2008; and that this was the only bargaining session in April 2008.

On cross-examination, Neimark testified that he was not sure if it occurred at the April 30, 2008 session but at some point management indicated that it wanted to split the contract they were working on and making it into two separate contracts, and thereafter management agreed that whatever was being said at the sessions was being said for both facilities.

On redirect, Neimark testified that at least at one session after the session where management management agreed that whatever was being said at the sessions was being said for both facilities, Lerner indicated that management was only bargaining for one facility at that subsequent session.

Kipp testified that she left the April 30, 2008 bargaining session at 4:15 p.m. because she had a doctor's appointment; that she informed the Union of this at the beginning of this bargaining session by announcing that "[t]his will be a shortened session" because she had a doctor's appointment (Tr. 262); and that she thought that this session began at 1 p.m.

General Counsel's Exhibit 21 is Neimark's May 4, 2008 e-mail to Lerner complaining about what occurred at the April 30, 2008 bargaining session and the fact that Lerner was only willing to schedule 3-hour sessions. Neimark proposed that the May 7, 2008 session at Galesburg begin at 9:30 a.m. and go until 5 p.m. The e-mail ends with the following:

> Shortening the session is even more troublesome when you suddenly indicate that the TAs we signed at previous sessions only applied to one home, when all along we had been bargaining both facilities together and you had agreed to do that previously. Furthermore you insisted on re-opening settled issues that we have signed TAs on and, having failed to convince us that you should be allowed to regressively bargain, you took the position that you will no longer TA individual items or groups of items. We urge you to stop using tactics clearly aimed at delaying agreement.

In a May 5, 2008 e-mail to Neimark (GC Exh. 54), Lerner, as here pertinent, indicated as follows:

> . . . .; If I spend 6 hours of driving time to travel to Galesburg from Chicago, I need to get a few hours of my work done; besides bargaining with you. We therefore must keep to the bargaining schedule of 2 PM.
>
> The TA's that were previously done were clearly done only for Galesburg Terrace. For that reason, the TA's that were done were only done on Galesburg's proposed contract.
>
> . . . .
>
> We have not regressively bargained. What has happened is that you haven't been honest with us. We signed on some items for Galesburg as TA's, with the understanding from you that it wasn't yet binding or concluded; just a tentative agreement. You now are backing out of this by stating that we're bound by it, and we're being regressive. The dictionary defines tentative as "Not fully worked out, concluded, or agreed on; provisional."
>
> If we can't trust you because you lie to us, our bargaining with you is worthless.
>
> If you are also going to argue against the definition of a word, what value is there to any contract you sign?
>
> We need an agreed upon definition of a TA before we agree to use them in the future.

Neimark testified that Lerner's claim that they discussed that "TA" does not mean a binding agreement is not true.

The next bargaining session was held on May 7, 2008, at the Galesburg facility. Neimark testified that he, Lopez, Babcock, and Cindy Campbell were present for the Union; that Lerner and Kipp were present for management; that they started this session off by giving Lerner a copy of the Union's economic proposal; that Lerner would not accept the copy of the Union's economic proposal, indicating that they were still talking about noneconomics and he would not discuss economics until they were done with noneconomics; that the Union asked Lerner to discuss the Union's economic proposals and Lerner turned the Union down; that Lerner insisted that they were only talking about Galesburg on that day; that the majority of this session was spent talking about no call/no shows and tardiness; that

Lerner asked to discuss article 15, section 2 again, which language had discussed at the last meeting in Streator that had been "TA-ed" prior and Lerner wanted to change it again; that Lerner wanted to change already agreed upon language so that if an employee signed a settlement, it would not be precedent; that the Union told Lerner that the language had already been "TA-ed" but it would be taken under consideration in view of an overall agreement; that Lerner took the position that the employee should be able to agree to the settlement and the employee should not have to go through the Union to agree on it; that they talked about another issue which had already been "TA-ed," on February 12, 2008, namely, rule 4 which had to do with the safety of weapons issue; that Lerner did not give a specific reason for why he wanted to reopen this issue; that he told Lerner that the Union objected to reopening the weapons issue tentative agreement but the Union would take it under consideration; that the parties did not reach any tentative agreements at this session; that the Union proposed May 20, 2008, for the next bargaining session and Lerner proposed May 29, 2008, in anticipation of a May 27, 2008 unfair labor practice hearing at the Board in Chicago concluding before May 29, 2008; that he proposed corresponding by e-mail between sessions but Lerner rejected bargaining by e-mail; and that it was fair to say that this session lasted no longer than 3 hours in that it started at 2 p.m. and ended no later than 5 p.m.

Kipp testified that at the May 7, 2008 session Neimark handed an economic proposal to management; and that "[m]anagement responded that we weren't done with the noneconomic issues, so therefore, there wasn't a reason to go on to the economics" (Tr. 265).

On cross-examination, Kipp testified that in her affidavit to the Board, which she gave in June 2008, she indicated as follows: "I have written down that the parties were to meet on May 7, 2008 at 2 p.m. in Galesburg. I do not remember anything particular that happened at that session" (Tr. 312); and that she could not remember anything specific about the May 7, 2008 bargaining session.

On May 11 and 12, 2008, Neimark and Lerner engaged in an exchange of e-mails (GC Exh. 56). Neimark, in his May 11 e-mail to Lerner, indicated, as here pertinent, as follows:

> . . . .
>
> At our session on May 7, you refused to accept possession of our economic proposals. While we continue to negotiate over language items, we contend that it is also time to begin to bargain economic items. Your outright refusal to even accept documents is further evidence that you are simply trying to delay bargaining.
>
> . . . .
>
> You refused to continue to schedule weekly bargaining sessions and insisted that you were only going to meet once every other week, despite your earlier promises that we would meet every week until an agreement is reached. I asked if you would be open to bargaining through email correspondence between sessions and you indicated that you were not open to this because you did not want to have to type proposals and counters.
>
> Your new position that (1) bargaining at each facility is for that facility only and that (2) you will only bargain every other week, combined with your continuing obstinance about only meeting for short periods of time means that you are agreeing effectively to only bargain for (less than) three hours a month for each facility. This is not acceptable.

The May 11, 2008 e-mail, part of General Counsel's Exhibit 56, also appears in the record as General Counsel's Exhibit 22. In his May 12, 2008 reply, Lerner, as here pertinent, indicated as follows:

> . . . .
>
> While we would love to quickly finish the bargaining and sign a contract with you, we simply can't do it every week. We've now decided to negotiate every other week, because our business needs were suffering, from devoting so much time to weekly negotiations. Our business simply needs our attention on a regular basis.
>
> . . . .

On May 14, 2008, Neimark sent an e-mail to Lerner (GC Exh. 55), responding to charges made by Lerner regarding the negotiations.

With respect to the May 22, 2008 bargaining session, Neimark testified that it was held at Camelot; that he, Lopez, and union employee Lori Frascone were present for the Union; that Lerner was present for management; that Lerner stated that Kipp was not able to make this session and management was not going to be able to decide anything without her presence, unless it was something they had already discussed; that he did not recall the time of day that this session started; that the parties discussed the Galesburg no call/no show policy change that had been requested at the previous session, when actions taken pursuant to the drug and alcohol policy would be grievable, no-strike/no-lockout, and arbitration; that the Union never received a written drug and alcohol policy from Lerner; that Lerner indicated that using the drug and alcohol policy he "thought . . . it was his right to target people if they were union supporters . . . ." (Tr. 100) and he should be able to terminate them even if the person was tested for illegitimate reasons; that he believed that before union certification Respondents had random drug and alcohol testing and employees were also tested when there was a reasonable suspicion; that with respect to no-strike/no-lockout, Lerner took the position that the grievance policy would not apply to this, and Lerner took the position that even if the Union did all it could to stop a strike, the Union should be held liable for the costs to the employer; that the parties reached tentative agreements with respect to several sections of article 7 of the Union's proposed contract, sections 3, 4, and 5 on pages 12 and 13 of General Counsel's Exhibit 51, namely, a bulletin board in the facility for purposes of union notices, release for steward training, and time for union orientation of new employees; that while Lerner rejected arbitration at this point in time, he did not present the Union with any kind of written counterproposal on his peer review, which was what he was trying to establish in place of arbitration; that the parties discussed the fact that there would not be a meeting on May 29, 2008, because Lerner would still be in the Board hearing in

Chicago; and that the parties discussed meeting on June 12, 2008, in Galesburg.

General Counsel's Exhibit 23 is a May 25, 2008 e-mail from Neimark to Lerner. The e-mail opens with the following:

> On Wednesday, May 21, 2008 at 1:15 pm, the union hand delivered to Lynn, the secretary at Galesburg Terrace, our intention to commence picketing of your facility on Saturday, May 31 from 1:30–2:30 pm. Please understand that our intention to picket is necessary only because of your continued dilatory and surface bargaining.
>
> These bargaining tactics on your part were again evident at our session on Thursday, May 22 at Camelot Terrace.

Neimark then summarizes what transpired at the May 22 bargaining session, indicating that at this session Lerner stated that "[i]f I were to target a person for their union activity and test them and they turn out dirty, I should have the right to terminate the employee. So what if I targeted them for their union activity? They were dirty." Neimark then indicates that "[t]he union has made multiple requests for copies of drug testing documentation from Galesburg . . . and Camelot . . . . You have yet to provide such documentation." Neimark also requests information regarding who conducts and determines whether the drug test was positive or not. The e-mail then indicates as follows: "[t]he union continues to object to your continued refusal to negotiate over economic issues." And the e-mail finishes with the following:

> Finally, your continued refusal to negotiate for more that 2.5 hours at any time has made it difficult for us to make progress. On top of that, it is unacceptable that you have cancelled our session which was scheduled for next Thursday. It is not acceptable that our next scheduled session will be on June 12, a full 3 weeks away. If you continue to schedule sessions that far apart and continue to insist that the bargaining at each session only covers the facility at which we are bargaining (even though you have taken the liberty to bring up issues you want to bring up about Galesburg while bargaining at Camelot), your are agreeing to only bargain for 2.5 hours every six weeks. This despite our earlier commitment to bargain every week until we reach a mutual agreement.
>
> . . . .

General Counsel's Exhibit 24 is Lerner's May 25, 2008 e-mail response to Neimark. As here pertinent, it reads as follows:

> It is quite evident that you have no interest in bargaining in good faith with us. All you are interested in is creating a paper trail, so you can create and file phony and contrived NLRB Unfair Labor charges against us. I'm here to tell you that your tactics won't work. . . .
>
> . . . .
>
> . . . . If an employee is found positive for drugs by an agreed upon lab, no matter under what circumstance, they cannot be employed in our nursing home. For that reason I gave you a hypothetical — even if we targeted somebody because we didn't like their union activity, and they tested positive, we have to terminate them for the safety of our patients, and per IDPH rules. So, don't throw it back at me accusingly; it was only a hypothetical case.
>
> ….
>
> You claim you made "multiple requests" for drug testing history and our Peer review policy—We have no recollection of any request of drug testing history. Please be specific as to what you want, and we'll get it to you next week after the hearing. The Peer review policy was given to you a long time ago. So please don't create fictitious shortcomings of ours, to build up a phony case.
>
> . . . .
>
> The lack of progress is not because of a lack of time; it's because of your lack of commitment to the process. Your intransigence on many items, and your agreeing to items only if we agree to others, wastes time. If we agree on something we should TA it, to get it out of the way, and make progress by moving forward.
>
> You clearly know that we can't be in 2 places at the same time. If your union calls us to a hearing on 5/27–5/30, in Chicago at the NLRB, we obviously cannot be there to negotiate with you that week. If you wouldn't waste our time with contrived charges, we would be meeting with you more regularly. I also can't necessarily be there the following week. If I have to catch up on what didn't get done that week. We've agreed to meet every other week, as the NLRB requires. In addition, if circumstances change, such as IDPH surveys, we have no choice but to reschedule.

On cross-examination, Neimark testified that he understood Lerner's statement regarding targeting a union activist for drug testing to be a hypothetical.

General Counsel's Exhibit 25 is a May 26, 2008 e-mail from Neimark to Lerner, which indicates, as here pertinent, as follows:

> . . . .
>
> The problem has consistently been that you have only discussed the issues you want to discuss and you have dominated the short time that you have agreed to meet with us to go over those same issues, including some which had already been TAd, until we have no more time. You are the only party who has refused to even accept a proposal. You are the only party who has refused to bargain on any issue.
>
> . . . .
>
> We have not agreed to management rights. We have said that we will agree to it if you agree to the other items, we would agree to it in return. Quid pro quo is part of bargaining in good faith.

General Counsel's Exhibit 26 is a June 1, 2008 e-mail from Neimark to Lerner which reads as follows:

> It has come to our attention that you are having difficulty hiring CNAs and other bargaining unit employees at Galesburg Terrace. Particularly for CNAs, your current hiring rate of $7.75 is drastically below market. It has also come to our attention that due to your difficulty recruiting

> CNAs, you have had to mandate staff and utilize costly overtime. It has also come to our attention that management at the facility has been telling employees that if the union was not at the facility, the facility would give across the board pay raises and that CNAs would start at $9.75.
>
> The union is proposing that effective immediately, Galesburg Terrace raise the starting pay of CNAs to $9.75 per hour, as has been promised by your facility management, and that all current CNAs who are paid less than $9.75 per hour be increased to that rate. We are also proposing that other employee pay rates be increased to $8.00 per hour.
>
> Other pay increases and economic benefit improvements will be proposed (as we have attempted to provide then to you already—but you refused to accept the documents), but for now we believe that these wage improvements are necessary immediately and without haste in order for the facility to be able to recruit and retain staff.

Neimark testified that the Union called this its emergency pay proposal in that the minimum wage in Illinois was set to go up on July 1 which would result in other employees in that facility with less training and experience reaching the Galesburg CNAs' pay level.

General Counsel's Exhibit 30 is a June 2, 2008 e-mail from Lerner to Neimark which reads as follows:

> While we sincerely appreciate your concern, we believe we can competently handle our staffing issues, without your assistance. In addition, we are not aware of anybody from "management" who stated what you are attributing to them. Galesburg Terrace's policy is that until we settle with you on a contract, we will handle all employee hiring and raises issues, in the same fashion it has always been handled.
>
> The drug testing history from Galesburg Terrace was faxed to you weeks ago together with the "tardy" history. It was only one sheet of paper, so perhaps you overlooked it. Either way, we will resend it to you today.

General Counsel's Exhibit 27 is a June 2, 2008 e-mail from Neimark to Lerner which reads as follows: "We are requesting a printout of hours worked by each employee at Galesburg Terrace for every pay period from January 1 to current."

On cross-examination, Neimark testified that he did receive this information after he made a couple of objections.

General Counsel's Exhibit 28 is an exchange of June 2, 2008 e-mails with, as here pertinent, Lerner advising Neimark as follows: "Since we're not yet discussing economics, I see no reason for this. Our staff simply doesn't have the time to produce paperwork for you, that isn't immediately necessary for negotiations." Neimark responded as follows: "We are discussing economics. Please send the requested information." Later that same day, as set forth in General Counsel's Exhibit 29, Neimark further responded as follows: "This is not only an economic issue. It also relates to working conditions."

General Counsel's Exhibit 31 is a June 6, 2008 e-mail exchange between Lerner and Neimark. First, Lerner indicated, "We can meet on 6/12 in Streator. Please confirm your availability." Neimark responded, "We are meeting in Galesburg on 6/12." Neimark testified that the parties had already set a bargaining session for June 12 (Wednesday), 2008, in Galesburg and Lerner was trying to change it to Streator.

General Counsel's Exhibit 32 is a later June 6, 2008 e-mail exchange between Lerner and Neimark. First, Lerner indicated as follows: "[w]e can't meet in Galesburg next week, due to the Jewish holidays on Mon and Tues. If you insist on Galesburg, it would have to be the following [The exhibit does not have the entire message]" Neimark replied as follows: "[s]o you can meet in 6/12 in Streator and in Galesburg the following week. We are available on Tuesday, June 17, Wednesday, June 18, and Thursday, June 19." Lerner then advised Neimark, "[y]ou must have a learning disability—you put your words into my mouth! We have told you countless times that our business need don't allow us enough time to meet more than once every 2 weeks. For your clarification it's either or. Either 6/12 in Streator or 6/17 in Galesburg." Neimark then responded as follows: "[w]e had an agreement that we were going to meet at Galesburg Terrace on June 12. That is when and where we expect to meet. If you are going to cancel that commitment, then we will meet the following week in Galesburg. We once again object to your continuing dilatory bargaining tactics."

General Counsel's Exhibit 33 is a June 10 and 11, 2008 exchange of e-mails between Neimark and Lerner. First, Neimark asked Lerner, "Are you still available to meet in Streator on the 12th? If so, I would like to meet with you then and then in Galesburg on either 6/23 or 6/24. I have some ideas that may break the logjam on the non-economic issues and would like to discuss them with you sooner rather than later." Lerner replied as follows: "[u]nfortunately, we cannot make it anymore due to previous commitments. However, we are more than eager to break any logjams and finish up the negotiations with a mutually beneficial contract." Neimark then asked Lerner "[f]or next week's session (6/17) in Galesburg, would you be open to meeting earlier (maybe from 9-noon)? Alternatively, would you be able to reschedule to the next day (Wednesday 6/18)?" Lerner replied, "[w]e could accommodate you and switch to 6/18."

With respect to the June 18, 2008 bargaining session, Neimark testified that it was held at Galesburg; that he, Lopez, some staff members, and some employees were present for the Union; that Lerner and Kipp were present for management; that the parties discussed the Union's emergency pay proposal; that Lerner said (a) that he did not see any emergency and he did not see any reason to raise the dollar amount just because the minimum wage went up; (b) just because the governor decided to raise the minimum wage by a dollar the value of their work had not increased at all; and (c) his position was that the minimum wage was sufficient for CNAs at Galesburg; that Lerner proposed adding language to the contract which would forbid the Union from leafleting 5000 feet from the facility; that 5000 feet is almost a mile; and that

> leafleting would be the offense that would constitute first offense discharge, not only for the employee of the facility, but if it was a union person doing it. The union would be required to fire them for leafleting within a mile. And then he [Lerner] indicated, I am not going to sign a contract without this.

Neimark further testified that the parties discussed another change to rule 23 about posting inflammatory or derogatory items, and removing rule 22 from the package proposal and agreeing to package 1; that the parties did not agree on package proposal 1 because they could not agree on any quid pro quo involving the management-rights clause; that at this bargaining session Lerner or Kipp gave the Union Respondents' written proposal on grievance resolution (GC Exh. 34); that the parties did not discuss this proposal at this session; that Lerner proposed that instead of arbitration there would be a peer review process in which the employer would select three peers to decide whether a grievance is valid or not, that decision would be final and binding, and the Union would not be entitled to choose any of the peers; that the parties did not reach any tentative agreements at the June 18, 2008 session; that this session lasted no more than 3 hours and 15 minutes; and that the parties already a bargaining date scheduled for July 1, 2008, and Lerner would not commit to any additional date beyond July 1, 2008, saying that he would not schedule anything beyond a week or two.

On cross-examination, Neimark testified with respect to the tentative agreement regarding the settlement of grievances being reopened by the employer, that the Union objected but it discussed this issue with the Employer under objection; that while management stated that if its proposal to have the Union agree to not leaflet within 5000 feet of Respondents' facilities were determined to be illegal the proposal would be rescinded, management proposed it again a month later; and that management never rescinded its proposed 5000 foot of facility leafleting prohibition.

General Counsel's Exhibit 35 is a June 18–19, 2008 e-mail exchange between Neimark and Lerner. First, Neimark advised Lerner as follows:

> The union continues to object to your continued practice of dilatory bargaining. The union attempted to schedule several bargaining sessions, and you refused to do so. You would only schedule one additional session. You then indicated that you would not schedule another session because you can't plan that far in advance. The result is, since you have taken the step of only agreeing to one session every two weeks and only agreeing to bargaining over the facility that you are at, that you have not agreed to any additional sessions of bargaining for Galesburg Terrace. In addition to your consistent position of meeting for no more than 3 hours an any time, despite our continued requests to bargain for longer periods, these additional infractions are further evidence of your efforts to delay the negotiation of a contract.

Lerner replied, as here pertinent, as follows:

> . . . .
>
> To my knowledge there is no NLRB requirement of scheduling bargaining sessions, far in advance, as you're requesting. It is extremely difficult committing to dates far in advance in our business, since emergencies and unexpected events constantly occur in nursing homes. If I commit to a date far in the future, and then need to cancel it, you'll then file NLRB charges like you recently did. So it is considerably safer for us to commit to only the next meeting, so that we have a better idea that we can attend it.
>
> Unless you can show me that the law states differently, we will schedule the following session, only at the conclusion of each meeting. Since we are bargaining every 2 weeks, we surely can find a mutually agreeable date two weeks later, as we did yesterday.
>
> Instead of focusing on creating a paper trail for your next trip to the NLRB to file ULP charges, it should be a lot more productive for you to focus on working out our differences. Yesterday we offered to sign off on numerous agreed upon items, but you refused, since you only wanted us to agree to additional things. That's not the way to get resolutions to issues, or to complete a contract. In fact, that's what is delaying things here; not our 1/2 day sessions. As [I] told you numerous times, we cannot travel 4-6 hours to a facility, in order to meet with you for an entire day. We must have adequate time to conduct some facility business while we're there.

Regarding the July 1, 2008 bargaining session, Neimark testified that it took place at Camelot; that he, Lopez, and Frascone were present for the Union; that Lerner and Kipp were present for management; that the session started at 2:43 p.m.; that the parties discussed arbitration again with the Union approaching it not in terms of discipline, which Lerner was objecting to, but rather in terms of contractual issues that are nondisciplinary; that the possibility of loser pays all for the arbitration was discussed; that the parties caucused from 3 p.m. to 3:40 p.m., and then they caucused again at 3:55 p.m.; that when the parties returned at 3:40 p.m. the Union presented Respondents with some modifications to the grievance and arbitration proposals; that the parties discussed the peer review arbitration procedure; that while the parties had already tentatively agreed upon the language in article 13 of the Union's proposed contract which spoke to discipline for violations of the work rules for just cause, Lerner made another proposal at this session, and then he withdrew his proposal before the end of the session; that while the parties agreed upon July 22, 2008, as the date for the next meeting, they did not pick a location; that this session lasted 2 hours and 15 minute; and that the parties did not reach any tentative agreements at this session.

General Counsel's Exhibit 36 is a July 2, 2008 e-mail from Neimark to Lerner which reads as follows:

> It has now been over a month since the union submitted our emergency pay proposal for Galesburg Terrace to you. You have not responded to the proposal, despite your promise at our bargaining session two weeks ago that you would. If the facility has not implemented the emergency pay proposal by Saturday, July 12, 2008, and if you continue to engage in your ongoing dilatory bargaining, it is our intent to commence picketing and aggressive leafleting at Galesburg Terrace beginning at 12:30 pm on Saturday, July 12, 2008 with possible intermittent continuation of picketing and leafleting at Galesburg Terrace and possible intermittent leafleting at all Gem facilities until you have met our demand.
>
> ….

General Counsel's Exhibit 37 is a July 2–3, 2008 e-mail exchange between Lerner and Neimark. First, Lerner, as here pertinent, indicated as follows:

> Our response to your request, is that we do not consider there to be any emergency right now. As your own member Steph[anie] Woetz, commented last time, all the vacant positions were filled without any difficulty, as 6 people were hired 2 weeks ago.
>
> Therefore, the wage request will be considered and negotiated, as part of the economic portion of our contract. Since we are making substantial progress during each negotiation session, that should be happening pretty soon.
>
> Also, please don't threaten me. You can picket and leaflet all you want, and I don't care, as long as it's off facility property. By now you should know that I will bargain fairly with you, and we will ultimately arrive at an equitable contract. But I won't be swayed by threats or intimidations.

Neimark replied as follows:

> There was no blame involved. I simply was commenting that we did not have a response. We have one now, and it is a response that is completely unacceptable.
>
> As of last Tuesday, the minimum wage increased to $7.75. I understand you are opposed to the state requiring employers to pay workers a minimum standard, but the fact remains that CNAs at Galesburg Terrace are now the lowest paid CNAs in the entire state of Illinois. I do not know of any other facility, certainly in the Galesburg area, where the pay is that low.
>
> Stephanie did correctly indicate that those positions were filled, but you obviously missed her overall message. She clearly sated that CNAs are feeling very pressured, many are leaving, and she doesn't know how long some of these new hires will last.
>
> Since you don't mind us leafleting, I will take this note as a withdrawal of your proposal to change Rule 22.

Then Lerner, as here pertinent, replied as follows:

> I did not agree to withdraw our proposed change to Rule 22. I only intended to convey, that your threats to us are meaningless, and that negotiations would go quicker and smoother if you would bargain in good faith. . . .

General Counsel's Exhibit 38 is a July 10–11, 2008 e-mail exchange between Neimark and Lerner. First, Neimark proposed that the July 22, 2008 meeting be held at Galesburg. Lerner replied the meeting would need to be in Streator, he was going to be in Galesburg the week of July 14, Neimark had indicated that he was unable to meet that week, and he, Lerner, did not have the 6 hours driving time every week to drive to Galesburg. Neimark replied as follows: "[w]e gave you two dates that week to meet and you turned both of them down, and then went on to say that you were too busy that week. We then scheduled the 22nd." Lerner then replied as follows: "I never said I was too busy; I'd committed to meet every second week, and I told you I was available on the 15th or 16th. You're the one who turned down a meeting next week; you said you were going to be away." Neimark replied as follows: "[t]he 16th is one of the days that I offered and you rejected at the last bargaining session. We continue to be ready to bargain with you on the 16th in Galesburg. We propose bargaining on the 16th in Galesburg and on the 22nd in Streator." Lerner then replied as follows: "I didn't reject it then; you suggested to skip the week. Unfortunately I now have the 16th booked. So it'll have to be the 22nd in Streator."

General Counsel's Exhibit 39 is a July 20–21, 2008 e-mail exchange between Neimark and Lerner regarding the forwarding to Lerner of the Union's proposal for grievance procedure.

Kwiek testified that she again became involved in the Camelot and Galesburg bargaining sessions on July 22, 2008, when Neimark, who was assigned as chief negotiator, was out of town; that the Union was represented at this session by her, Lopez, and Frascone; that management was represented by Lerner and Kipp; that the parties discussed (1) the fact that Lerner would agree to language at the bargaining table and then propose new language on those same topics at a later session, and (2) the Union had problems with the fact that the parties were not meeting weekly; that Lerner said that what she was saying "that those were lies" (Tr. 35); that she told Lerner "that it was difficult working with someone who has a mental illness and won't acknowledge that they have a problem" (Tr. 36); that she supposed that she lost her temper at the time; that the parties then discussed whether Lerner agreed to language and then changed his mind and the bargaining schedule; that the parties discussed the grievance and arbitration procedure for about 10 minutes; that Lerner and Kipp then left the room; that after they were out of the room for about 5 or 10 minutes, Kipp came back into the room and indicated that they were done; that the meeting lasted a total of about 30 to 45 minutes; that the meeting was scheduled for 4 hours; that it was the Employer's representatives who walked away from the table; and that the parties did not reach any tentative agreements at this session.

On cross examination, Kwiek testified that at the July 22, 2008 session the parties discussed grievance and arbitration language that had nothing to do with the master contract; and that what was discussed "had to do with not having arbitration and having an employer-sponsored panel that would decide if something . . . should be resolved but it would not involve a third party because that's not—that has no foundation in the master contract" (Tr. 47).

Kipp testified that at the July 22, 2008 session Kwiek stated that they were negotiating one contract and Lerner said that Camelot and Galesburg were separate entities and they were negotiating two contracts; that, as she recalled, Kwiek then called Lerner a liar; that Lerner asked her if she was calling him a liar; that Kwiek told Lerner that he was mentally ill and she hoped that he did not have a wife or children; and that management did not bargain for the rest of the session but rather there was a break and at the end of the break she told Kwiek that she "felt that nothing more could be accomplished because of the negative ness of how the contract negotiations had turned, due to the exchange" (Tr. 276).

General Counsel's Exhibit 40 is a July 25–27, 2008 e-mail exchange between Lerner and Neimark. First, Lerner asked, "[c]an we schedule our next bargaining session for 8/7 in

Streator?" Neimark replied as follows: "[i]f you are willing to negotiate one contract for both facilities, then we are fine with bargaining in Streator. I will check on the date with others involved." Lerner replied as follows:

> Please don't waste your time or mine by continuing to bring up this issue of "one contract for both facilities." It is a non-starter, and will never happen. The law requires us to negotiate for each building, since they are separate corporations, and we will continue to do that. We will never make one contract for both buildings, as we told you from day one.
>
> I won't be able to be in Galesburg until the following week. I'm willing to accommodate you by making it a "Galesburg negotiation session" in Streator, on 8/7 if you wish. However, if you insist on the location to be in Galesburg, I'm only available there, he following week on 8/14

General Counsel's Exhibit 41 is an August 1–7, 2008 e-mail exchange between Neimark and Lerner. First, Neimark indicated as follows: "[w]e propose that we bargain next in Galesburg on the 13th or 14th." Lerner replied as follows: "[a]re you meaning to cancel the 08/07 scheduled meeting, and replace it with 8/14?" Neimark replied as follows: "I can also bargain on the 7th, but we must bargain in Galesburg sometime in the next 2 weeks." Lerner replied: "So we'll do the 7th in Streator and the 14th in Galesburg." Neimark then indicated: "[w]e are proposing that the session begin at 9:30 am and go through 5 pm." Lerner replied: "[u]nfortunately, due to the long distances involved, we won't be able to begin before 2PM. As you're aware, it takes over 3 hours to get there." Neimark replied: "[t]hat is just not acceptable, unless you are agreeing to bargain until 10 pm." Lerner replied: "[w]e can't go past 5PM, but we can start at 1PM to accommodate you." Neimark replied: "[y]ou had said noon when we set this meeting up in the fist place. Why do you always have to back away from verbal commitments? I will be there by noon and hope that you will be there too."

With respect to the August 7, 2008 bargaining session, Neimark testified that it was held at Camelot; that he and Lopez were present for the Union; that Lerner and Kipp were present for management; that the parties spent most of the session discussing the grievance and arbitration policy; that the parties did not reach any kind of tentative agreement; that at the end of the session Lerner gave the Union three written proposals regarding (1) the bulletin board language in that Lerner again wanted to modify the language to prohibit the Union from handing out materials closer than 5000 feet from the facility; (2) Lerner wanted the Union to exclude the possibility that it would ever organize clerical, professional, or licensed or degreed employees and Lerner said, "[w]e are not going to sign a contract without this;" and (3) Lerner wanted to modify language that the parties had already "TA-ed," namely article 13 in that Lerner indicated that for infractions not listed in the work and safety rules the employer could discharge or discipline employees without cause since the state is an at-will State; that the parties had already scheduled another session for August 14; and that the session lasted less than 4 hours.

Kipp testified that at the August 7, 2008 bargaining session management gave her written proposal (GC Exh. 53(w)), to the Union. The typed proposal reads as follows:

> ARTICLE 13
>
> The Employer may discharge or discipline employees according to the Work and Safety Rules and Regulations. For infractions not listed there, Employer may discharge or discipline employees without cause, as IL [Illinois] is an employee-at-will state.

Kipp testified further that Neimark agreed to her proposal that "the Employer may discharge or discipline employees without cause." (Tr. 284 and 285.) [Neimark's initials do not appear on General Counsel's Exhibit 53(w)]; that at this session she also gave Neimark a typed proposal (GC Exh. 53(u)), which—as here pertinent—proposed that any union leafleting would be done no closer than 5000 feet from the facility property; that Neimark indicated that the law allowed leafleting as long as those leafleting were not on the employer's property; that she told him that if that was the law, she would agree; that she never submitted this proposal to Neimark again; that at this session she made a verbal proposal to the Union "[t]hat LPNs not be allowed to be Unionized" (Tr. 293); that she told Neimark that she did not believe that LPNs should be unionized, LPNs were considered supervisors, and she did not believe that they belonged in a bargaining contract; and that LPNs were not included in the master contract that the Union gave to management.

Lerner testified that at the August 7, 2008 bargaining session one of the issues discussed was licensed practical nurses (LPNs); that management advised the Union that it was aware that LPNs were "trying to get unionized" (Tr. 372) and "[y]es" management indicated to the Union that Galesburg and Camelot did not want LPNs ever to be represented by the Union at either Galesburg or Camelot (Id at 373); that Neimark said that LPNs have the right to attempt to organize; that he then said, "[w]ell, if that is your opinion, then we are not going to push it" (Ibid.); and that he never brought this proposal up again.

General Counsel's Exhibit 42 is an e-mail Neimark sent to Lerner later on August 7, 2008, complaining about Lerner attempting to readdress sections of the contract that had already been discussed. Neimark also advised Lerner that economics would be discussed at the next session and he was re-sending Lerner the Union's economic proposals Lerner refused to accept when the Union attempted to give them to him months ago.

General Counsel's Exhibit 43 is an August 11, 2008 e-mail exchange between Lerner and Neimark. First, Lerner indicated: "[w]e would appreciate if the Galesburg negotiating session were schedule from 1PM to 4PM." Neimark replied: "[o]ur position is that we should be bargaining for 8 hours. However, if you insist on only 3 hours, we do not object to those 3 hours being from 1–4."

With respect to the August 14, 2008 bargaining session, Neimark testified that it was held at Galesburg; that he Lopez, Frascone, and named bargaining unit employees were present for the Union; that Lerner and Kipp were present for management; that the Union asked to discuss economics and Lerner

insisted on talking about his request to exclude LPNs from any future potential organizing efforts; that Kipp read a list of issues to the Union's bargaining team, namely (1) that article 4, which is union security and checkoff, was rejected; (2) they were going to agree for employees to take time off to work for the Union but they wanted to reduce it from 90 to 30 days of paid union leave; (3) they were proposing 4 and 40 overtime whereas the Union's initial proposal had an 8 and 80 overtime system; (4) they wanted vacation based on normally scheduled hours rather than 40 hours a week for article 10, section 1; and (5) they insisted that the Union needs to be held responsible for strikes even if the Union takes action to stop a strike; that management said that some of their proposals applied to Camelot as well as Galesburg but management did not specifically indicate which proposals also applied to Camelot; that the parties agreed to the modification of article 7, section 6, the Union countered on vacations, and then the parties moved on to talking about the economic package that is attached to his bargaining notes for that day; that the parties discussed the meals, voting time, health and welfare, and pension; that the parties did not reach agreement on any of the economic proposals at that session; that the Union offered nine dates for the next bargaining session with two of the proposed sessions, August 26 and 27, 2008, beginning after 5 p.m.; that Lerner said that the only time he was available was August 26 and 27 during the day; that the parties were not able to schedule anything further than their August 20, 2008 date; and that this session lasted less than 4 hours.

General Counsel's Exhibit 44 is an August 17–19, 2008 e-mail exchange between Neimark and Lerner. First, Neimark indicated as follows:

> We are confirmed for Wednesday, August 20 at 1 pm at Camelot Terrace. We continue to propose that the next session at Galesburg Terrace be scheduled for one of the following: Anytime on August 25, 28, 29, 30, 31 or after 5 pm on August 26 or 27. We propose that an additional session be held in Galesburg or Streator on September 2 or 3. We continue to believe that we could finish this much quicker and save time and money in the long run for both parties if we were to agree to 7.5 hour bargaining sessions, as recommended by NLRB Region 33. . . .

As here pertinent, Lerner replied as follows:

> . . . please don't offer to meet with us after 5PM, when you know it's being disingenuous. We work very hard 8-10 hours a day, and are entitled to go home to our families afterwards. We aren't obligated to work after 5PM, just because you have meetings scheduled on Tuesday, the day we always meet.
>
> Last week we offered you to meet on our regular Tuesday, on 8/26 but you refused to meet at a normal hour. We also offered you 8/27, and you refused to meet at a normal hour.
>
> My schedule is very tight the next few weeks. However, in order to accommodate your meetings next week, I might be able to change our schedule to meet with you on Thursday 8/28 in Galesburg, as long as the following meeting would be on 9/8 in Streator. If this works for you, let me know.

Neimark replied, asking, "[w]hat time are we starting tomorrow," and Lerner then replied, "[w]e agreed last week to meet at 1 PM."

General Counsel's Exhibit 45 is an August 18–19, 2008 e-mail exchange between Neimark and Lerner. First, Neimark opens his e-mail with "I think that 8/20, 8/28, and 9/8 might work, if you agree to the following." Neimark then proposes scheduled sessions indicating that the parties should be able to reach settlement in early September 2008. Lerner replied, "I don't negotiate specifics over the internet; I simply offered you date to set up a negotiating meeting with you. Please respond to it, before the available dates get booked."

With respect to the August 20, 2008 bargaining session, Neimark testified that it was held at Camelot; that he, Lopez, and union employee Yvette Cagle were present for the Union; that Lerner and Kipp were present for management; that management presented a new written attendance policy (GC Exh. 47), and the parties discussed (a) no call/no show further; (b) compromised language; and (c) meals again; that, with respect to General Counsel's Exhibit 46, the parties tentatively agreed to the following language: "one no call/no show results in termination with the exception of a situation that rendered it impossible for the employee to call in" but Lerner wanted to add that "[t]his determination is solely in the hands of management"; that the Union did not agree to allowing management alone to make this determination; that the Union objected to (1) the short time of the bargaining sessions; (2) bargaining sessions being two weeks apart; and (3) management not giving the Union written responses; that Lerner said that he did not give written responses, and he would only negotiate face-to-face; that the parties did not reach any tentative agreements at this session; and that the session lasted 4 or less hours.

Regarding the August 28, 2008 bargaining session, Neimark testified that it was held at Galesburg; that he, Frascone and named bargaining unit employees were present for the Union; that Lerner was present for management; that Lerner said that Kipp had prepared a proposal on tardiness but since Kipp was not present, he was not prepared to talk about it; that the parties discussed (a) jury duty with Lerner indicating that while paid jury duty was the current practice, he was not willing to continue it and he was not going to allow it to be in the contract; (b) sick leave and personal leave, with Lerner indicating that he was not really prepared to discuss that; (c) pension, with Lerner indicating that he would not agree to it because he was concerned that he would be liable for it even if the building were to be closed; (d) health and welfare, with Lerner indicating that (1) he did not want to pay for the Union's junk plan in that the Union had proposed using its health and welfare plan which Lerner considered to be a junk plan; (2) he wanted to utilize management's present policy, which is more expensive and very few employees can afford; and (3) he was not willing to accept any kind of health insurance that did not involve employee contribution; and (e) wages, with Lerner reiterating that the current pay rate was sufficient, he was willing to increase CNA pay by 10 cents and that was it, but nothing for anybody else; that no tentative agreements were reached at this session; that the Union caucused and came back at 3 p.m. with a new

written proposal on wage increases, namely a scale, and the Union withdrew its pension proposal but retained its health and welfare proposal; that the wage proposal was lower than what the Union originally proposed; that Lerner did not change his position on pay, indicating that the administrator was quite happy with the availability of the employees a the pay rate at which they were paying; that this session ended around 4 p.m. and therefore it was no longer than 3 hours; and that the parties scheduled the next session for September 10, 2008, at 1 p.m. at Camelot.

General Counsel's Exhibit 49 is a September 9, 2008 e-mail exchange between Neimark and Lerner. First, Neimark, as here pertinent, advised Lerner as follows:

> It has come to my attention that management is threatening to drug test our leaders at Galesburg Terrace as part of a new program of massive random testing. Implementation of such a program would be a violation of the NLRA because it constitutes an unauthorized change in terms and conditions of employment.

Lerner, as here pertinent, responded as follows: "[n]o new drug testing program was ever implemented or even proposed by management." Neimark responded, as here pertinent, as follows: ". . . I was writing for clarification. Thanks for the clarification."

With respect to the September 10, 2008 bargaining session, Neimark testified that it was held at Camelot; that he, Lopez, and Justin Mooney, who is an employee at Galesburg, were present for the Union; that Lerner and Kipp were present for management; that at the outset of the session Lerner objected to the presence of Mooney, indicating that Mooney had no right to be there since the parties were just discussing Camelot that day; that Mooney was present that day because the Union wanted to negotiate for both facilities; that Lerner said that he was going to go out and poll the employees and determine whether they wanted Mooney to be representing them in that meeting; that he told Lerner that his proposed poll was not appropriate; that Lerner eventually sat down and bargained; that the parties discussed (1) some language proposals management had asked for; (2) sick leave; (3) tardiness; (4) a proposal to add language about endangering the safety of residents; and (5) reopening some other language on breaks, etc.; that management's proposals are in writing; that management attempted to reopen Rule 17, indicating that management wanted to change it in a way that had to do with sleeping on the job notwithstanding that this language, which was break language, had previously been tentatively agreed upon; that the parties discussed the economic proposal, with management basically just reiterating their feeling that the $7.75 was sufficient, management did not want to put money into "junk insurance," and management was not having any trouble recruiting people for minimum wage to work as CNAs; that while at the outset of this session Lerner indicated that they were bargaining for Camelot, the parties were discussing the Galesburg economic proposal at that point; that the parties agreed to management's language regarding endangering the safety of residents, family, or staff would be a first offense termination; that since Lerner refused to call these things tentative agreements because the Union took the position that tentative agreements could not be later withdrawn, Lerner started calling them "possible agreements" and labeling them "PAs"; that toward the end of the scheduled session (5 or 10 minutes before 5 p.m.) when they were discussing economics, Kipp suggested a 15-minute caucus and they would come back to discuss wages some more; that Lerner then said we are ending this session now "we're not going to come back and caucus or talk anymore about this" (tr. 156); that the parties did not agree to any further bargaining sessions but they already had one scheduled for September 16, 2008; and that he tried to get Lerner to schedule a session beyond September 16, 2008, but Lerner refused to go beyond 1 week.

Kipp testified that Justin Mooney attended a session at Camelot on September 10, 2008; that at the outset of the session Lerner asked why Mooney was there since he was a Galesburg employee and the parties were negotiating separate contracts; that Neimark said that he thought that some of the issues to be discussed at that session would be some of the same issues pending with respect to Galesburg and, therefore, Mooney should stay: that Lerner did not say anything about polling employees regarding whether they wanted Mooney to be there; and that this issue did not come up at a later point in this session.

On rebuttal during the presettlement portion of the trial herein, Lopez testified that she attended a September 2008 bargaining session at Camelot at which employee Mooney, who worked at Galesburg at that time, was present; that Lerner and Kipp were present for management at this session; that when Lerner came into the session he wanted to know why Mooney was at Camelot because the parties were only discussing Camelot; that Neimark said that he had a right to choose who the Union wanted to be on the bargaining team for the Union; that Lerner said that he would go out and poll the workers at Camelot to see if they wanted Mooney to do the bargaining for them; that Lerner, whose facial expressions and the fact that his face became red led her to conclude that he was upset and angry, went to the door; and that Lerner did not leave the room, he eventually returned to the bargaining table, and bargaining commenced for the day.

On cross-examination, Lopez testified that she believed that Lerner raised his voice; that when Lerner brought up Mooney being there, Neimark said that they were also going to be discussing Galesburg issues; and that Lerner said that he was going to poll the employees to see if they wanted Mooney to be on the bargaining team for them.

General Counsel's Exhibit 50 is a September 10–11, 2008 e-mail exchange between Neimark and Lerner. First, Neimark indicated as follows:

> Given that you have continued to engage in dilatory and surface bargaining, we are suggesting that further sessions be held with a mediator from the Federal Mediation and Conciliation Service.
>
> Each session, you have presented new non-economic proposals that address issues that had been discussed in earlier bargaining sessions. All of the proposals presented could have been proposed when the parties were still discussing non-economics.

> The union believes that your motives for these activities are transparent. You continue to bring up non-economic issues in order to avoid deep discussion of the very important economic issues.
>
> The utterly absurd positions you have taken on the economics, with justifications that clearly fly in the face of rational thought and facts on the ground (like your claim that Galesburg Terrace does not have a turnover problem when over 66% of your direct care workforce has worked at Galesburg Terrace for under one year).
>
> I have forwarded this email to Jerry Meehan, the FMCS Commissioner who has been assigned to this case.

As here pertinent, Lerner replied as follows:

> As usual, you seem to think that you can dictate what gets discussed and when. You think that since you finished going through your non-economic proposals, we must forget about ours, and they will go away. Be advised that that's not the case. The Employer has the same rights you do to discuss its non-economic needs. We clearly told you previously that we hadn't presented all our non-economic proposals, but because you insisted that we immediately discuss economics, we reluctantly agreed to.
>
> So don't feign surprise at this. We will continue to bring up our non-economic proposals until they are resolved. Remember a contract involves two sides—It's not just your side that gets to propose issues. We clearly aren't doing this to delay discussing economic issues, because you are well aware that we've already discussed them with you, with numerous proposals and counterproposals. When we continue to bring up non-economic issues, it's because you have never yet given us our opportunity.
>
> Just because you are unhappy with our response to your economic proposals, doesn't mean we aren't discussing them, and aren't willing to come to an agreement. We have discussed them and will continue to discuss them, and don't yet need any mediator. If you would come down from your unreasonable expectations, we surely could agree to contract terms. But if you insist on the ridiculously expensive proposals you have made, we will undoubtedly be progressing very slowly.
>
> . . . .

Regarding the September 16, 2008 bargaining session, Neimark testified that it was held at Galesburg; that he, Frascone, and named bargaining unit members were present for the Union; that Lerner and Kipp were present for management; that the Union proposed that management either provide the Union's health insurance or pay 100 percent of the health insurance premium of the policy provided by management; that the Union decreased its wage proposal; that Lerner continued to say that he was not willing to do anything more than 10 cents and that "people who work in nursing homes don't do it for the money, so he didn't feel that they needed to provide any more money" (Tr. 159); that Lerner described the Union's proposal as crazy; that there was a 15-minute caucus and the parties returned to the bargaining table at 3:05 p.m.; that Lerner did not offer a counter proposal and indicated that he was still at 10 cents; that Lerner proposed some changes to Article 28 regarding the time allowed for lunch and breaks and the fact that employees would be considered on duty during these periods; that the parties did not reach any tentative agreements during this session; that the session started at 2 p.m. and ended at 3:23 p.m.; that attached to his bargaining notes is the Union's September 16, 2008 economic proposal which was tendered to management at this session, page 3 of General Counsel's Exhibit 53(hh); and that the Union's economic proposal is a further reduction of the Union's previously proposed wage proposal.

Kipp testified that Respondent's Exhibit 10(b), which refers to article 28 of the proposed contract, was drafted by management and given to the Union at the September 16, 2008 bargaining session; and that this proposal of management was from both Camelot and Galesburg. The document reads as follows:

> Article 28
>
> 1. Each employee is entitled to 1/2 hour lunch period
> 2. Each employee is entitled to a total of twenty minutes of break time. . . .
> 3. An employee is considered on duty, from the time they punch in on the time clock, until the time they punch out.

Kipp further testified that Neimark told her that this proposal needed to be in contract language.

When called by Lerner at the postsettlement portion of the trial herein, Kipp testified that she remembered meetings where there was a discussion about changing health insurance carriers for Galesburg and Camelot; that it is possible that in the middle of September 2008 she attended a meeting with Lerner and Neimark and she thought Lori might have been present; that she believed that Lerner brought up the issue of health insurance at this meeting; that Lerner said that they were shopping around for a better deal regarding health insurance carrier because it was expected that there would be a rise in premiums; and that Neimark said that most of the union members did not take it so it was not of real interest to him.

On cross-examination, Kipp testified that in her May 5, 2009 affidavit to the Board she indicated, "I do not know anything about a change in the facilities health insurance carrier in 2009. I do not take any insurance." (Tr. 774.)

When called by Respondents, Lerner testified that on September 16, 2008, he "notified the union negotiators that both Camelot and Galesburg were looking for other carriers because the prices were going up very high from the existing carriers . . . [a]nd Ron said to me 'Oh, we don't care, our members aren't part of this anyway'" (Tr. 799); that he told Neimark that Respondents were looking at Aetna and if Neimark had any concerns, to let him know; that this was the end of that conversation; and that the Union did not ask at this session for documentation regarding the cost of the Aetna policies but the Union did later (he thought in February 2009) ask for the difference in cost between the plans, and it was provided.

On cross-examination, Lerner testified that Neimark was not concerned about the existing policies because Neimark always said, "Those are too expensive for our employees" (Tr. 857), and Neimark was always trying to push his union health policy;

that, regarding the health care insurance carrier utilized by Respondents, Neimark also said, "That doesn't concern us . . . ., basically do what you want because my members are [sic] involved in this insurance plan" (Ibid.); that Neimark was not concerned about a switch in the current policy for the current members because his employees, the ones he was representing, were not members of that policy; that Neimark did provide several proposals during negotiations concerning health care; that the switch from Unicare to Aetna was bargained and the parties in fact negotiated this switch; and that the parties did not memorialize in writing the switch from Unicare and Blue Cross and Blue Shield to Aetna.

On rebuttal, Neimark testified that he was not notified by Respondents of the change in health insurance carrier on September 16, 2008; and that he was not given any advance notice of a change in health insurance carrier by either Respondent.

With respect to the September 25, 2008 bargaining session, Neimark testified that he, Frascone, and named employees, including Pauline Kilpatrick, were present for the Union; that Lerner was present for management; that the session, which was held at Camelot, began at about 2:15 p.m. because some employees from the facility came into the room and asked to speak with him, and he talked with them until 2:15 p.m.; that Lerner started that session indicating that he was not moving on economics at all, the pay rate now is reasonable, the wage is acceptable, and until the Union made any kind of reasonable offer, he was not even going to think about moving off of 10 cents; that when the Union asked Lerner what did he mean by reasonable, Lerner replied that what the employees were being paid at that time was reasonable; that the Union then caucused and provided another economic proposal to Lerner, proposing retroactive minimum anniversary raises that were lower than what it had previously proposed; that Lerner said he would not agree to anything retroactive and that he would study the proposal; that the parties discussed sleeping on break which stemmed from the proposal management had given to the Union the session before about being considered on duty during break and lunchtime; that the parties did not reach agreement about the sleeping on break issue because Lerner said he could not agree in that he needed to talk about it with Kipp; that the parties did not reach any tentative agreements at this session; that he did not remember how long the session lasted but he believed that the session did not go beyond the usual 5 p.m.; and that in the three bargaining sessions in September 2008 the parties reached a total of one tentative agreement, which Lerner insisted be characterized as a PA or possible agreement.

Kipp testified that Respondent's Exhibit 10(e) is management's sick leave proposal which was given to the Union at the September 25, 2008 bargaining session. The document reads as follows: "[s]ick leave accumulates at the rate of one (1) day per quarter. Sick leave may not be added to vacation time, nor will cash bonus be given in lieu of sick leave." Kipp further testified that Neimark agreed to this proposal and said that it needed to be in contract language.

The Board issued a Decision and Order Remanding in *Camelot Terrace, Inc.*, 353 NLRB No. 20 (2008). More specifically, the Board adopted Judge Cullen's findings that Camelot violated the Act by issuing warnings to and discharging employee Henson. The Board, however, remanded the Lopez termination for the judge to issue a supplemental decision explaining his findings and credibility resolutions in sufficient detail for the Board's review.

Neimark testified that the parties had one bargaining session in October 2008.

Respondent's Exhibit 5 is an October 28, 2009 e-mail exchange between Neimark and Lerner. First, Neimark advised Lerner as follows:

> About 2 weeks ago, I gave Teresa Sangster a handwritten information request for a list of bargaining unit employees, including name, address, phone number, rate of pay, date of hire. The list that she gave me did not have contact information and did not include employees hired in October. I asked her to provide the missing information and to date I have not received this.
>
> In addition, the request asked for copies of drug testing reports since the last set of reports provided when we were negotiating over the contract language on drug testing. We requested the information in order to test if you are being consistent with your stated policy of terminating all who test positive for drug use. We have reason to believe that your management is not consistent with that "policy" and only enforces it against those that they choose to enforce it with. Your company's failure to provide the requested information, and your earlier refusal (by email on September 9) to provide it, is in direct violation of your duty to bargain under the National Labor Relations Act.

Lerner responded as follows: "I'll check it out. I'm on the road today and don't have access to any records of "previous" requests. If it hasn't been provided, we will get it to you. In the future, please copy me on any requests you make from administrators. I prefer to be in the loop to make sure we are being compliant with NLRA."[9]

On October 29, 2008, as noted above, a complaint was issued which collectively alleges that at various times from January through September 2008 Respondents Camelot and Galesburg and the Union met for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment and Respondents failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Camelot and Galesburg units by (i) restricting the dates for bargaining sessions; (ii) restricting the lengths of bargaining sessions; (iii) repeatedly cancelled and shortened scheduled bargaining sessions beyond their unreasonably stated intention not to bargain for more than four hours per session; (iv) reneged on or withdrew from tentative agreements without good cause; (v) refused to bargain over economic subjects; and (vi) refused to make economic proposals.

When Neimark testified at the trial herein on November 12, 2008, he testified that there is no contract in place for either

[9] It appears that Lerner may have added at some later time to his response. The other page of R. Exh. 5, however, does not have the usual e-mail information, i.e., the date, time, and e-mail address. Additionally, the type is a different size than Lerner's response quoted above.

Camelot or Galesburg; that the parties had one bargaining session in November 2008 at which they reached some noneconomic tentative agreements; that Lerner never gave the Union a written proposal on wages or economics; that since the February 12, 2008 session until the end of September 2008, the parties have reached five tentative agreements; that between January and September 2008 the parties have met a total of 21 times, bargained a total of less than 60 hours, met 9 times at Galesburg and 12 times at Camelot, and not reached any tentative agreement on any economic issue; that the certification year has expired at both facilities; that the Union has never cut a bargaining session short; that Lerner has canceled bargaining sessions for matters of personal convenience, namely his son's engagement, his surgery, and when he had the vehicle problem; that the parties have only reached tentative agreements on about one half of the proposals by the end of September 2008; and that the Union requested Galesburg drug testing reports but management has not provided this information.

On cross-examination, Neimark testified that the Union canceled one session because of snow and it canceled the second one a week in advance because it had another meeting scheduled on April 1, 2008; that while the Union requested written responses to the Union's written proposals, management refused to comply with this request, and he believed that management's refusal to put its responses in writing to the Union's written proposals demonstrates that management was not bargaining in good faith; that management did provide the Union with written proposals on certain topics but management did not provide the Union with written proposals on many things that the Union requested them for; that the bargaining sessions were rarely productive; that in view of the fact that through September 2008 management agreed to less than one half of the items which were in the master contract, management was trying to create a new document; and that management would tentatively agree to certain proposals and later management would come back and try to create whole new proposals around that same language.

On redirect, Neimark testified that while management ultimately responded to most of the Union's requests for information, some of the responses may not have been timely; that while Lerner originally indicated that he would agree to a 90-day period regarding union security, Lerner subsequently said that he was rejecting union security altogether; that the Union has never waived any right to file a petition to seek to represent employees of any kind in the nursing home industry in Illinois; that the master contract provides for (a) arbitration and grievance; (b) the payment for jury duty; (c) the Union would not be liable for strikes or walkouts where the Union makes reasonable attempts to interdict; (d) pensions; and (e) a minimum wage way above what Lerner was offering; that Lerner renewed his proposal to have the Union agree not to seek to represent the LPNs even after he told Lerner that such a proposal was not legal; that, with respect to the wage information, sometimes it would take a month and a half to get the information from management; and that the hours information that the Union requested in connection with the overtime issues was provided within 2 or 3 weeks.

On recross, Neimark testified that the bargaining sessions between January and September 2008 averaged about 3 hours each, and rarely did they go to 4 hours.

On November 13, 2008, during the trial, counsel for the General Counsel requested an adverse inference be drawn regarding Kipp's failure to turn over her 2008 calendar, which has notations on it with respect to when sessions were to be held, in response to the subpoena of counsel for the General Counsel. This matter was taken under advisement and counsel for the General Counsel was directed to raise it in her brief. It does not appear that counsel for the General Counsel specifically raises this matter on brief. Also, it is not clear exactly what the adverse inference would be. Consequently, this request is denied.

Neimark testified that he was present at a bargaining session at Galesburg on December 3, 2008, along with Frascone, Cagle, Babcock, and Kilpatrick for the Union; that Lerner was present for management; that the parties discussed the grievance procedure, particularly the peer review because Respondents did not want to have binding arbitration on disciplinary cases; that the Union proposed to agree to peer review for disciplinary matters if Respondents would agree to union dues checkoff and security and COPE; that Lerner did not agree to the Union's proposal since he considered those to be economic issues; and that the parties TA'd a variety of items at this session, which agreements are attached to his notes of the bargaining sessions (GC Exh. 67)[10].

General Counsel's Exhibit 94 consists of (1) settlement agreements (a) in Cases 33–CA–15587 and 33–CA–15670 regarding Galesburg, and (b) in Cases 33–CA–15584 and 33–CA–15669 regarding Camelot, with both settlement agreements signed by Lerner, Neimark, and counsel for General Counsel Melissa M. Olivero (in the "Recommended by" box) on "12/4/08," and (2) notices to employees with respect to both of the settlements. As noted above, I approved these settlements. Neimark testified that as part of the settlements Respondents agreed to bargain in good faith with the Union, and to meet and bargain with the Union for a minimum of 5 hours per session and 20 hours per month.

General Counsel's Exhibit 68 is a December 5, 2008 e-mail from Neimark to Lerner which reads as follows:

> I have attached 2 documents. The first contains all items that we have TA's or PA'd to date. The second contains all items that we have yet to come to an agreement on. The second document contains some language that you prefer and some that we prefer. I do not present the 2nd document as a package proposal, but instead as items to be discussed.
>
> . . . .

Neimark testified that it was his understanding that the TAs and PAs in these documents applied to both Galesburg and Camelot; that PA stands for possible agreement which "was a term that was constructed by Respondent because he [Lerner] did not want to—he considered TAs to be binding upon the parties. He did not want to be held bound by anything he agreed to" (Tr.

[10] Neimark testified that his bargaining notes were contemporaneously recorded at the bargaining session.

437); and that in the course of his experience as a representative with the Union he has never heard the term "PA" used in bargaining with other employers.

With respect to the December 9, 2008 bargaining session at Camelot, Neimark testified that he, Lopez, Babcock, and Frascone were present for the Union; that Lerner and Kipp were present for management; that the session began at 1:05 p.m.; that the parties discussed management rights, vacation and personal time, meals, arbitration, no-strike/no-lockout, jury duty, health and welfare, sick leave, leaves of absence, and full-time versus part-time; that the parties reached a tentative agreement on a variety of these items; that at this session Lerner gave the Union a written list of various items that the parties had TA'd, which was contingent upon the approval of his attorney; that the list is part of his bargaining notes (GC Exh. 67); that the parties approved the package of TAs before the timeline that they agreed upon; that the TAs applied to both Galesburg and Camelot; that this session ended between 4:30 and 5 p.m.; that the Union never agreed to end early; and that this session ended because Lerner would not respond to the Union's questions and, therefore, there was no further discussion.

General Counsel's Exhibit 71 is an e-mail exchange on December 10, 2008, between Lerner and Neimark. First, Lerner advised Neimark as follows: "I just realized that Thurs next week won't work. Can we change for Wed?" Neimark replied as follows: "Wednesday doesn't work for us." Lerner then asked Neimark, "What about Tuesday?" Neimark replied as follows: "No. We have staff meeting on Monday and Tuesday. Thursday or Friday were our only possibilities" and "I take that back. I have another meeting scheduled on Friday." Lerner replied as follows: "That means we are mutually agreeing not to meet this week, since we can't meet Thursday, and that's your only possibility. Let me know if you can make it work." Neimark replied as follows: "We are not mutually agreeing not to meet this week. Yesterday we mutually agreed to meet on Thursday. That is the day that we are ready to meet on. If you are canceling, you are unilaterally canceling this session. It is not mutual." And Lerner replied as follows:

> It's obvious that you always go out of your way to make things difficult. Within a few hours of our scheduling the next meeting, I notified you that our scheduling of Thursday was in error, since we cannot make it due to a conflict. Without being specific, it is a very legitimate reason, that would easily stand up in court. We offered you any other day of the week, and you refused. Since you are making yourselves available only on the only day we are unavailable, it is you that is canceling the session. As an alternative, would you be able to meet in my office any day of the week?

On cross-examination, Neimark testified that this session was not rescheduled.

On cross-examination, Lerner testified that if he asks someone if they can find another day and they say no, he understands from the other person that the other person was mutually agreeing not to meet.

General Counsel's Exhibit 72 is a December 11, 2008 e-mail from Neimark to Lerner which reads as follows: "Here is a revised copy of the agreement including the TAs from this past week. We are available to meet on Wednesday in Galesburg."

With respect to the bargaining session on Wednesday, December 17, 2008, Neimark testified that it was held in Galesburg; that he, Frascone, Babcock, and Kilpatrick were present for the Union; that Lerner was present for management; that the session started a 1:15 p.m.; that the Union presented an economic proposal for Galesburg and Camelot at this session; that the proposal is attached to his bargaining notes (C Exh. 67); that the parties discussed the economic proposal; that Lerner indicated that he was not willing to do wage reopeners each year of the contract and he wanted a 5-year contract; that Lerner indicated that he was not willing to tie anything to the minimum wage in that part of the proposal referred to a certain amount above the minimum wage; that Lerner indicated that he was only willing to give 10 cents per hour for everyone, there was just not any money, and it would make him highly uncompetitive to agree to things that the Union had proposed; that Lerner indicated that pay is a management-rights decision and if he wanted to pay people more, he could pay certain individuals more, depending on what ever management wanted to do and it should not be grievable; and that this session ended at 4:20 p.m. so it lasted 3 hours and 5 minutes.

On December 18, 2008, Judge Cullen issued a supplemental decision in Cases 13–CA–43936 and 13–CA–44044 in which he concluded that Camelot violated Section 8(a)(3) and (1) of the Act by its discharge of Lopez.

General Counsel's Exhibit 74 is an exchange of e-mails between Neimark and Lerner starting on December 19, 2008, and concluding on December 25, 2008. First, Neimark advised Lerner as follows:

> Your continued failure to bargain in good faith remains the primary obstacle in attempting to reach a settlement to the contracts at Galesburg Terrace and Camelot Terrace.
>
> At bargaining this past Wednesday, your refusal to clarify your position on wage increases makes it very difficult for us to propose a counter that may be acceptable. Your coy answers make it difficult for us to evaluate your proposals. Your continued claim that any more than a 10 cents increase would make you uncompetitive is counterfactual and perplexing. When we have asked you to clarify what you mean by uncompetitive, your response has been that you do not need to explain it.
>
> The fact of the matter is that your wage rates are uncompetitive in that they are too low. No other facility in Galesburg, or in any other part of the state of Illinois for that matter, starts CNAs out with wages as low as what you propose. Your claim that higher increases would make you uncompetitive are transparent attempts to continue to stall bargaining.
>
> Furthermore, your behavior in scheduling bargaining sessions has been inconsistent with the settlement you signed with the NLRB. The settlement requires you to bargain for 20 hours a month for each facility with sessions that are to last no less than 5 hours per session. We would have no problem bargaining for five hours a session

if you were to bargain in good faith and answer our clarifying questions rather than attempt to avoid answering them. Your claim that we cut bargaining short on Wednesday because we had nothing father to discuss was bogus. We had nothing further to discuss because you refused to fully discuss the issues that were at hand. We have proposed and continue to propose, that we hold 2 back-to-back bargaining sessions each of the last two weeks of January, since the union bargaining team is unavailable for the first half of January. We are proposing that those sessions begin at 9:30 am, recess at 12, reconvene at 1 and conclude at 3:30pm. Given that we are bargaining separate contracts with separate economic resolutions, it can be argued that you are required, as per the settlement, to bargain twice the amount of time that I am trying to hold you to. You have refused to set up bargaining sessions any earlier than one week before the session with the bogus claim that you cannot plan that far in advance.

The union is requesting the following information in order to be able to evaluate your economic proposals and to propose counters:

1) Copies of the profit-loss reports for 2007 and 2008 year to date for Galesburg Terrace, Camelot Terrace, Regal, Forest Hill and Gem Healthcare.

2) Copies of the balance sheets for 2007 and 2008 year to date for Galesburg Terrace, Camelot Terrace, Regal, Forest Hill and Gem Healthcare.

3) Daily Census Reports for the past 8 months for Galesburg Terrace, Camelot Terrace, Regal, and Forest Hill.

4) Any and all documentation of your claims that your reimbursement rates have been lowered. Please provide a copy of all documentation of your rate history from January 2007 to the present.

5) Any and all documentation of your claim that providing the raises we have requested and the insurance we have proposed would make you "uncompetitive."

Also, to again clarify our requests for information which we made at the bargaining session on Wednesday: It should be understood that just because we are asking you to provide additional information on the "American Worker" indemnity plans, it does not mean that we are inclined to accept the concept and we continue to propose that the employer pay the full premium to provide a fully-insured plan, such as that SEIU Health and Welfare Fund, to all of its bargaining unit employees. Our agreement to a lesser plan would be contingent upon you making significant good faith movement on wages.

We look forward to receiving your responses soon and we urge you to consider bargaining in good faith from this point on so as to avoid further NLRB and legal action against you.

Lerner replied as follows:

We have been very forthright and forthcoming with you in regard to our economic proposals. We have told you countless times that we cannot give your members the 25–35% raise they are asking for and still remain competitive. We have offered you a 10 cent raise, and we have put out for discussion a health plan, that we would consider participating in as part of an overall package, if the staff also participates in its cost.

While our proposal obviously doesn't sit well with you, because you likely have promised your members considerably more than we've proposed; that doesn't make it unfair bargaining. An attorney once told me that even if management would offer nothing in the way of raises; it would not be considered by the NLRB to be unfair bargaining.

Your request for financial data for facilities not involved in our contract negotiations, is a non-starter, and unless you show us differently, surely isn't a legal request.

Regarding your request for Galesburg and Camelot financials—Please provide us the legal basis for this request. Since we've never raised to you the concept of an inability to pay your requested increase, we don't believe there is a legal requirement for us to provide them to you.

Neimark replied as follows:

I am asking you for the third time to clarify what you mean by competitive and to explain how raising your pay rated to our requested level, which is closer than your proposal, to the market wage for CNAs in Galesburg nursing homes, would make you unco[mpetitive].

Lerner replied as follows: "We have discussed this with you in the past, and will discuss it again with you this upcoming meeting 12/31."

With respect to the December 31, 2008 bargaining session, Neimark testified that it was held at Camelot; that he and Lopez were present for the Union; that Lerner and Kipp were present for management; that bargaining commenced at 12:15 p.m.; that the parties discussed mandatory overtime, the reinstatement of Lopez, and insurance and wages; that Lerner indicated that he had no problem getting CNAs to work for him for $7.75 an hour; that Lerner was not willing to look at other salaries in the Galesburg area, indicating that he doesn't look at other nursing homes and the employees were happy with what they were being paid; that the minimum wage at the time was $7.75; that the parties discussed both facilities; that this session ended at 2 p.m. because it was New Year's Eve and the parties wanted to get back to Chicago, Illinois.

General Counsel's Exhibit 75 is a January 3, 2009–January 5, 2009 e-mail exchange between Neimark and Lerner. First, Neimark advised Lerner as follows:

At the bargaining session on December 31, you made the claim that you have no difficulty finding CNAs to work at Galesburg Terrace at the current pay rate, minimum wage, and that in order to remain competitive, you intend to not pay workers any more than you have to in order to hire. Furthermore, you indicate that CNAs are satisfied with the wage you offer. The following information is needed in order to evaluate the claim you have made. We reserve the right to make additional requests for information to address this issue if such questions should

arise. Please provide this prior to our next session on January 22.

1) Please provide a list of all CNAs who have been employed by Galesburg Terrace since July 1, 2007, their rate of pay (present for current employees and upon termination for those who are no longer employed), their hire and termination dates, and their last know phone number.

2) For all CNAs who have been employed by Galesburg Terrace since July 1, 2007, please provide evidence that the CNA has proper certification, that a criminal background check was performed, and that no disqualifying offenses were found or that evidence that the employee has a waiver was provided.

3) Please indicate if any additional measures are performed to pre-screen new applicants (e.g. pre-employment drug testing, checking of references, etc.).

Lerner replied as follows:

> Your requests for information are not being made to evaluate our claim. They're being made to harass us . . . . Also, I never said that the employees were satisfied with their wage; all I said was that people are obviously willing to accept these positions for the wages we are paying. . . .
>
> Regarding your specific requests:
>
> 1. You have requested and already been provided with these lists, and regular updates, countless times. What are you missing, that relates to this issue?
>
> 2. Background checks are being done pursuant to state and federal law. Our compliance to this requirement is closely monitored by regular inspections of the IL Department of Public Health. You can check with IDPH if we have had any compliance problems with this issue. Since we don't keep lists of background checks, we are unable to provide one to you. However, all this information is public record. IDPH keeps a nursing registry that lists all the employees' qualifications, including the record of their last background check. If you have a specific employee that you are unable to obtain their background check, please provide their name, and we'll attempt to assist you.
>
> 3. We do reference checking on new employees, but no drug testing.

Neimark replied as follows:

> I assure you that we are not requesting this information to harass you and that they are all essential for our discussion regarding wages. It is our belief that because it is difficult for your administration to hire qualified CNAs at the wages you are offering, they have been hiring unqualified people to work as CNAs, just as the facility has maintained unqualified administrative staff. I do not believe that IDPH has monitored you as you claim.
>
> Furthermore, I need the information requested to determine the exact rate of turnover and hence to be able to evaluate your claim that you are able to retain employees, and to demonstrate to you that you have a problem with turnover and staff retention.
>
> Finally, we have indeed requested the list we are requesting by this notice numerous times, but such a list has never been provided. I am asking that you provide precisely the information requested in black and white.
>
> These requests are all relevant to the issue that we are bargaining and hence are legal requests under the NLRB.
>
> Finally, at this point we have only scheduled 5 hours of bargaining for the month of January. Please submit your proposed dates for other bargaining sessions to fulfill your obligation to bargain for 20 hours per month, keeping in mind that I am out of town until January 15.

Lerner replied as follows:

> Please stop misquoting me. I never said "you are able to retain employees." What I said was that we are satisfied with our ability to hire and staff the building with the necessary required staff. Nursing homes across the country are notorious for staff turnover, and we are no different. Regarding background checks, it's your prerogative not to believe me. However, I simply cannot give you something we don't have. We don't keep lists of the background checks, but I can assure you that every hire that requires one, has one done. But feel free to check with IDPH, and ask them whether they thoroughly review background checks, at every annual survey they perform.

On cross-examination, Neimark testified that although Lerner indicated in his e-mail that "[w]e don't keep lists of the background checks," this turned out to be false because eventually a list was provided by Respondent for Camelot.

On January 13, 2009, Lerner e-mailed Neimark with a further reply (GC Exh. 76), which reads as follows:

> If you don't believe me, you can check with IL Department of Public Health. Ask them if checking the C.N.A.'s background checks is a required task of their surveyors during their annual inspections. Since we don't have the lists that you requested, if you have a specific CNA that you have concerns about their credentials, please ask me to obtain their background check.
>
> Also, I still didn't receive the info you requested from the insurance broker. He said that your request of every possible option made the company rep. nervous. They're wondering if you're trying to get all of their business secrets. He's still trying, but you might need to tailor your request to the most important issues that you need info about.

With respect to the January 22, 2009 bargaining session, Neimark testified that it was held at Galesburg; that he, Frascone, Babcock, and Kilpatrick were present for the Union; that Lerner and Kipp were present for management; that the session started at 12:15 p.m.; that the parties discussed health insurance; that at a point in time Lerner left the room and they discussed with Kipp the reinstatement of member Woertz, who was a union supporter who had quit, and the reduction of hours in housekeeping; that he learned of the reduction of hours in housekeeping from member Kilpatrick who told him before this session that she and other housekeepers were reduced in their hours; that management did not inform the Union of any inten-

tion to reduce hours in housekeeping or any department; that prior to this session the Union did not receive any notice from Respondent of their change in the hours of the housekeepers at Galesburg and the Union was not given the opportunity to bargain over the decision of its effects; that when the Union tried to discuss this matter at this session, Lerner indicated that he was willing to talk but he wasn't going to change anything; that Woertz did go back to work at Galesburg but instead of complying with the policy manual and past practice, Woertz was put on a 6-month probation instead of the usual 3-month probation; that the Union learned of the 6-month probation from Woertz and not from management; that Lerner indicated that it was the practice to give 6-month probation to those who returned if they had attendance problems; that the Union asked for and received proof of this[11]; and that the Union had never been given notice of a change in the probationary period for rehired employees prior to this session, it had not been given an opportunity to bargain over the increased probationary period for rehired employees or the effects of that decision.

On cross-examination, Neimark testified that it is not true that Lerner was the one who brought up the reduction of hours at Galesburg at the January 22, 2009 bargaining session but rather the Union brought it up because employee Kilpatrick had indicated that Galesburg had already reduced the hours before this meeting; and that with respect to the documents Galesburg produced showing that other returning employees had a 6-month probation, the documents were signed after the Union requested them, the facility engaged in deceptive practices in producing these documents, and even if the change occurred when Respondents said it happened, it would have still have happened after the Union was certified.

Teresa Sangster, who is the assistant administrator at Galesburg,[12] testified, when called by counsel for the General Counsel, that she made the decision to cut hours of the housekeepers in January 2009 because "We needed to make an economic cut" (Tr. 684); that she spoke with Lerner before she made the decision because of the negotiations with the Union; that Lerner told her that he would take it to the bargaining committee; that she believed that the Union was notified of the change; that Lerner brought her a proposal that someone else had suggested inside the bargaining committee; that Brenda Philbee, who was the housekeeper/laundry supervisor, just made the announcement to the staff; and that in her May 1, 2009 affidavit to the Board (GC Exh. 104) (which was not offered) she testified as follows:

> In January 2009, we had an across-the-board reduction in hours for housekeeping and laundry staff. This reduction was due to the decline in the employer's census. There was not enough work to keep these employees working their full amount of hours. Brenda Philbee, housekeeping/laundry supervisor, initially cut the hours of every employee in her department by one day for a two-week pay period. As employees quit or as she replaced people in the department, I believe she hired in more part-time people.
>
> . . . .
>
> I do not know if the union was notified of the reduction of employee hours in advance by the employer. [Tr. 686.]

Sangster testified further that employees were notified or this reduction in their hours at the payroll meeting by Philbee; that General Counsel's Exhibit 100, which reads as follows: "AN EMPLOYEE'S PROBATIONARY PERIOD SHALL BE HIS INITIAL THIRTY DAYS OF ACTIVE EMPLOYMENT AS A PROBATIONARY EMPLOYEE. IF AN EMPLOYEE IS SEPARATED AND SUBSEQUENTLY RE-HIRED, HE/SHE SHALL BE SUBJECT TO ANOTHER PROBATIONARY PERIOD" is in the employee packet when they are hired; that the policy has been given to employees as long as she has been at Galesburg; that there is no other written policy at Galesburg concerning probationary periods for employees; that Woertz was a CNA who gave two weeks notice and left Galesburg on good terms; that subsequently she and Galesburg Administrator Lynette Orosco rehired Woertz; that Woertz was given a 6-month probationary period instead of 30 days because every second weekend Woertz would take a 4-day weekend; that, while the 6-month probationary period is not a written policy of Galesburg, it is what Galesburg has done since she has been there; that General Counsel's Exhibit 99 are five signed agreements with employees who were rehired between October 31, 2008, and May 5, 2009, to accept a 6-month probationary period; that these are all of the contracts of this nature that Galesburg had signed up until the information was faxed to counsel for the General Counsel on May 5, 2009; that she was not aware of any others since she has been at Galesburg, but prior to her arrival there had been; and that she did not know if the policy had ever been given to the Union.

When called by Lerner later in the trial, Sangster testified that she went from administrator to assistant administrator at Galesburg on December 2, 2008, over a licensing question; that she has increased the number of days in the probationary period for people who have trouble with call-ins or being late or tardy; that people have signed contracts calling for probationary periods longer than 30 days when they returned to work after they've quit (GC Exh. 92); that she put a copy of these contracts at the front desk for Neimark to pick up; that these contracts were in the files when she took them out; that she did not ask someone that day or that week to have them signed; that extending the 30-day probationary period was not a new policy of hers in that it has been in place for as long as she has been at

[11] GC Exh. 92 is five agreements signed by employees who returned to Galesburg indicating that they agreed to a 6-month probationary period. The documents were signed during the period between "10/31/08" and "12/16/08," with Woertz signing her document on "11/21/08." Neimark testified that he was not provided any documents indicating that employees were given a 6-month probationary period upon rehire that were dated prior to May 24, 2007, when the Union was certified with regard to this facility; and that this policy was not part of the information that management provided to the Union regarding their policies prior to Woertz advising him that she had been placed on a 6-month probationary period.

[12] Sangster testified that when she was hired in 2007 she was administrator at Galesburg but there was a question about her educational background and she became assistant administrator in 2008.

Galesburg, namely 3 years; that before she was hired at Galesburg there are other Galesburg employees whose probationary period was extended but there was no contract for them; that she implemented an extended probationary period for Woertz because of her frequent call-ins; that Respondents' Exhibit 21 is a progressive discipline that was given to Woertz throughout the year; that in January 2009 she proposed to supervisor Philbee to make some layoffs since the census was low and their public aid rate was being cut; that she mentioned this to her bosses, Lerner and Kipp; that since laundry and housekeeping was not as busy as they had been, it was decided that this was the best place to start; that when she suggested to her bosses to layoff one person they told her that they would take it to the Union; that she was told that the members indicated that it would be better to cut everyone back 1 hour; that she did not implement any changes in the work hours of the laundry and housekeeping employees before the Union agreed to it; and that Respondent's Exhibit 22, the handwritten schedule sheet for January 2009 for laundry and housekeeping, shows that she "implemented this change of reducing the hours by one hour [on] 1/23." (Tr. 744.)

When called by Lerner, Kipp testified that in January 2009 Galesburg reduced the hours of its housekeeping and laundry employees because the number of residents in the building did not require the staff that was in housekeeping and laundry; that she attended a meeting with the Union where this issue was discussed; that management proposed the layoff of one person; that Babcock suggested that instead of anybody losing their job, management should just cut an hour off everyone's daily schedule; that management implemented that suggestion; that she was not aware of any layoff before this meeting with the Union; and that Respondents' Exhibit 22 appears to indicate that the change was implemented on January 23, 2009.

On cross-examination, Kipp testified that in her May 5, 2009 affidavit to the Board she indicated as follows:

> The housekeeping staff at Galesburg has had a reduction in hours worked. Instead of terminating anyone, everyone got to keep their jobs and we cut some hours. I do not know if the union was provided notice or an opportunity to bargain over the change in advance. [Tr. 774.]

When called by Respondents, Lerner testified that in January 2009 Galesburg reduced the hours of its housekeeping and laundry employees; that on January 22, 2009, this issue was discussed with the Union; that at the January 22, 2009 bargaining session he advised Neimark that the administrator wanted to layoff one person in housekeeping and laundry; that Babcock recommended that instead of laying off an employee, everyone's hours could be reduced by 1 hour a day; and that this alternative suggestion was implemented.

On rebuttal at the second session Frascone, who is an employee of the Union, testified that she attended a bargaining session at Galesburg at which the reduction of hours for housekeeping and laundry employees was discussed; that she, Neimark, Kilpatrick, and Babcock were present for the Union; that Lerner and Kipp were present for management; that the Union became aware that the housekeeping hours had been cut when Kilpatrick told those who had come to this bargaining session, just before the session began, that management had decided to cut the hours in housekeeping and they chose to cut everybody's hours by an hour a day; that Kilpatrick indicated that this cut had already gone into effect; that Kilpatrick told them that it had already been changed, "they were going to put it into effect" (Tr. 865); that during this bargaining session Lerner was told by the union representatives that he would have to bargain this change with the Union and that the Union's position was seniority should rule ["the junior person should get the hit on the hours, not with everybody" (Tr. 866)]; that Lerner said that he was not going to go by seniority; that management implemented a change where every housekeeper and laundry employee had a 1-hour cut a day; and that the Union did not learn of this change from Lerner or Kipp but rather from a bargaining unit employee.

On cross-examination, Frascone testified that Kilpatrick told them before the bargaining session that the hours were going to be cut and that the employees had already been told about the reduction; that she believed that people's hours were actually shortened before this bargaining session; that Kilpatrick told them that employee's hours were being cut; that Lerner did not announce at this meeting that management was contemplating laying off someone; and that there was no discussion at this bargaining session about a layoff.

General Counsel's Exhibit 77 is a January 23, 2009 e-mail exchange between Neimark and Lerner. First, Neimark advised Lerner as follows:

> Just want to confirm our discussion yesterday on bargaining dates for the coming months. It is essential that we set bargaining dates for months to come because my calendar fills up weeks in advance, and unless we have scheduled dates, it is likely that you will find yourself violating the terms of the agreement with the NLRB because of your refusal to schedule bargaining in advance. We are assuming that all sessions are scheduled from 1-6 pm. What we are proposing, based on discussion yesterday but not confirmed, is the following:
>
> Tuesday, February 3 in Galesburg
>
> Thursday, February 12 in Streator
>
> After that, every Wednesday, beginning in Galesburg on February 18, alternating between Galesburg and Streator.
>
> The union has previously scheduled activities on March 11, March 18 and April 22. For those weeks, we are proposing that bargaining be held instead on the Tuesday preceding that Wednesday (March 10, March 17 and April 21).
>
> I have set all of these dates in my appointment book from now through April 29. I expect that if you have any problem with particular dates, you will call me right away to reschedule those times.

Lerner replied as follows:

> As I told you numerous times, in good conscience, we cannot schedule bargaining sessions more than one week in advance. As you're quite aware, the nature of the nurs-

ing home business constantly has emergencies and unforeseen issues arising. That prevents Debbie and I, the 2 company negotiators, from committing to a date more than one week in advance. In the past, when we committed to meetings two weeks in advance, we got burned because we asked you to reschedule one, and you refused and accused us of unfair labor practices.

Having said that, it is clearly our intent to meet with you weekly for 5 hours, as the NLRB agreement requires. As I told you, we will try to give you a possible date two weeks in advance, in order to be flexible, and to assist you with your busy schedule. But we won't be able to confirm it until the meeting of the first week.

Additionally, unless you can show me differently, I don't find the agreement with the NLRB to require us to schedule our meetings weeks in advance, as you posit, not in NLRB law. The fact that you like scheduling your meetings weeks in advance is admirable, but unfortunately, there are two parties to this negotiation and you are also going to have to give something of yourself, to meet your obligation to meet with us on a weekly schedule.

2/3 is definite, with 2/12 penciled in as our goal. Thereafter, we will try for every Wed in alternating places.

We cannot commit now to your March schedule, but as always, will try to accommodate you.

With respect to the February 3, 2009 bargaining session, Neimark testified that it was held at Camelot; that he, Frascone, Babcock, and Kilpatrick were present for the Union; that Lerner and Kipp were present for management; that the parties discussed wages and health insurance; and that when he asked Lerner to explain what he meant when he said that the wages that the Union proposed would make him noncompetitive, Lerner said that "[i]t means what it means, . . . he doesn't have to explain what it means, [and] [i]n a nutshell, when you pay more than you need to, you are not competitive. We try to get all the things we can for the best price we can. We have no problem getting employees for the rates we pay." (Tr. 461.) Neimark further testified that Lerner said at this session that he was not going to talk about current conditions he would only talk about contract issues; that at 3:30 p.m. the Union tendered a written economic proposal which is in his notes (GC Exh. 67); that the Union proposed a wage tier system but Lerner said that he was absolutely not going to tie anything to the minimum wage, he did not want any raise for signing the contract, he was not interested in a shift differential, he would not agree to wage re-openers, he was not interested in the union health fund unless there is financial participation from the employees, and the employees would have to pay a part of their insurance; that the Union made another wage proposal at 4:20 p.m. which is in his notes (GC Exh. 67); that Lerner responded that he was willing to give only 10 cents to the CNAs only; that this was a change in that at the previous session Lerner said that he was willing to pay (a) 10 cents more to everyone, and (b) $25 toward the health insurance plan which cost $50 a pay period; that Lerner said that he was not going to be concerned with the minimum wage increases because "I can't help the Governor's follies" (Tr. 463); that with respect to the fact that the 6-month probationary period being applied to Woertz, he told Lerner that it was indicated to him that those documents (GC Exh. 92) were signed after he requested them; that Lerner did not respond to him; that the session ended at 5:50 p.m.; and that the session lasted approximately 4-1/2 hours.

With respect to the February 9, 2009 bargaining session, Neimark testified that it was held at Camelot; that he, Lopez, Frascone, Babcock, Kelly Freeman, Ashley Caulkins, and Nicole Barrett were present for the Union; that Lerner and Kipp were present for management; that Federal Mediator Meehan, was present; that the parties started off telling the mediator what were the outstanding issues, namely wages, health and welfare, union security, and COPE; that the union wage proposal provided that when an employee worked in a class above that employee's class, the employee was paid more but when the employee worked in a class below that of the employee, the employee received his or her normal rate; that Lerner was not willing to give both of those things; that he was advised for the first time during this session that the employees' health plan had been changed; that he made an information request which is attached to his notes (GC Exh. 67), namely for a list of bargaining unit employees, the monthly census report for both facilities, the total census and payer source for the last 24 months, staffing reports for both facilities, and copies of the current health plan; and that the Union was seeking the historical census information so that it could develop a proposal that would tie the census to bonuses and because Lerner was denying the Union financial information, and it was the Union's way of figuring out what would be a reasonable economic proposal.

On cross-examination, Neimark testified that before the February 9, 2009 bargaining session he had several discussions with the mediator asking him to try to come to bargaining sessions; that for a long time Lerner refused to allow it; and that finally on February 9, 2009, Lerner allowed the Federal mediator to come to the bargaining session.

When called by Respondents, Lerner testified that he invited the Federal mediator to attend negotiations; that the Federal mediator had telephoned him a couple of times indicating that he was available but he told the mediator that they were making progress on the noneconomic issues; that when the parties were not making progress on the economic issues he invited the mediator to attend; and that the mediator came in February and March 2009.

On cross-examination, Lerner testified that he was not aware whether Neimark telephoned the Federal mediator several times over the course of several months before Lerner finally decided that it would be appropriate to have the mediator at the bargaining sessions; that the mediator never told him that Neimark suggested that he telephone Lerner; and that he brought in or invited the mediator.

When called by counsel for the General Counsel, Sangster testified that at the time she testified at the trial herein Aetna was the employee health insurance carrier for Galesburg; that she believed that the previous health insurance carrier was Blue Cross/Blue Shield; that she was not sure when Galesburg changed to Aetna; and that she was not aware if the Union was notified of the change.

General Counsel's Exhibit 78 is a February 9 and 10, 2009 exchange of e-mails between Neimark and Lerner. First, Neimark advised Lerner as follows:

> Today in bargaining, you indicated that the facilities health plan was changed recently. The facilities neither informed the union nor bargained with us over this change. As such you have once again violated your obligation to bargain in good faith. As such, we are requesting to negotiate over the changes. Please provide both the new plan [and] the old plan (I will check to see if I have the old one). Also, please provide information on the deductions for the plans and a list of all employees who participated in the old one and who participates in the new one.

Lerner replied as follows:

> At bargaining meetings months ago, I did notify you that both Galesburg and Camelot's insurance carriers were going to raise the costs of their plans by very hefty amounts (I believe over 30%). I told you we were going to be searching for other carriers. You agreed at the time, and didn't request anything. Debbie Kipp is witness to that.
>
> We were able to change to Aetna, which kept the cost pretty constant, for similar benefits. So stop making your continued phony accusations, and begin bargaining fairly. We could wrap things up in short order if you did.

Neimark replied as follows: "I do not recall this at all. Please indicate the bargaining session in which this discussion happened so that I can check my notes." Lerner replied as follows: "I don't have my notes with me now, but based on your past behavior, whatever I tell you, you're going to deny anyway. But I would state under oath, and so would Kipp, that I notified you." Neimark then replied as follows: "In conversation with Lori, she indicates that she does remember you mentioning that you were looking, but that we never agreed and we were never informed that you intended to change carriers. You still did not fulfill your duty to inform us of a major change." Neimark testified that he did not receive any prior notice that management intended to actually change carriers, he did not receive notice of the actual change in carriers, and the Union was not given an opportunity to bargain over the change in health insurance carriers.

Frascone testified, when called as a rebuttal witness at the end of the second session, that she remembered having the conversation with Neimark which is referenced in General Counsel's Exhibit 78; that Neimark was correct in his February 10 e-mail to Lerner that she recalled it being mentioned when they met at Camelot that the Respondents were looking; that she could not remember who brought it up at the meeting; that Respondents informed the Union just that they were looking into changing health insurance carriers; that the Union was never told that there was in fact going to be an actual change of insurance carriers for either Respondent; and that the Union was never offered an opportunity to bargain over that change.

On rebuttal, Neimark testified that he was never given the opportunity to agree or disagree to the change in Respondents' health insurance carrier in February 2009.

General Counsel's Exhibit 79 is, as here pertinent, a February 11, 2009 e-mail exchange between Lerner and Neimark. Lerner indicated to Neimark as follows: "We provided you the new plan at the bargaining session, and will be faxing you the participants. The payroll deductions are $97.50 at Galesburg and $145 at Camelot." Neimark responded as follows: "You did not provide the new plan. You indicated that you needed to make a copy. I looked at it for 1 minute." Neimark testified that he subsequently received a copy of the plan.

Administrator Marna Anderson, who was hired by Camelot in 2004 as director of nursing and who became administrator of the facility in 2006, testified, when called by counsel for the General Counsel, that the current health insurance carrier is Aetna Insurance, which has been Camelot's insurance carrier since October or November 2008; that before that Unicare was the insurance carrier when she was hired by Camelot in 2004; that Aetna was retained because Unicare was going to raise their rates, copays, and deductibles; that Aetna cost $7 more a pay period than Unicare before Unicare was going to put the increases in place; that notice was posted, employees attended a meeting in the summer of 2008 conducted by the insurance agency Camelot utilized, the differences were explained, and, by a show of hands, the employees chose Aetna; that she believed that in November 2007 she sent a letter to Neimark advising him that Camelot was looking at different health insurance plans and if he had any questions he should telephone her; that Neimark never did ask her about this; that in her May 5, 2009 affidavit to the Board she testified that "[t]he union was notified of the change in the insurance carrier. I believe that Mr. Lerner sent them a letter stating that we were looking into getting a better plan for the employees. I do not know when this letter was sent" (Tr. 641); and that she did not indicate in her affidavit that she had sent a letter to Neimark.

When called by Lerner, Anderson testified that Aetna has been Camelot's insurance carrier since November 2008; that the prior insurance carrier, Unicare, was going to raise the rates, the copay and deductibles; that Respondent's Exhibit 19 is a letter she sent to Neimark, dated "July 1 , 2007"[13]; that the letter does not have Neimark's address or the address of the Union; that she signed the letter, which advises that (a) Camelot is looking for bids from other insurance carriers because Unicare's costs are increasing; (b) Camelot will be canvassing its employees regarding this matter; and (c) Neimark should notify Camelot as soon as possible if he has any problems with this; and that Neimark did not reply to this letter.

On cross-examination, Anderson testified that she probably had a meeting with employees in the summer of 2007 about the health insurance carrier situation; that she had another meeting with employees in 2008 regarding this matter; that she did not

[13] Anderson testified on voir dire that a digit is not missing after "1" rather the space is a typo on her part; that she did not mention this letter when she gave her affidavit to the Board in May 2009; that she never produced the letter because she did not believe that she was asked for it; that she said that she believed that Lerner sent a letter to Neimark; that they started talking about the policy change probably in the summer of 2008; and that she never notified Neimark of the switch and this is the only communication that she claims she had with Neimark.

inform Neimark of the 2008 meeting with employees with respect to the health insurance carrier situation; that the Union was certified at Camelot on October 10, 2007; that the letter she sent to Neimark about considering changing the health insurance carrier was dated July 1, 2007, before the Union was certified as the collective-bargaining representative of the employees at Camelot in the involved bargaining unit; that after the Union was certified, Camelot had subsequent meetings about changing health insurance carriers and she did not notify Neimark; that they decided to change health insurance carriers in October or November 2008; that when Camelot decided to change neither Neimark nor the Union were notified of the change and Camelot did not offer to bargain over the change; that Neimark was not notified of the meetings which were conducted immediately prior to the change of health insurance carriers in 2008; that Camelot's coverage under Unicare was an annual plan; and that the July 1, 2007 letter to Neimark would have been before Camelot had to make a decision on the health insurance carrier on August 31, 2007, regarding Unicare increases which were effective as of September 1, 2007.

When called by Respondents, Lerner testified that Respondents' Exhibit 19 is a letter that Camelot notified Neimark in July 2007 that it was looking for an alternative health insurer because it needed to avoid a large cost increase, and it was going to canvass the employees; that the Union did not make any objections at the time to him, "They didn't contact me, they showed no interest in the issue" (Tr. 803); that he had no recollection why at the bottom of Respondents' Exhibit 19 there is an indication that the document was faxed from Gem to some other location on July 10, 2007; and that it looks like 9 days after Anderson wrote the letter she asked him to fax it to her.

General Counsel's Exhibit 80 is an e-mail Lerner sent to Neimark on February 11, 2009. It reads as follows:

> Your request for census information is not being honored, as it is financial in nature. Unless you can show me differently, NLRA rules don't require us to provide you our sales and income information.
>
> The employee information you requested will be provided to you next week. The Camelot bookkeeper is on vacation this week. If you don't have it by next Thursday, call Marna.

When called by Lerner, Anderson testified that the census information the Union requested in February 2009 was provided in May 2009; and that she did not provide the information sooner because Lerner told her that she was not required to provide this information because it was financial information.

With respect to the February 18, 2009 bargaining session, Neimark testified that it was held at Galesburg; that he, Lopez, Babcock, and Kilpatrick were present for the Union; that Lerner and Kipp were present for management; that Federal Mediator Meehan was also present; that the parties discussed wages and insurance; that the Union made several economic proposals, which are included in his notes (GC Exh. 67); that Lerner said that he was not going to be giving any wage increases in Galesburg, aside from the 10 cents since he thought that they did not need a wage increase; that Lerner indicated that he was willing to do an indemnity health insurance plan where he pays a little bit every month; that Lerner said, "The only way I see agreement is leaving the wages where they are and the health Insurance plan" (Tr. 473); that Lerner was referring to his health plan, which Neimark described as a low cost indemnity plan, which pays a flat amount which barely covers the cost of most procedures; Lerner said that he had no reason to give a wage increase, and if the Union was going to keep requesting a wage increase "we were at impasse" (Id. at 473); that he told Lerner that there was no impasse, and he did not have the right to declare an impasse; that at some point he asked Lerner what he meant by declaring impasse, and Lerner said, "Well, because we are at an impasse, we don't have to meet every week anymore" (Id. at 475); that the Union then delivered another wage proposal at about 2:15 p.m.; that Lerner said that it was way above what management was willing to give, he did not believe in shift differentials, he was not interested in wage reopeners, management had no problem with what they pay people, and he countered with 10 cents again for CNAs only; that management was asking for a 4- or 5-year contract and he asked Lerner about the additional years; that Lerner said that he was not yet proposing anything for those years; that at some point Lerner rescinded his impasse declaration; that the Union gave management another wage proposal, which is in his notes; that Lerner would not move off the 10 cents for the first year for CNAs only; and that Lerner would not put anything in writing at that point so the Union did not have anything in writing from Lerner with the 10 cents in it.

General Counsel's Exhibit 81 is a February 19 and 23, 2009 e-mail exchange between Neimark and Lerner. First, Neimark advises Lerner as follows:

> Noticed a few discrepancies on the lists you gave me. Hoping you can get an explanation.
>
> The following employees were listed on the payroll worksheet but were not on the employee list: . . . .
>
> The following employees were on the employee list but not on the payroll worksheet: . . . .
>
> Please provide an explanation on why the following employees received multiple pay raises in a given year or received a pay raise in their first year of employment: . . . .
>
> Please explain:
>
> Bonnie Simons, Housekeeping Aide, current pay $10.56—hired in 1/07 at 9.95, raised to $10.25 in 2/07 and $10.56 in 2/08—all other people in position are paid $7.75.

Lerner responded as follows:

> The missing pages of the list were provided to your rep. Crystal Lopez.
>
> Notwithstanding our doubts if you're legally entitled to request this specific employee information, in the spirit of cooperation, we will provide the information we have. Firstly, when there's no union contract in place, it is entirely up to the department heads to decide someone's salary and raises, based on their performance and also the facility's staffing needs. So there can always be inconsistencies, between employees, as the employer can decide what's best for the facility at that time.

> In response to your specific questions, unfortunately we don't keep records of why certain staff gets different raises than others. We therefore cannot give you completely specific answers to all our questions, but we can give you the general recollections of our administrator.
>
> Fortson, Jackson and Miller were all hired at a time when CNA's were in very short supply. So, beside[s] receiving a 90 day evaluation raise, they likely received an incentive raise to stay.
>
> Rhodes received an extra raise to be on the shower team.
>
> Sorenson worked in laundry, then kitchen, and then got certified and began working as a CNA. There was a pay increase during those changes and her certification.
>
> Bonnie Simons—you clearly have been misinformed. She's been working at Camelot for approx. 25 years, and has regularly earned raises along the way.

Neimark testified that he was not made aware of the Employer giving incentive raises to bargaining unit employees; that the incentive raises were given at a time when the Union was a certified representative of the bargaining unit; and that he was not given any prior notice of the Employer giving of incentive raises to certain bargaining unit employees, and he was not given an opportunity to bargain over this.

Patrice Prang, who was acting director of nursing (DON) at Camelot from January to March 2009 when she became the full-time DON at Camelot—which position she left in July 2009 to go back to being a staff nurse, testified that she was not aware of (a) any program of incentive raises for CNAs or (b) CNAs being given incentive raises since the time she worked at Camelot.

When called by counsel for the General Counsel, Anderson testified that she was aware that some CNAs, due to shorthandedness, were given incentive raises; that when she was DON if she was really desperate for help she could say that she probably did give incentive raises to CNAs, telling them that after their probation they would receive an increase in pay; that in her May 5, 2009 affidavit to the Board she testified as follows: "We have always given the CNAs short pay. If by census, we are supposed to have three CNAs and only two show up, those two are given extra pay, short pay. I'm not aware of any other incentive pay we give CNAs." (Tr. 643.)

Lerner subsequently elicited the following testimony from Anderson:

> Q. Okay. And do you remember if Camelot gave an incentive raise in 2009?
>
> A. No.
>
> Q. Let's rephrase that. Did Camelot give an incentive raise in 2009?
>
> A. To a CNA?
>
> Q. Yes.
>
> A. Yes.

When called by Lerner, Anderson testified that when she was DON she would tell a CNA who had good references that she would receive more money after 90 days. On cross-examination, Anderson testified that the discretion that she exercised in giving an employee a raise as a DON is not written anywhere.

When recalled by Lerner, Anderson sponsored Respondent's Exhibit 26, which is a new employee verification form for Melanie Shelton, which is signed by both Shelton and Huffman as DON. The form, which refers to a starting date of "5/9/07," indicates (1) a starting wage of "$8.50/ hr" and a postprobationary wage of "$9.00/ hr," and (2) the job is part time and the employee is on the list for full time. Regarding this situation, Anderson testified that she recalled Huffman asking her if she could give Shelton more money because Shelton was a good CNA and Huffman wanted to keep her on staff; and that it kind of sounded like Shelton indicated that she was going to leave if she did not get the increase, "[t]hat she could go somewhere else and get that amount of money or more" (Tr. 757). Huffman was not called by Lerner to explain the situation.

On cross-examination, Anderson testified that in her May 5, 2009 affidavit to the Board she did testify as follows: "We have always given the CNAs short pay. By census, we are supposed to have three CNAs and [if] only two show up, those two are given extra pay, short pay. I am not aware of any other incentive pay we give CNAs." Anderson testified further that this was her testimony at the time but when she reviewed employee files she saw the Shelton document and she did remember telling Huffman that they could give Shelton more money; that as DON in 2004 she gave incentive pay to CNAs; that she did not know if Erica Fortson, Kathy Jackson, and Christina Miller received incentive raises because Camelot was short CNAs and she thought it was "because they were possibly good workers and we wanted to keep them on board" (Tr. 760); and that it is not a written policy where employees are given incentive pay because Camelot is short on CNAs and it needs them to stay. On redirect, Anderson gave the following testimony:

> Q. BY MR. LERNER: You say it's not a policy, but it's in your past practice to give money as a situation required in order to keep an employee from leaving?
>
> A. Yes, I would say yes.

With respect to the February 25, 2009 bargaining session, Neimark testified that it was held at Camelot; that he, Lopez, and Babcock were present for the Union; that Lerner was present for management; that Federal Mediator Meehan was present; that the parties discussed wages; that Lerner said that (a) he would not agree to anything that gives anything more to people that have been there for less than 5 years; (b) he was not in agreement with any increases upon ratification; and (c) he had no interest in giving additional money, no compounding of increases; that since the Union was not making any headway on wages it proposed that when employees had perfect attendance they would receive a bonus, a short pay bonus, a residential referral bonus, a quarterly census bonus, and a vent unit premium pay of $1 above what everyone else was paid since the nurses were being paid more to work on the vent unit; that Lerner rejected all of the bonus proposals, except the resident referral bonus; that Lerner indicated that census is not a function of the employees' performance and he was not aware of LPNs getting additional money for working on the vent unit; that Lerner said that "people should just be happy to have jobs"

(Tr. 481), and he was not having a problem with getting people to come to work; that he asked Lerner for attendance records for all employees at Galesburg and Lerner denied the request; and that he made this request because he wanted to verify Lerner's statement that he was satisfied that he was able to get people to work.

On rebuttal, Neimark testified that when Lerner refused to provide Galesburg attendance records at the February 25, 2009 bargaining session Lerner said that he believed he did not have to; that Lerner did not say it was because the information did not exist; that at some later date Lerner said that such things do not exist; that he then asked Lerner how he could have a policy in which management gives somebody a verbal warning after three absences in a year; that Lerner responded, "Oh, that's a good point." (Tr. 875); and that the Union never did get these records.

Regarding the March 5, 2009 bargaining session, Neimark testified that he could not find his notes for this session; that Lerner gave him a written proposal for Galesburg in which Lerner was proposing "A ten-cent increase for CNAs, a year two, three, four, and five, at one and a half percent raise, no reopener of wages during the contract term, and a resident referral bonus of $200" (Tr. 482); and that other employees at the Galesburg facility would receive no increase.

Neimark testified that after the March 5, 2009 session he indicated that he needed to talk to the Union's members; that he indicated that he intended to talk with the members one on one in small groups to find out how they felt and if this was something they would agree to and vote yes on if the Union took it to ratification; that a ratification vote was not taken because it was clear that it would be rejected; that he did go out and speak to his members, organizers spoke with members on breaks, "we visited them in their homes, [and] called them on the phones, etc." (Tr. 484); and that after speaking with the members it was his feeling that "this absolutely would not be accepted" (Id. at 485).

When called by Lerner, Kipp testified that at the March 5, 2009 bargaining session management had given Neimark an economic proposal and Neimark said that he would take it to his members, and it would take him 3 weeks to get that accomplished; and that the parties did not meet on the fourth week because Neimark was ill.

Rhodes, who is a CNA at Camelot, testified that she was hired by Camelot on February 23, 2007; that her direct supervisor is Administrator Anderson; that she works 72 hours in an average pay period; that her rate of pay is $9.55 an hour; that Camelot holds regular payday meetings every 2 weeks on Friday in the dining room at Camelot at 1:30 in the afternoon, and it is mandatory that everyone attend; that such a meeting was held on March 6, 2009; that Anderson conducted the first part of the meeting; that Prange, who is the new director of nursing (DON), then asked the nursing staff to remain in the room; that Prange went over some of the things she expected from the nursing staff, including that the nursing staff should call Camelot first instead of calling Prang on her cell phone; that Prang "then talked about a new policy that was going into effect . . . . [, namely] [i]f you missed five days in a calendar year, you were terminated." (Tr. 588); that Prang said that this attendance policy was going into effect "immediately" (Ibid); that General Counsel's Exhibit 91 (which is set forth below) was not shown to her by Prang on March 6, 2009, but it contains the same terms as Prang verbalized on March 6, 2009; that she did not sign anything at this meeting other than to show she attended this meeting; and that she never saw the policy in General Counsel's Exhibit 91 posted anywhere in the facility.

General Counsel's Exhibit 91 reads as follows:

CAMELOT TERRACE
ATTENDANCE POLICY

It is the responsibility of the employee to check the schedule frequently for changes and revisions. You are expected to arrive on time for all scheduled days/shifts.

During the 90 day probationary period the employee is required to work all scheduled shifts without exception. During the 90 day probationary period if the employee calls off one time it will result in immediate termination.

After the 90 day probationary period is over the following procedure will be used:

2nd call off within one year = verbal warning
3rd call off within one year = written warning
4th call off within one year = suspension without pay
5th call off within one year = termination

If the employee fails to show up for a scheduled shift and does not call off they will be immediately terminated with no possibility for re-hire.

_____ _____
Signature of Employee Date
[Emphasis in original.]

On or about March 9, 2009, Rhodes contracted a bronchial respiratory infection, she had to go to the emergency room in Streator, and she was off work the next 2 days with breathing treatments.

Rhodes returned to work on Wednesday, March 11, 2009. Rhodes testified that she was still real sick, she could not work a whole day, and she left the facility; and that on March 11, 2009, at 3 p.m. Prang telephoned her on her cell phone and she had the following conversation with Prang:

> She [Prang] called me to tell me that she was terminating me and I actually thought it was a joke and laughed at her. She said, "No," she was serious, that I was being terminated and I asked her for what, and she said because I missed the five days. I said, "Even with a doctor's note," and she told me, "Yes," that the doctor's note did not matter.
>
> . . . .
>
> She [Prang] just told me that they were making her terminate me. [Tr. 591.]

Rhodes further testified that she never received a letter indicating that she was being discharged; that she did not know the attendance policy of Camelot prior to March 6, 2009; that she never saw it posted in the facility; that she received a copy of the employee handbook when she was hired in February 2007; that the employee handbook indicated that management had the right to terminate an employee at any time they wanted for any

reason; that there was nothing in the employee handbook that resembled the policy that Prange explained on March 6, 2009; that at the time of the announcement of the attendance policy on March 6, 2009, employees "were entitled to four sick days, and that was either three or four personal days within a year" (Tr. 592); that this is more than 5 days; that at the time of her discharge she had remaining paid time off, namely 1 personal day left; that she had never received a verbal warning from Camelot for missing days of work; and that she had never received a written warning of a suspension.

On cross-examination, Rhodes testified that a document (R. Exh. 14),[14] with her signature and with the signature of Director of Nursing Julie Huffman, who signed the document on "2–23–07," was a fabrication to the extent that it contains language about Camelot's absence policy in that this language was not there when she signed the document when she was hired. Lerner then elicited the following testimony:

> Q. BY MR. LERNER: After you were terminated, did you call Julie Huffman on the phone?
>
> A. No, I did not. I don't have Julie Huffman's phone number.

Lerner did not call Huffman as a witness.

Rhodes testified that she eventually went to her own family doctor on Friday, March 13, 2009; and that her doctor recommended that she take the week off from work.

Prang testified that she was hired by Camelot in April 2007 as a staff nurse; that in March 2009 she agreed to take the director of nurses (DON) position; that at the time of her testimony herein she was a staff nurse; that as DON she had authority to hire and fire employees; that, as noted above, she stepped down from the DON position about 1 month before she testified at the trial herein (Prang testified on August 26, 2009); that there was no change in the attendance policy at Camelot when she was DON; that when she became DON the policy was the same as when she was hired in April 2007, and that the policy did not change between April 2007 and when she testified at the trial herein; and that the policy is as follows:

> if an employee called off two times within a year, they would receive verbal counseling. if they called off three times within a year, there was a written warning given. On the fourth call off, I believe it is one day suspension without pay. And after five call-offs, subject to termination. [Tr. 610.]

Prang further testified that the attendance policy on General Counsel's Exhibit 91 was the attendance policy she was given at the time of her hire in April 2007; that on March 6, 2009, she conducted a meeting for nursing staff to discuss her expectations as DON; that the meeting was conducted as part of the regular payday in-service; that several of the nurses and the CNAs were present for her portion of the meeting; that the attendance policy described in General Counsel's Exhibit 91 was presented to the employees on March 6, 2009, as, this is our attendance policy, please be aware of it; that she showed the employees the sheet and then she had a binder and she told the employees that the sheet would be in the binder at the nurses station for everyone to review; that she was not aware if the sheet was posted anywhere in the facility after this meeting; that before the March 6, 2009 meeting she was not aware if the attendance policy was posted anywhere in the facility; and that with respect to whether the policy contained in General Counsel's Exhibit 91 is contained in the employee handbook at Camelot:

> It's in a packet that was given at the time of employment that has W-4 forms and sign that you've received your name badge, resident rights policy is in there, just several different things that they want you to be aware of, your responsibilities and your expectations as an employee. And you sign those things at the time of hire. [Tr. 612.]

Prang then gave the following testimony:

> JUDGE WEST: I'm sorry for interrupting. You sign those things at the time of hire? So the employee signs off on something which would indicate what the attendance [policy] was at the time of hire?
>
> WITNESS: I don't believe they sign the attendance policy. I did not sign my attendance policy, but it is in a packet of papers with different facility policies that you're expected to take home and read and be aware of. [Tr. 612.]

Prang testified further that she gave an affidavit to the Board on May 5, 2009, General Counsel's Exhibit 102—which was not offered—in which she indicated, "I pulled the attendance policy from the employee handbook that I received when I was hired in April 2007. The policy I presented is exactly as it appears in the employee handbook" (Tr. 614); the testimony that she gave in her affidavit was related to the meeting of March 6, 2009; that while she was DON she verbally warned two employees, and she believed that she issued a written warning for violations of the attendance policy but she could not recall any of the employees' names; that she did not remember ever suspending any employee as DON for violation of the attendance policy; that as DON she discharged Rhodes for violating the attendance policy; that as DON she also, after she gave her May 5, 2009 affidavit to the Board, discharged one other employee, Kathy Jackson for violating the attendance policy; that Jackson was reinstated at Camelot; that her predecessor as DON was Deb Price and she was not fully aware of "how . . . [Price] was enforcing attendance policy" (Tr. 616); that in her May 5, 2009 affidavit to the Board she testified as follows: "My predecessor, Deb Price, was lax in enforcing the attendance policy. I am enforcing the policy as written"; that prior to being DON she was not aware of Price not enforcing the attendance policy; that when she became DON she undertook a review of employee personnel files starting with CNAs; that she terminated Rhodes for excessive call outs; that she reviewed Rhodes personnel file the day she was terminated; that she discussed terminating Rhodes with Administrator Anderson and Lerner; that she brought up the fact that Rhodes had five absenteeism in the first 3 months of the year, which was a violation of the policy as she understood it; that "[i]t was a general consensus between

[14] R. Exh. 14 was not received in evidence. As noted below, this employee report form was received in evidence as part of GC Exh. 97, which are documents Anderson forwarded to counsel for the General Counsel after Anderson gave her May 5, 2009 affidavit to the Board.

Marna, myself, and Mr. Lerner" that "it was a violation of the policy and . . . [Rhodes] should be terminated" (Id. at 619); that general consensus here means that she, Marna, and Lerner discussed it together; and that in her May 5, 2009 affidavit to the Board she testified as follows:

> After I discovered that Ms. Rhodes was over the limit for the number of call-offs, I discussed the matter with Marna Anderson, administrator, in her office. Mr. Lerner was also present at the time for one of his regular visits. I brought the frequent call-offs to the attention of Marna and Mr. Lerner. I also brought up the policy she signed at hire and that I had reviewed only a few days before. I said I felt it was grounds for termination. They discussed it outside of my presence. They called me back into the office and we were all in agreement to terminate Kathy Rhodes' employment. [Id. at 620.]

Prang testified further that she did not follow the procedure set forth in General Counsel's Exhibit 91 (Camelot's "ATTENDANCE POLICY"), namely giving a verbal warning first, then a written warning, then a suspension without pay before terminating Rhodes "[b]ecause . . . [Rhodes] had violated the excessive call-off policy that she had been reminded of just a few days earlier" (Ibid.); and that she started her review of personnel files in March 2009 because that is when she went from acting DON (starting in January 2009) to full-time DON.

Subsequently, Prang testified that when she telephoned Rhodes and terminated her she did not tell Rhodes, "They are making me fire you" (Tr. 624); that when she was hired in April 2007 she signed a employee report which gave her shift, her wage, and her job title; that she kept a copy of the employee report in her own records; that her employee report does not have, as Respondent's Exhibit 14 (contained in GC Exh. 97) does, an attendance policy; that in March or April 2009 she hired two CNAs and she wrote the attendance policy on their employee reports; that during her review of employee files as DON she saw the attendance policy written on the employee reports of Julie Sieber and Melanie Shelton and some others who she could not recall; that Sieber signed her employee report in 2007; and that there was something in the employee packet which they received when they were hired, in addition to the employee handbook, which gave the attendance policy. Prang then gave the following testimony:

> Q. . . . That being the case, if the employee received a document indicating what the Respondent's attendance policy was, why would it have been necessary for someone to handwrite on the employee report what the attendance policy was?
>
> A. I don't know why the predecessor who hired these people felt that it was necessary, but I took the initiative to do it on the ones that I was hiring because there had been so much controversy over people not understanding what the existing attendance policy was. So I thought that would just be something that I went over at hire that my new employees are aware that this is what the policy is here.

Prang testified further that when she was hired in 2007 whoever was responsible for filling out the employee report for Prang did not feel it was necessary to include the attendance policy in handwriting on the employee report; and that the "controversy" consisted of a number of employees indicating, after Rhodes' termination, that they were not aware of the attendance policy.

At the outset of her testimony Prang testified that she was employed by GEM Health Care for Camelot Manor Terrace. After acknowledging that Lerner owns Camelot, Prang gave the following testimony:

> Q. BY MR. LERNER: Can you define what you meant by controversy?
>
> A. Just a lot of the staff members—there was a lot of talk after Kathy was terminated and a number of the staff members said that they did not know that. I got calls at home saying, "If I missed five days of work, do I come to work tomorrow?" And I had to explain to people that it's not five days of work missed necessarily, but five separate call-offs.
>
> Q. Okay. So there was [sic] a lot of questions about it? Would that be a better term than controversy?
>
> A. Yeah, probably, yes.
>
> Q. Okay.
>
> MR. LERNER: No further questions.

Subsequently, Prang testified that she first saw General Counsel's Exhibit 91 when she was hired in April 2007; and that at the bottom of General Counsel's Exhibit 91 there is a line for the "Signature of Employee" and "Date." When asked if she signed this "ATTENDANCE POLICY" form when she was hired, Prang testified as follows: "I don't recall if I signed it or not. I know it was in the packet that was given to me and I was aware of it, but I don't recall if I signed it or not." (Tr. 631.)

Later, in response to a question of Lerner, Prang testified that "a number of employees" was a total of three or four calls or text messages. And then in response to questions of the Union's attorney, Prang testified that she received three or four text messages, three or four calls but some of the texts were from the same people who had called, and some just kept calling. Also, she testified that she spoke with a couple of people the next day about the attendance policy. Then when Lerner asked her how many in total asked her about the attendance policy, Prang testified that it was the same three of four repeatedly.

When called by counsel for the General Counsel, Anderson testified that Camelot's attendance policy is contained in the employee handbook; that General Counsel's Exhibit 91, which is titled "CAMELOT TERRACE ATTENDANCE POLICY," was in existence in 2004 when she was the DON; that this policy is in the employee packet; that employees sign the document and the document would be kept in the employee file; that every employee is supposed to sign the form received as General Counsel's 91 when they are hired; that every employees' file should have this signed form in it; that she had employees who she hired sign this attendance policy form; that the attendance policy in General Counsel's Exhibit 91 is not found in the employee handbook (GC Exh. 93); and that in her May 5, 2009 affidavit to the Board she testified as follows:

> The employer's attendance policy has not changed since I have been employed here. Under the attendance policy, after the 90-day probationary period an employee who calls off twice is subject to a verbal warning. An employee who calls off three times, receives a written warning. An employee who calls off four times is suspended. And an employee who calls off five times is terminated. That policy is contained in the employee handbook. All new hires receive an employee handbook and must sign that they received it. I do not remember if the policy has been posted on the bulletin board, but everyone gets it in the employee handbook. [Tr. 646 and 647.]

Anderson testified further that General Counsel's Exhibit 97 is a letter that she sent to counsel for the General Counsel on May 6, 2009, the day after she gave her affidavit to the Board; that she attached to this letter are absence reports of Camelot employees (The exhibit also contains (1) a copy of the "CAMELOT TERRACE ATTENDANCE POLICY," received herein as GC Exh. 91, with what purports to be the signature of Shelton dated "5/8/07," (2) a copy of an "EMPLOYEE REPORT" for Sieber, which has a "JOB TITLE" of CNA, a "START DATE' of "2/21/07," a "DATE/ACTION" of "2/21/07," a "SUPERVISOR" box with the signature of Huffman RN dated "2/25/07," an "ADDITIONAL SIGNATURE" box with the signature of Anderson dated "2/26/07," and what purports to be the employee's signature,[15] (3) a copy of an "EMPLOYEE REPORT" for Rhodes, which has a "JOB TITLE" of CNA, a "START DATE' of "2/23/07," a "DATE/ACTION" of "2/231/07," a "SUPERVISOR" box with the signature of Huffman RN DON dated "2/23/07," a blank "ADDITIONAL SIGNATURE" box and Rhodes' signature,[16] and (4) an unsigned copy of GC Exh. 91); that according to the absence reports attached to the letter, (1) Camelot CNA Jim Melvin has four absence reports between "8/11/08" and "11/12/08" and she did not believe that Melvin was suspended for these absences, (2) Miller has four absence reports between "3/10/08" and "12/29/08" and she did not believe that Miller was suspended for these absences, (3) Jackson had four absences inside of a year and Jackson was not suspended, and (4) Diane Bauer had 10 absences in 1 year and she was not discharged for those absences; that the copy of the "CAMELOT TERRACE ATTENDANCE POLICY," received herein as General Counsel's Exhibit 91, with what purports to be the signature of Shelton dated "5/8/07" is the only example Anderson included in this submission of an employee who signed the attendance policy that was in their personnel file; that as indicated in General Counsel's Exhibit 101, between August 1, 2008, and August 1, 2009, the following bargaining unit employees had the following number of absences and none, except Rhodes, was disciplined or discharged:

Dolly Barrett	9
Cynthia Blom	10
Anita Mullaney	6
Sabrina Oxnart	5
CNA Diane Bauer	9
CNA Jolene Daugherty	12
CNA Sherry Fitch	4
CNA Cathy Jackson	7
CNA Jim Melvin	7
CNA Christina Miller	7
CNA Kathy Rhodes	5
Kay Crow	4
Julie Lyle	4
Nicole Pleskovitch	4

Anderson testified further that she has the authority to hire and fire and managers have the authority to hire and fire; that the DON, among others, is a manager; that she participated in the decision to discharge Rhodes; that Prang came to her and told her that since the short time that Prang was DON Rhodes had five absences; that she reviewed Rhodes' employee record and Prang pointed out that Rhodes signed it and it indicates if she had five absences it was termination; that she agreed with Prang that it would be termination for Rhodes; that Prang did not point out that any of the other CNAs in General Counsel's Exhibit 101 had more absences than Rhodes; that the only CNA absence question that Prang presented to her was that of Rhodes; that she and Prang agreed that Rhodes was going to be terminated; that Lerner walked into her office and asked her what was going on; that she and Prang explained the situation to Lerner and told him that they were going to terminate Rhodes; that Lerner said, "If that's what it says in the record, that's what it says in [the] record. If she's got five, then she' got five" (Tr. 657); that Lerner did not try to dissuade her from discharging Rhodes; that there was no further conversation at that time; that she did not think that anyone was fired before Rhodes for violating the attendance policy; that she did not personally fire Rhodes; that she did subsequently send Rhodes a letter reinstating her employment; and that she was not aware of anyone being discharged or disciplined as a result of this attendance policy since Rhodes' termination.

In response to questions of Lerner, Anderson testified that Huffman wrote the absence policy on the employee reports and at a point in time the absence policy was typed as a separate document, i.e., the last page of General Counsel's Exhibit 97.

Anderson testified further that the Union was certified at Camelot in 2007 and the absence policy typed document was typed in March or April 2007; that she did not know if there were handwritten attendance policies on employee reports other than the ones for Rhodes and Sieber; that Lerner did not play

[15] With respect to this document, no explanation was given regarding why if the "START DATE" and "DATE/ACTION" are "2/21/07" Huffman's signature is dated "2/25/07" and Anderson's signature is dated "2/26/07" when in comparison with the next page in the attachment—the "EMPLOYEE REPORT" of Rhodes—Huffman's signature is dated "2/23/07" which is the same date as the "START DATE," the "DATE OF ACTION," and the date Rhodes signed that form. As here pertinent, in the "DESCRIBE WHAT HAPPENED" portion of Sieber's and Rhodes' incident reports titled "EMPLOYEE REPORT" the following appears:

attendance policy: 2 call-ins in 1 year = verbal warning
3 call-ins in 1 year = written warning
4 call-ins in 1 year = 3 days suspension without pay
5 call-ins in 1 year = termination

[16] As noted, this is the same document which was marked for identification as R. Exh. 14.

any role in the decision to rehire Rhodes; that she wanted Rhodes back to work; that she was advised to hire Rhodes back because of the settlement agreement; that she did not see the settlement agreement but Lerner told her about the settlement agreement and that is why she hired Rhodes; and that she wanted Rhodes back anyway because Rhodes is a good worker.

When called by Lerner, Anderson testified that the absence policy in General Counsel's Exhibit 91 was in place when she was hired in 2004, it was part of the employee packet, but it did not have a signature line or a date; that she did not sign a document like General Counsel's Exhibit 91 when she was hired; that she received a copy but she did not sign it; that subsequently DONs were writing the policy longhand on a form; that when that got tedious they went to the typed attendance policy with a signature line; that Respondent's Exhibit 16 is Rhodes absence reports; that when Rhodes was terminated the absence reports back to January 2009 were relied on; that other people who had five absences during 2009 were not terminated; and that Huffman was DON when she signed Rhodes employee report on "2/23/07."

On cross-examination, Anderson testified that Sieber still works at Camelot; that she signed Sieber's employee report which is contained in General Counsel's Exhibit 97; that she did not sign Rhodes employee report which is contained in General Counsel's Exhibit 97; that she did not sign Rhodes employee report because "I don't have to sign these. I leave these up to managers" (Tr. 721); and that in view of this, she did not recall why she would have signed Sieber's employee report.

General Counsel's Exhibit 82 is an e-mail exchange during the period of March 6–25, 2009, between Neimark and Lerner. First, Neimark advised Lerner as follows:

> It has come to my attention that a new attendance policy has been posted at Camelot Terrace today. This was done without negotiating a change in the terms and conditions of employment, as such it is a violation of the NLRA. We are demanding that the policy be retracted until such time that you have negotiated this change in policy.
>
> Furthermore, we are demanding that you reinstate the hours that you have taken from laundry and housekeeping employees, also in violation of the act.

As here pertinent, Lerner replied as follows:

> . . . .
> Facility didn't post a new attendance policy. The policies that were hung were clearly dated 2/28/07 and 3/1/07. In fact, they weren't even new then, as they were just a reiteration of what's in the policy book. In addition, we're not even sure who hung them now, because administration didn't. But since they were clearly old policies, your allegations are meritless.

As here pertinent, Neimark replied as follows:

> . . . .
> . . . I am now in possession of the attendance policy in question. There is no "clearly dated" marking on the page. I compared the page with the policy book, and it is not even close to a reiteration of "what's in the policy book." The administration posted the new policy following a payday in-service on March 6 when it was announced by the Director of Nursing that the new policy was being implemented.
>
> . . . .
> . . . on 3/11/09, the facility terminated Kathy Rhodes for a violation of the newly posted illegal policy. We understand that the facility was interested in terminating her because of her light duty status and her workers comp liability.
>
> In sum, the union is demanding that . . . the facility withdraw the illegally established new policy, reinstates Kathy Rhodes and pays her for all time lost due to your violation of the law. If you do not immediately cease and desist from your illegal behavior and make Ms. Rhodes whole for her losses, the union will pursue this not only with the NLRB, but also will use all other avenues, including the American with Disabilities act and the Illinois Workers Compensation law.
>
> . . . .

As here pertinent, Lerner replied as follows:

> Please provide me with the "new attendance policy" you are referring to, so I can check it out. To my knowledge, we are currently operating with a policy that was implemented 3–4 years age which, in fact, mirrors the agreement Rhodes had signed upon employment, over 2 years ago. The DON was only reiterating an existing policy; nothing new was ever implemented.
>
> . . . .
>
> Kathy Rhodes' termination was for her violation of the existing facility attendance policy, and a specific agreement that she signed. You can obtain the documentation of this by speaking to Marna. It was not because of any of the scurrilous allegations you have made. The facility has bent over backwards to accommodate Ms. Rhodes with things such as light duty, since her injury. The only thing that caused her to be terminated was her clear violation of the attendance policy. If after review of the documents you have an objection, please present it to me. Management feels very confident that this termination was justified. But, as always, we're willing to talk with you about all issues.

Neimark testified that it had been called to his attention by employee Lopez that there was a meeting of CNAs on March 6, 2009, they were handed a new policy on attendance, and the director of nursing had indicated that this was a new policy and posted it at that time; that he had not previously been provided an attendance policy that looked anything like what he learned from employee Lopez; that he had been provided the attendance policy that was in the policy manual; that he was not provided notice of the new attendance policy from management before it was implemented and the Union was not given the opportunity to bargain over the implementation of a new attendance policy; that if it was in fact a stricter enforcement of existing policy, management did not bargain with the Union over its decision to more strictly implement its attendance policy; that management did not bargain with him about the termination of Rhodes; and that management did not contact him to

advise him that management intended to discharge Rhodes under this new attendance policy.

As noted above, General Counsel's Exhibit 91 reads as follows:

> CAMELOT TERRACE
> ATTENDANCE POLICY
>
> *It is the responsibility of the employee to check the schedule frequently for changes and revisions. You are expected to arrive on time for all scheduled days/shifts.*
>
> During the 90 day probationary period the employee is required to work all scheduled shifts without exception. During the 90 day probationary period if the employee calls off one time it will result in immediate termination.
>
> After the 90 day probationary period is over the following procedure will be used:
>
> 2nd call off within one year = verbal warning
> 3rd call off within one year = written warning
> 4th call off within one year = suspension without pay
> 5th call off within one year = termination
>
> If the employee fails to show up for a scheduled shift and does not call off they will be immediately terminated with no possibility for re-hire.
>
> _____ _____
> Signature of Employee Date
> [Emphasis in original]

Neimark testified that employee Lopez and not management gave him this form; that this is the policy he understood was announced to employees on March 6, 2009; that General Counsel's Exhibit 93 is Camelot's policy (employee) handbook (which has GEM HEALTHCARE MANAGEMENT, INC. printed at the top of the cover sheet)[17]; and that, as here pertinent, the section on "*Call Off and Punctuality*" on page 26 reads as follows:

> Employees must call off at least two hours prior to their scheduled shift start when they are absent. Failure to call off [aka no call no show] results in immediate termination.
>
> In order to ensure proper staffing levels management reserves the right to refuse a call-off at any time.
>
> Employees who call off on holidays or weekends must work the corresponding day[s] on the next weekend or holiday. Calls off on consecutive weekends will accumulate requiring continuous weekend duty until satisfied.
>
> Attendance will be a major consideration in promotions, evaluations, and pay raises. [Bracketed material in original.]

Neimark testified that he was never provided another policy book of the Respondent in effect at Camelot, and he was never provided another attendance policy for Camelot other than the ones contained in General Counsel's Exhibit 93.

On cross-examination, Lerner testified that notwithstanding Ruddick's above-described November 14, 2007 letter to him, regarding Camelot and Galesburg, requesting, as here pertinent, employee handbook, any and all disciplinary policies and/or memos describing the application of the discipline policies or informing employees thereof, and any and all work rules, he did not know whether General Counsel's Exhibit 91 was provided to the Union; and that the attendance policy, as shown in General Counsel's Exhibit 91, was enforced prior to the discharge of Rhodes and prior to the certification of the Union as the representative of the bargaining unit.

Neimark testified that on March 9, 2009, Lerner sent an e-mail proposing that the current wage rates would remain the same for Camelot, employees would receive a 10-cent raise on their anniversaries, there would be no reopening of the contract, and a resident referral bonus of $200; that there would not be a 10-cent increase then, even for the CNAs according to this offer of Lerner; and that this was significantly below the normal raise given to Camelot employees in that the employees at Camelot had historically received a 1-, 2-, or 3-percent raise every year and Lerner's proposal was well below 1 percent, except for support workers since 10 cents would have been more if they only got 1 percent.

General Counsel's Exhibit 83 is a March 25, 2009 exchange of e-mails between Neimark and Lener. As here pertinent, Neimark advised Lerner that "any and all changes to policies that are made without prior negotiation with the union will immediately be considered to be violations of the act and will trigger new board charges" and " . . . any disciplinary actions taken without prior notice and bargaining will be subjects of charges." Lerner replied, "[w]e are very well aware of our obligation to not make any universal changes" and "[u]nless you can show me differently, disciplining employees does not fall into that notification/bargaining requirement."

Neimark testified that he canceled the scheduled April 1, 2009 bargaining session because he was ill.

With respect to the April 6, 2009 bargaining session, Neimark testified that it was held at Camelot; that he and Lopez were present for the Union; that Lerner and Kipp were present for management; that the session started about 1:42 p.m.; that the parties discussed the attendance policy, the termination of Rhodes, and economics; that Lerner said that the attendance policy was not a new policy; that he showed Lerner the policy; that he asked Lerner to bargain over the termination of Rhodes but Lerner refused to give him Rhodes' personnel file; that Lerner said that the file was confidential and he had no duty or right to give it to the Union; that Lerner did not indicate what in the file was confidential and he did not offer to give any part of the file to the Union; that Lerner refused to give the file to him without Rhodes' authorization; that Rhodes is a bargaining unit

[17] The last paragraph on p. 25,which continues on p. 26 of the employee handbook reads as follows:

> The rules and policies set forth in this handbook are guidelines for the employee to follow. Any violation of these rules may, at the sole discretion of the employer, be the basis for disciplinary action up to and including suspension without pay or termination of employment. The employer can rely on any reason it deems appropriate to discipline an employee. The employer has the sole discretion to determine when and under what circumstances discipline, including discharge is appropriate.

member and the Union was grieving her discharge; that he was requesting Rhodes' personnel file to obtain the information the Union needed to successfully grieve Rhodes' discipline; that Lerner said that he had no duty to bargain over discipline and he refused to do it in the course of the bargaining session; that Lerner and Kipp were upset that the Union had not taken the economic proposal to a vote, they believed that the Union was obligated to because the union bargaining representatives had told them that they were going to take it to the members to discuss it, and Lerner and Kipp basically yelled at the union bargaining representatives for not doing so; that at some point Rhodes and Administrator Anderson arrived at this session, Rhodes authorized Lerner to give the Union her personnel file, and the file was given to the Union; and that the parties began to grieve Rhodes' termination.

On cross-examination, Neimark testified that the following appears on page 26 of Camelot's employee handbook (GC Exh. 93): "The employer has sole discretion to determine when and under what circumstances discipline, including discharge is appropriate; that at the April 6, 2009 bargaining session Lerner said that he would not provide Rhodes' personnel file without her permission; and that Anderson provided Rhodes' personnel file once Rhodes arrived at this session and signed a document provided by management.

With respect to April 6, 2009, Rhodes testified that she attended a meeting in the conference room at Camelot; that Neimark, Lopez, Lerner, and Anderson were present; that Neimark asked her if he could have her personnel file and she said, "yes"; that Lerner pulled up the days she had missed and Lerner said "that he had the right to do what he wanted to" (Tr. 593 and 594); that Neimark asked if Lerner and Anderson could step out of the room so he could talk with her; that as Lerner stood up to leave he told her: "this was the time that Ron [Neimark] was going to make me all kinds of promises and all kinds of lies, that when we got to Court, that the Judge would tell him he has the right to do what he wants to as an Employer" (Tr. 594); that she told Neimark that other employees had missed at many days if not more than she had; that she received notice of this policy on March 6. 2009, and she was fired on March 11, 2009; and that she was eventually reinstated on May 28, 2009.

When called by Lerner, Anderson testified on cross-examination that she gave Rhodes' personnel file to Neimark in April 2009 because he asked for it; that she was not aware that Neimark had been denied access to that file prior to that; and that there is no confidentiality rule that bars her from giving a bargaining unit member's personnel file to Neimark.

When called by Respondents, Lerner testified that he did not give Rhodes' personnel file to Neimark immediately because he knew that Rhodes was coming to the bargaining session and he told Neimark that he wanted Rhodes to give her permission, and then he would ask Anderson to get the information from the file; and that after Rhodes gave permission for her complete file to be given to Neimark, it was turned over to Neimark.

When called by Lerner at the postsettlement portion of the trial herein, Kipp testified that, with respect to the April 6, 2009 bargaining session, she on her way to the meeting she telephoned Babcock and asked her if any meetings were held regarding management's economic proposal; that Babcock told her no such meetings were held because they were busy; and that at the meeting she told Neimark that Babcock said that there were not any meetings and Neimark acknowledged this, saying that Lopez had contacted a few people.

Regarding the April 29, 2009 bargaining session, Neimark testified that it was held at Galesburg; that he, Frascone, Babcock, and Kilpatrick were present for the Union; that Lerner was present for the facility; that the session started at 12:23 p.m.; that the parties discussed economics, namely wages and the health fund; that Lerner was still insisting on a 5-year contract without a wage reopener; that Lerner said that he was not willing to pay more than he originally offered because labor was available at the price they pay, and he did not have a problem in getting enough people to work; that he asked Lerner to bring in the administrator so that they could discuss whether Lerner's assertions were true, and Lerner refused; that at this session management gave the Union two discussion only pieces or, in other words, something in writing with "For Discussion Purposes Only, Not a Proposal" written at the top; that both were cross-outs of items that were in the Union's proposals; that Lerner was still offering what the Union understood to be a 10-cent raise but since a lot of the information that Lerner had previously provided to the Union was false in that the actual wages were higher, it turns out that management's 10-cent raise was probably less in some cases; that Lerner left the room at about 3:30 p.m. to see if he could contact Kipp so he could consult with her and give some kind of response to the Union; that he did not know whether Lerner was going to return to the session so he told Administrator Sangster that the union people were leaving, they would be around if they were needed to return and she should tell Lerner to call them because they were available to return to bargain; that about 20 minutes later he received a telephone call from Lerner; that he was in Galesburg on his way to the hospital to visit member Woertz who had fallen; that Lerner said that he had spoken with Kipp and the management's "discussion only" pieces that Lerner gave to the Union at this session could be considered management proposals; and that he said that he would come back to bargain but Lerner did not take him up on it.

On cross-examination, Neimark testified that when Lerner left the April 29, 2009 session at 3:35 p.m. he said that he might be back if he was able to get Kipp on the telephone; that the Union had made it clear the it was waiting on a counter from Lerner; that at 4:05 p.m. Lerner had not come back to the session so he looked for Lerner and when he did not find Lerner he told Sangster that he was leaving the building and she should tell Lerner that he would come back to the meeting if Lerner was coming back to the session; that Lerner "had not indicated that . . . [he] was coming back" (Tr. 572 and 573) to the session; and that Lerner at 3:35 p.m. "had indicated that it was unlikely that . . . [he] would come back" (Ibid.); and that Lerner "indicated that if . . . [he] could get a hold of . . . Kipp, . . . [he] would be back" (Ibid.).

When called by Lerner, Sangster testified that on April 29, 2009, she was in her office when Lerner entered it at 4:15 p.m.; that Lerner telephoned Neimark and told him that he "talked with Deb Kipp and that they were coming to an agreement about something and that he would see him later . . . . at the

next negotiations" (Tr. 748 and 749); and that Lerner telephoned Neimark to find out where he was.

When called by Respondents, Lerner testified that on April 29, 2009, he asked Neimark if Respondents had given him all of the information he requested, and Neimark said that he received everything. Lerner testified further that at the April 29, 2009 bargaining session he asked Neimark why he filed charges with the Board, and Neimark told him, "Well, this is the way I can extend my year and you won't be able to make an impasse. By filing charges, I can get that done" (Tr. 794); that he left this bargaining session at 3:15 p.m. to contact Kipp, who was not present at the session; that he returned to the session about 4 p.m. and the Union's negotiating team was not there; that he went to the administrator's office and telephoned Neimark using the cell phone number Neimark provided to him; that Neimark had left the facility to visit Woertz, who was in the hospital; and that Sangster did not tell him that Neimark had left word that he was leaving the session.

On rebuttal, Neimark testified that he did not say to Lerner regarding charges filed with the Board that "[t]his is a way I can extend my year and there won't be an impasse" (Tr. 878); that the only time he mentioned impasse to Lerner was in an e-mail to Lerner in which he advised Lerner that bad-faith bargaining would preclude impasse; and that he never discussed reasons why he filed charges with Lerner.

General Counsel's Exhibit 84 is an April 3–May 3, 2009 e-mail exchange between Neimark and Lerner. First, Neimark pointed out to Lerner various parts of Lerner's bargaining that the Union considered to be surface and dilatory bargaining, including (a) Lerner's insistence on a 5-year contract with wage increases that don't even keep up with the increases in the minimum wage; (b) Lerner's refusal to reopen the wages; and (c) Lerner's clear attempt to rush to impasse. Neimark also explained to Lerner why the Union requested certain information, and cited Lerner's "continued inability to bargain for the amount of hours he has agreed to bargain for." (Tr. 501) Lerner responded asserting, among other things, that the Union's demanding wage increases that it knows will not be accepted by the Employer shows that the Union is not interested in reaching an agreement, and, therefore, is bargaining in bad faith. Lerner also indicated as follows:

> Our wage proposal is very clear to you, based on your elucidation of it; we never said we couldn't afford large raises; we simply stated that we are paying the amount that we can recruit employees at. There's no need for us to justify that, especially with the phantom paperwork you're now requesting. . . . Since each employee certification is located in their own file, and not in one location, it would be extremely time consuming to get them all for you. If there's anybody in particular that you'd like to see their certification, please let me know, and we'll provide it. . . .
>
> . . . .

Neimark replied, as here pertinent, as follows:

> . . . .
>
> When you asked if all information we requested was provided, I indicated to you that all information we requested that you had not specifically refused to give us was given to us. However, you have refused to provide a huge amount of information that we need to evaluate and bargain in good faith. As such, you continue to bargain in bad faith.
>
> . . . .
>
> To classify our wage increase proposals as "wage increases that you know will not be accepted by the Employer" and indicate that it shows that I am bargaining in bad faith is absurd, because the proposals we have put forth are all, even the initial proposals, well below the market wages of similarly situated employees everywhere in the state.

Neimark testified that he was never provided copies of each employee's certification from their file.

With respect to the May 5, 2009 bargaining session, Neimark testified that it was held at Camelot; that he was present for the Union; that Lerner and Kipp were present for management; that the session started at 12:40 p.m.; that the parties discussed wages and the economic proposal; that Lerner continued to insist on a 5-year contract; that the Union proposed three options, namely (1) a 3-year contract with reopeners in years 2 and 3; (2) a 4-year contract with 4-percent increases in years in years 2, 3, and 4; and (3) a 5-year contract with 4-percent increases each year, with minimum rates for CNAs that escalated throughout those years; that Lerner rejected the Union's proposals; that at 3 p.m. the Union brought up a 5-year contract with 3-percent increases each year, with minimum rates that escalated each year of the contract; that Lerner handed this back to Neimark crossed out; that the Union made two more proposals ("discussion pieces") but the parties were not able to reach agreement on that date on wages; and that Lerner did not make any movement on wages.

General Counsel's Exhibit 85 is a May 5–7, 2009 e-mail exchange between Neimark and Lerner. First, Neimark submitted a complete economic proposal, which was attached to the e-mail, to Lerner, indicating that the proposal would expire on Friday. As here pertinent, Lerner replied, asking Neimark to call him to discuss the proposal.

General Counsel's Exhibit 86 is a May 7–10, 2009 e-mail exchange between Neimark and Lerner with respect to a revised economic proposal of Neimark, which was attached to his e-mail.

Regarding the May 12, 2009 bargaining session, Neimark testified that was held at Galesburg; that he and Kilpatrick were present for the Union; that Lerner was present for management; that the parties discussed wages, health insurance, and the Union dropping Board charges and court proceedings; that later the Union did deliver a proposal which included dropping all of the proceedings but Lerner rejected the proposal; that Lerner said, "I don't see coming to an agreement if we are going to be in Court together" (Tr. 506); that the parties discussed an insurance reopener around a formula for some bonuses that the Union was proposing; that Lerner indicated that he was willing to give a 3-cent bonus for a census over 95; that it was his understanding that historically the census never reached 95; and that General Counsel's Exhibit 87 is a copy of the Union's eco-

nomic proposal which was delivered to Lerner at the May 12, 2009 bargaining session.

With respect to the May 20, 2009 bargaining session, Neimark testified that it was held at Camelot; that it started at 12:10 p.m.; that he, Lopez, Kathy Jackson, and Sandra Thomas were present for the Union; that Lerner was present for management; that the parties discussed wages and the attendance policy; that the Union requested to bargain over the attendance policy, if implemented, and Lerner said, "[T]hey are not going to bargain over the attendance policy" (Tr. 509); that Lerner indicated that the could resume discussion on the attendance policy when the administrator returned; that Lerner continued to press for the Union to agree to withdraw the court cases and the Board charges in order for him to agree to the "concessions" that he was willing to give; that the Union requested the attendance records of all employees so that the Union could determine whether other people had been absent or tardy as often as the ones who were written up; that the Union did not obtain such records at this session but several weeks after this session management did provide the Union with a list of employees indicating how many absences they had between a certain month and another month; that management showed the Union some documents which were signed by two or three employees upon their hire, which documents had written versions of the new attendance policy on them; that of those employees, only Rhodes was still an employee of one of the Respondents and she had been terminated; that the Union asked for copies of this document for all employees and Administrator Anderson indicated that only some of the employees signed such a document, and she did not know why it was only given to some employees; that the parties discussed wages in that Thomas, who was an employee at Camelot, had been told by management that the policy for 2009 on wages was going to be a half-percent, 1 percent, or 2 percent, depending upon their evaluation, which was a change from the prior practice; that Respondent did not deny that it was a deviation from prior practice but management did not agree to change it either back to the status quo; that Lerner claimed that he did not know what the increase is; that the parties discussed the fact that the attendance policy was inconsistent with the paid time-off policy in that theoretically an employee could be terminated before they used up their paid time off; that the parties discussed evaluations and merit raises; that Lerner wanted to tie employee's raises to whether the employee engaged in community service work on their own time outside of the facility; that this would be a violation of the Fair Labor Standards Act; and that regarding merit raises, Lerner said that "it was perfectly fine for the Administrator or for the supervisor to base employee merit raises on how an Administrator feels about a person, and to use the subjective criteria" (Tr. 514).

General Counsel's Exhibits 88, 89, and 90 are e-mails Neimark sent to Lerner on May 23, 2009. The first indicates as follows: "At the 2/25/09 bargaining session, the union requested all Galesburg Terrace attendance records. You refused to provide them at that time and, to date, we have not received them. We continue to request them for 2008 and 2009." The second indicates as follows:

> On 2/9/09, at the bargaining session, the union requested in writing that you "provide monthly census reports for both facilities, including total census and payor source for the past 24 months. Please also provide daily staffing reports for both facilities for the past six months." This has not been provided. Furthermore, we are requesting that the daily staffing reports for both facilities also go back the past 24 months.

And the third indicates as follows: "The union is requesting an updated list of all bargaining unit employees at both Camelot Terrace and Galesburg Terrace with name, address, phone number, date of hire, CORRECT rate of pay, [and] job title."

With respect to the May 27, 2009 bargaining session, Neimark testified that it was held at Galesburg; that he, Babcock, and Kilpatrick were present for the Union; that Lerner and Kipp were present for management; that the session began at 12:30 p.m.; that Lerner indicated that he wanted to bargain over the Camelot attendance policy; that the parties also discussed the withdrawal of the lawsuits and wages; that the Union made a wage "discussion" and the Union asked Respondents to provide the Union with a written wage proposal; that he told Lerner that the Union was not going to put any additional proposals in writing until the Union received a written proposal from Lerner; that Lerner said that the Union had no right to do that and the Union was stalling by not giving him a written proposal without him first giving the Union a written proposal; that the session ended at 5:05 p.m.; and that Lerner said, "[A]nything that he had discussed or agreed to would be moot if we [the Union] did not agree to withdraw the lawsuit." (Tr. 517.)

On May 28, 2009, Rhodes was reinstated at Camelot. Rhodes testified that Anderson telephoned her on May 28, 2009, on her home phone and told her that she was calling her to reinstate her job and did she want it; that she told Anderson she wanted her job; that she had just come home from surgery; that General Counsel's Exhibit 95 is a copy of the letter that she received from Anderson; and that the letter, which is dated May 28, 2009, reads as follows: "As per our conversation I am offering you your C.N.A. position back. Please advise me as to when you are able to return to work."

The Board issued a Supplemental Decision and Order in *Camelot Terrace, Inc.*, 354 NLRB No. 24 (May 28, 2009), adopting Judge Cullen's decision and recommended Order in which he concluded that Camelot violated Section 8(a)(3) and (1) of the Act by discharging Lopez because she engaged in protected concerted activities, and the Board ordered that Camelot rescind the discharge, reinstate Lopez to her former job, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

On May 29, 2009, as noted above, a complaint was issued which collectively alleges that from December 2008 through May 2009 Camelot and Galesburg engaged in numerous, serious violations of the Act, which alleged violations are described above.

When called by Respondents, Lerner sponsored Respondents' Exhibit 12, which is a tentative agreement between the Union and Galesburg signed by Neimark and Lerner on June 25, 2009. Lerner testified that the tentative agreement was supposed to be presented to the employees for their ratification at

the end of June 2009; and that the tentative agreement has not been ratified.

On rebuttal, Neimark testified that the tentative agreement for Galesburg did not apply to Camelot; that the noneconomic language in the Galesburg tentative agreement was similar to the language being negotiated for Camelot but the economics were different; and that he took the Galesburg tentative agreement to the membership for a vote because he believed that Lerner had been so evasive in his bargaining that the Union was not going to be able to take it further, and he was just trying to get it approved so that there would be a contract and the Union could live to fight another day. On cross-examination, Neimark testified that he posted a summary of the settlement and the notice of the ratification meeting 3 days before the ratification meeting because

> up until that time, . . . [Lerner] was trying to back out of the agreement. I had several discussions with . . . [Lerner] while . . . [he] was in Florida about why . . . [Lerner] . . . [was] backing out, including that . . . [Lerner] wanted us to drop both the Galesburg and the Camelot litigation. So I didn't post it until I was sure that we really had a settlement.

Neimark testified further that the Galesburg tentative agreement was dated June 25, 2009; that he posted the notice of the ratification meeting on June 25, 2009; that the ratification meeting was held on Saturday June 27, 2009; that the ratification meeting had to be held that Saturday before July 1, 2009, because there was a minimum wage increase on July 1, 2009; and that Lerner kept stalling on the actual tentative agreement until June 25, 2009, so that is what the Union had to deal with.

When called by Lerner, Kipp testified that, with respect to the July 2009 ratification vote, Neimark told her that the proposal was voted down 3 to 2; and that she asked Neimark why only five people showed up at two meetings.

Neimark testified that the parties did not bargain for more than 20 hours in December 2008, and in each of the months of January–May, 2009; that the certification year for Galesburg ended in May 2008; that the certification year for Camelot expired in October 2008; that the Union has never reached a first contract at either facility; that the Union never received the CNA screening information for Galesburg; that Lerner at some point indicated that this information was contained in various employee files but he did not have a list, and it was difficult to gather the information; that Lerner did not offer to have the Union come in and inspect the records; that the Union never received the attendance information for Galesburg or the census information for Camelot; that initially Lerner refused to turn over Rhodes personnel file; that the Union was not given advance notice or the opportunity to bargain, before it became a fait accompli, over (a) the reduction in hours of the housekeeping staff at Galesburg; (b) the employers' change in health insurance carriers at both facilities; (c) incentive raises at Camelot for CNAs; (d) the attendance policy announced on March 6, 2009; (e) stricter enforcement of the attendance policy at Camelot; and (f) the 6 months probationary period for Woertz and other employees at Galesburg; that between the shortened sessions and Lerner's inability or refusal to answer clarifying questions, the Union has just not been able to reach an agreement that would be acceptable to its members; that Respondents not providing requested information has made it very difficult for the Union to modify and adjust its proposals to be mutually agreeable to the employer; that the unilateral changes at Galesburg and Camelot are a de-motivating factor for employees in that there is a sense that there is nothing that they can do, that the Union has no power, that the Union has no ability to do what it is supposed to do as a union, and it has made it very difficult for the parties to reach an agreement that is acceptable to the Union's members; that the Respondents' wage proposals have made it impossible to reach an agreement since the Respondents' proposals have been incredibly low, and in some cases, constituted a decrease in the status quo; that Respondents' refusal to schedule bargaining sessions more than one week in advance had made it very difficult on the Union since the Union has other work which it needs to do and the Union fills up its schedule much quicker than 1 week in advance; that Respondents' refusal to put things in writing means that the Union has been bargaining with quicksand in that the Union essentially has not been able to get a real sense as to where the employer is on things, aside from the 10 cents only, because the employer refuses to commit to anything in writing; and that Lerner's overall behavior both at and away from the bargaining table has been to hamper the Union's ability to reach an agreement.

On cross-examination, Neimark testified that during negotiations Lerner said that he was not going to say that he could not afford additional wages because he knew what that meant; that, with respect to Lerner taking the position that he could not schedule bargaining sessions more than 1 week in advance, Neimark did not understand this because he bargains with a lot of nursing home owners and they are able to schedule bargaining sessions more than 1 week in advance; that Lerner is the only nursing home owner he bargains with who takes the position that he is not able to schedule bargaining sessions more than 1 week in advance; that the census information was eventually provided for Galesburg but not for Camelot; that no other nursing home owner has ever refused to provide census information; that the Union was proposing that Respondents participate in the Taft Hartley health insurance plan which the Union provides to its members in Chicago; and that Respondent's Exhibit 12 is a tentative agreement for a full agreement that the parties reached in June 2009 for Galesburg.[18]

On redirect, Neimark testified that Lerner said, "I am not going to say I can't afford it, because I know the implications of saying that." (Tr. 581.)

When called by Lerner, Sangster testified that Respondents' Exhibit 23 is the Galesburg CNA background checks Neimark requested which she mailed to him on August 21, 2009. On cross-examination, Sangster testified that she was not aware that Neimark first requested information on CNA screening in January 2009; that Galesburg maintains a copy of each CNA's screening inside their personnel file; and that she was not aware that Neimark lives at 607 Ridgewood Court and not 606

[18] R. Exh. 13 was introduced to show the Union's wage proposal as of "4/16/08" vis-à-vis the tentative agreement wage in R. Exh. 12.

Ridgewood Court so she was not aware that she sent Respondents' Exhibit 23 to the wrong address.

When called by Respondents, Lerner testified that it took so long to provide the CNA background check information because he did not believe that Neimark had a need for this information, which was easily available on the internet; and that he ultimately gave the information to Neimark because counsel for the General Counsel advised Respondents that this was a legitimate request.

On cross-examination, Lerner testified that he would rather be productive running his facilities rather than bargaining with the Union; and that on "[e]very single one" (Tr. 830), Neimark always agreed to cancel sessions or end them early.

On rebuttal, Neimark testified that he did not always agree to end sessions early by mutual agreement; that "usually we ended sessions because the employer would not be responding to questions, not be considering things, so we would have nothing left to discuss. We would've exhausted our options to bargain because the employer wasn't bargaining" (Tr. 873); that often he objected to Lerner's use of "by mutual agreement" because Lerner was not bargaining in good faith in that he was not responding to questions or not presenting proposals; that Lerner did not tell him to always ask the administrators at Camelot and Galesburg for information; that Lerner refused to meet more than once a week and he refused to schedule bargaining sessions more than 1 week in advance; and that the Union was given incorrect rates of pay by management on more than one occasion.

Analysis

For the reasons specified below, the General Counsel has shown that the above-described settlement agreements should be set aside.

Before getting into the merits of the allegations in the involved complaints, credibility issues must be resolved. Counsel for the General Counsel on brief contends that Respondents' witnesses presented testimony replete with material inconsistencies and inherently incredible statements; that Respondents' witnesses were impeached on numerous occasions; that while Prang testified that the attendance policy shown in General Counsel's Exhibit 91 was contained in Camelot's employee handbook, this is where she pulled it from, and it is exactly as it appears in the employee handbook, this is not the case; that while Prang testified that she was not sure how her predecessor, DON Price, enforced the attendance policy, in her pretrial affidavit Prang testified that Price was lax in enforcing the attendance policy and she, Prang, was enforcing the policy as written; that while Assistant Administrator Sangster testified at the trial herein that the Union was notified before the reduction of housekeeping hours was implemented, in her pretrial affidavit she testified that she did not know if the Union was notified of the reduction of employee hours in advance by the employer; that while Kipp testified at the trial herein that the reduction of housekeeping hours—vis-à-vis a layoff—was a union member's idea, in her pretrial affidavit Kipp testified, "Instead of terminating anyone, everyone got to keep their jobs and we cut their hours. I do not know if the Union was provided notice or an opportunity to bargain over the change in advance" (Tr. 66); that Kipp was impeached numerous times with her sworn, pretrial affidavits and other documents; that Kipp's testimony at both trials seemed extremely implausible and her testimony should not be credited; that while Administrator Anderson testified at the trial herein that when she was DON she would give incentive raises to new employees if she was desperate and needed a worker, in her pretrial affidavit Anderson testified that the only incentive pay that she was aware of was the short pay given to CNAs who showed up for their shift when less than the number scheduled showed up for that shift; that while Administrator Anderson testified at the trial herein that she rehired Rhodes upon the advice of the Board agent, Anderson later admitted that she rehired Rhodes upon the advice of Lerner; that General Counsel's Exhibit 15 directly contradicts the testimony of Lerner regarding the cancellation of the April 16, 2008 session in that Lerner sent the e-mail about the car to Neimark at 1:34 p.m. before he allegedly even learned that the car was not running; that Kipp's testimony at the trial herein about the harmonious relations with UAW during her negotiations with that Union regarding Forrest Hill was contradicted by the facts, namely that the UAW filed a charge alleging bad-faith bargaining and a complaint was issued alleging bad-faith bargaining by refusing to meet and bargain more than once every 2 weeks for 2 hours, canceling sessions, and refusing to be bound by tentative agreements; that while Kipp testified at the trial herein that negotiations with UAW took 2.5 months, the period of bad-faith bargaining alleged by the UAW in its charge was, in part, 6 months[19]; that Lerner's statements regarding the Forrest Hill charge are strikingly similar to his allegations in the instant case; that the evidence presented regarding the Forrest Hill case, which Lerner himself placed in issue, demonstrates Lerner's true *modus operandi* regarding bargaining with the representative of his employees, namely Lerner (a) accuses the union of making frivolous charges; (b) falsely accuses the union of occasioning the delays in bargaining; (c) claims that matters outside of his control caused cancellation of bargaining sessions; and (d) relies upon his busy schedule as an excuse to avoid bargaining; that Lerner's demeanor was evasive, argumentative, and nonresponsive; that the testimony of all of Respondents' witnesses seemed deliberately structured to fit Respondents' theory of the case; that all of Respondents' witnesses demonstrated a lack of veracity and avoided giving direct answers; that a substantial conflict has been shown between the pretrial sworn testimony of Respondents' witnesses and their testimony at trial; and that the testimony of Respondents' witnesses should not be credited.

Lerner eliciting the testimony he did from Kipp regarding the UAW negotiations was not only unwise but, in my opinion, it bordered on—if it did not cross the line—suborning perjury since Lerner was there and he knew exactly what did in fact happen.[20] Respondents' approach to that matter demonstrates,

[19] The UAW was certified on June 28, 2004, to represent employees at Forrest Hill . The March 30, 2005 complaint in that proceeding alleged that at various times from August 2004 "to date" Forrest Hill engaged in bad-faith bargaining.

[20] Interestingly, more than once during her testimony on this subject Kipp was told to keep her voice up and to speak up.

inter alia, Lerner's and Kipp's refusal to admit the obvious even when it is presented to them. Undoubtedly, in the business universe these two individuals control, their exercise of power for the most part goes unchallenged. For the reasons set forth by counsel for the General Counsel and in view of the contradictions, inconsistencies, and outright lies under oath set forth herein, I agree with counsel for the General Counsel that the testimony of all of Respondents' witnesses was deliberately structured to convey Lerner's point of view, even though that point of view is contradicted by the facts. I do not credit any of the challenged testimony or challenged documents of Respondents' witnesses which are not supported by a reliable corroborating witness or a reliable corroborating document.

The October 29, 2008 Complaint

Paragraph 6 of the above-described October 29, 2008 complaint collectively alleges that at various times from January through September 2008 Respondents Camelot and Galesburg and the Union met for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment and Respondents failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Camelot and Galesburg units by (i) restricting the dates for bargaining sessions; (ii) restricting the lengths of bargaining sessions; (iii) repeatedly canceling and shortening scheduled bargaining sessions beyond their unreasonably stated intention not to bargain for more than 4 hours per session; (iv) reneging on or withdrawing from tentative agreements without good cause; (v) refusing to bargain over economic subjects; and (vi) refusing to make economic proposals.

Counsel for the General Counsel on brief contends that Respondents' restricting the dates of and the length of the sessions, and canceling and shortening sessions demonstrates Respondents bad faith; that "[c]onsiderations of personal convenience, including geographical or professional conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity," *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); that before the commencement of bargaining Lerner stated his intention to restrict the length of the sessions to three hours; that Respondents imposition of a very short time limit for bargaining sessions during the first 8 months of bargaining constituted a violation of the Act; that Respondents further refused to schedule bargaining sessions more than 1 week in advance, despite the Union's pleas that they do so; that the obligation to meet at reasonable times is not diluted by the demands of a respondent's business, *Barclay Caterers,* 308 NLRB 1025, 1035–1036 (1992); that here, Respondents outrageously demanded to limit bargaining to 3 hours per session in bargaining for a first contract for two nursing homes; that an employer violates Section 8(a)(5) of the Act by withdrawing from a tentative agreement without good cause; that here, Respondents have not offered any cause, much less a good cause for withdrawing from tentative agreements; that Respondents' refusal to bargain over economic subjects and refusal to make economic proposals between January and September 2008 are also evidence of their overall pattern of bargaining in bad faith; that on May 7, 2008, Lerner refused to accept the Union's first economic proposal; that on June 2, 2008, Lerner asserted that the parties were not yet discussing economics; that Respondents did not make their first economic proposal until August 28, 2008, after over 7 months of bargaining, and only after the Union insisted many times on bargaining over economic issues; that insistence on postponement of a mandatory subject of bargaining (economic issues) until language on other issues has been agreed upon is also indicative of a desire not to reach an agreement, *International Powder Metallurgy Co.*, 134 NLRB 1605 (1961); that Respondents' admission that they refused to negotiate on economic issues for months weighs strongly in favor of a finding of overall bad-faith bargaining; that here, Respondents offered no explanation for their clearly regressive wage proposal; that Respondents further demonstrated their bad faith in proposing that the Union (a) agree to never organize LPNs; (b) limit union leafleting activities to 1 mile from the facility; and (c) be removed from involvement in adjusting employee grievances, and in proposing a particularly strong management-rights clause; and that the advancement of predictably unacceptable proposals and the failure to provide reasonable justification for proposals which are questioned, are indicia of bad-faith bargaining, *Bryant & Stratton Business Institute,* 327 NLRB 1135 (1999).

The Charging Party on brief argues that Lerner's repeated failure to meet with the Union regularly, his restriction of bargaining session length to 4 hours, his further shortening of sessions when the parties did meet, and numerous canceled sessions evidences management's dilatory tactics; that it is unlawful when an employer conditions future bargaining on acceptance of a 4-hour daily maximum time limit, *Caribe Staple Co.*, supra; that Lerner canceled the January 24, 2008 session allegedly because of elective surgery; that Lerner canceled the February 5, 2008 session allegedly because his son got engaged; that considerations of personal convenience do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity, Id. at 893; that Lerner cancelled the April 16, 2008 session due to alleged car trouble; that the Union proposed nine suggested dates for bargaining and Lerner responded that he was available on a date for which the Union had already indicated it was unavailable; that the Union made several attempts to reschedule additional and extended sessions before April 30, 2008, and each attempt was rejected by the Lerner because he had a business to run; that Lerner was adamant that management would meet with the Union only every other week; that Lerner insisted that he could not schedule anything beyond the next bargaining session because of his busy schedule; that the Board has held that such excuses cannot justify failure to bargain in good faith, *Calex Corp.,* 322 NLRB 977, 978 (1997); that this type of arbitrary limitation on both the length as well as the number of sessions is further evidence of bad faith; that an employer's unreasonable refusal to accede to Union's requests for more frequent meetings is evidence of bad-faith bargaining; that in late August 2008 Lerner indicated that he was available to bargain on two occasions which the Union had already indicated it was not available; that Lerner reneged on or withdrew from tentative agreements without good cause throughout bargaining; that an employer's withdrawal and continued renegotiation of already

agreed upon provisions of the contract is bad faith and surface bargaining and Lerner's conduct insures that there will be no satisfactory resolution of these bargaining contracts, *Bryant & Stratton Business Institute,* supra; that between January and September 2008 the parties have met a total of only 21 times, the meetings lasted for a total of less than 60 hours, no tentative agreements were reached on any economic issue, and there were only a total of five tentative/possible agreements reached with Respondents; that even though the parties reached a tentative or possible (in effect, nonbinding according to Lerner) agreement on certain noneconomic issues, the Act is violated where restrictions in bargaining session length contribute to a finding of bad-faith bargaining, *Nursing Center at Vineland*, 318 NLRB 901, 905 (1995); that for much of the 10 months of bargaining Lerner refused to bargain over economic subjects; that Lerner does not even claim that there was any agreement to conclude negotiations on noneconomic items before discussing economic subjects (actually both Kipp and Lerner made this assertion but neither one is credible.); that when the Union and management first engaged in economic bargaining, Lerner refused to make economic proposals; that eventually Lerner indicated that he would not consider changing his 10-cent wage increase offer for CNAs only unless the Union agreed to the current pay rate the employees were already receiving; and that Lerner's refusal to engage in negotiations for much of the bargaining history and refusing to make any economic proposal until August 28, 2008, further establishes bad faith.

The Respondents on brief contend that they initially negotiated every week for the first 4 or 5 months; that Respondents then met every second week because business was suffering; that after speaking with a Board agent, Respondents went back to weekly meetings; that the only exceptions to this schedule were clearly legitimate, true emergencies which were not for personal convenience, namely surgery complications, an unexpected required religious ceremony for a son's engagement, and an unexpected car breakdown; and that any session that was shortened was based on mutual consent.

Lerner made it more than obvious that he has nothing but contempt for the process, and that he would do whatever he could, even violate the law, to undermine the ability of the Union to properly represent employees in the two involved units. It appears that Lerner wanted to minimize any change to his normal routine, i.e., when he normally went to Camelot and Galesburg, and the fact that he wanted to carry out his normal work while he was at these facilities—to the extent that he could. As both Lerner and Kipp indicated, they viewed the bargaining sessions as an incursion on their normal business schedules. With this in mind, Lerner restricted the dates on which bargain sessions would be held. This resulted in a total of only 21 bargaining sessions being held collectively for Camelot and Galesburg between January and September 2008. Notwithstanding the Union's demands for more sessions, between January and September 2008 Lerner restricted the bargaining sessions for separate first contracts for two facilities to a total of 9 for Galesburg and 12 for Camelot. Moreover, Lerner, as treated below, limited these sessions to an average of about 3 hours. To frustrate the Union, on at least three occasions, Lerner chose dates and times for bargaining sessions after the Union had already indicated that it was not available on those dates and times. Also, Lerner during a period would only agree to schedule bargaining sessions every second week, and he limited advance scheduling to just the next session. As alleged in paragraphs 6(i), and 7 of the October 29, 2008 complaint, Respondents violated the Act by unlawfully restricting the dates of the bargaining sessions. *Caribe Staple Co.*, 313 NLRB 877, 893 (1994).

With respect to restricting the length of the bargaining sessions, notwithstanding the Union's objection and notwithstanding the Union's numerous requests for bargaining sessions to last more than 3 or 4 hours, Lerner restricted the length of the sessions to 3 or 4 hours. Additionally, Lerner, as described above, shortened some of the bargaining sessions so that the average time spent at a bargaining session was about 3 hours. As noted above, after, in effect, calling Kwiek a liar at the July 22, 2008 session, causing a reaction from Kwiek (neither Lerner nor Kipp are credible. Consequently the testimony of Kwiek, who I find to be a credible witness, is credited), Lerner shortened this session by walking out with Kipp after 30 to 45 minutes of a session which was scheduled for 4 hours. Lerner's claim that any session that was shortened was based on mutual consent is another one of his lies. As alleged in paragraphs 6(ii), and 7 of the October 29, 2008 complaint, Respondents violated the Act by unlawfully restricting the length of the bargaining sessions. *Barclay Caterers,* 308 NLRB 1025, 1035–1036 (1992).

As noted above, Lerner claims on brief that three of his cancellations were legitimate, true emergencies which were not for personal convenience, namely surgery complications, an unexpected required religious ceremony for a son's engagement, and an unexpected car breakdown. Regarding the surgery assertion, Lerner's testimony and the documentation are contradictory at best. Lerner's January 21, 2008 "1:12 PM" e-mail (GC Exh. 11), to Kwiek indicates, "I have to have surgery this week . . . ." But Respondent's Exhibit 7, if one is to believe Lerner's assertions with respect to what it represents, indicates that Lerner had an office visit at "11:45 am" on January 21, 2008, during which visit outpatient surgery was performed. If that was the case, a reasonable person would not expect Lerner to be asserting later that same day that "I have to have (future) surgery this week." Respondent's Exhibit 7 was received because Lerner testified that this is what he retrieved from a web site. However, Lerner is not a credible witness. Respondent's Exhibit 7 does not, on its own, unequivocally prove that Lerner had surgery which justified his canceling the January 24, 2008 bargaining session. This document was not turned over by Lerner to counsel for the General Counsel pursuant to her subpoena. All things considered, I am not giving Respondent's Exhibit 7 any weight whatsoever with respect to Lerner's claim that he had a legitimate reason that was not a matter of personal convenience for canceling the January 24, 2008 session. Since Lerner has no credibility, there is no proof of record supporting Lerner's claim that he had any justification, let alone a matter of personal convenience, for canceling the January 24, 2008 bargaining session.

With respect to Lerner's claim that he had to cancel the February 5, 2008 session because of an unexpected required reli-

gious ceremony for a son's engagement, there is only Lerner's testimony and his e-mail to Kwiek (GC Exh. 21), supporting this assertion. Lerner's e-mail to Kwiek leaves the impression that he had to go from Chicago to New York. If he flew, Lerner did not sponsor an exhibit(s) showing that he has an airline ticket(s). If he drove, Lerner did not sponsor exhibits showing that he purchased gasoline between Chicago and New York. If he stayed in a hotel in New York, Lerner did not sponsor an exhibit showing that he was in New York during a specified period. One is left with only Lerner's word. And Lerner himself has demonstrated what that is worth. Lerner is not a credible witness and I do not credit his assertion that he had any justification, let alone one that was not a matter of personal convenience, for canceling the February 5, 2008 session.

Lerner's claim that there was a legitimate, true emergency which was not for personal convenience, namely an unexpected car breakdown, which justified canceling the April 16, 2008 session is not credited. Contrary to Lerner's incredible testimony on cross-examination that his "1:34 PM" April 15, 2008 e-mail does not contradict his testimony, it does just that. Lerner testified that his wife told him about the problem on April 15, 2008, at 2 p.m. and he could not start the car at 3 p.m. that day. Here, counsel for the General Counsel caught Lerner in an obvious lie and, even though he was testifying under oath, he would not admit the obvious. Not only does Lerner's "1:34 PM" e-mail contradict his testimony, but his April 15, 2008 "5:08 PM" e-mail is contradictory in that in it he indicates ". . . the mechanic hasn't been able to diagnose why my car didn't start yesterday . . . ." Obviously, "yesterday" would have been April 14, 2008, a day before he was even allegedly aware that there was a problem with the car. All of this coupled with Lerner's testimony that his wife "must" have picked him up at the gas station on the night of April 15, 2008, and he did not recall when he picked the car up at the gas station, leaves one no choice but to question the validity of Lerner's assertions regarding the alleged car problem. In view of the contradictory nature of the documentation and in view of the fact that Lerner is not a credible witness, I do not credit his assertions that a car problem justified his cancellation of the April 16, 2008 bargaining session. As alleged in paragraphs 6(iii) and 7 of the October 29, 2008 complaint Respondents violated the Act by canceling or shortening bargaining sessions. *Calex Corp.,* 322 NLRB 977, 978 (1997).

With respect to reneging or withdrawing from tentative agreements without good cause, once again counsel for the General Counsel caught Lerner lying under oath. In his May 5, 2008 e-mail to Neimark (GC Exh. 66), Lerner indicated, "We need an agreed upon definition of a TA before we agree to them in the future." Lerner could not admit the obvious, even though he was under oath, when asked on cross-examination why if the parties—as he had testified—already agreed at the first session that tentative agreements could be opened at any time, he was, on May 5, 2008, arguing in his e-mail that the parties had to agree to allow tentative agreements to be opened at any time. Lerner and Kipp lied under oath when they asserted that there was an agreement at the first (Kipp and Lerner) or second session (Kipp) that tentative agreements could be opened at any time. Lerner and Kipp are not credible witnesses. I find Lopez to be a credible witness and I credit her testimony that she attended the first two bargaining sessions, and no one at these sessions discussed the meaning of a tentative agreement. Hoisted on his own petard, Lerner does not even attempt to argue that there was good cause to renege or withdraw from tentative agreements. The numerous occasions when Lerner reneged or withdrew from tentative agreements are set forth above. No purpose would be served by reiterating them here. Suffice it to indicate that Lerner did not deny that he reneged or withdrew from tentative agreements on numerous occasions, and he made no attempt to assert that he had good cause in any instance. This was a delaying tactic on the part of Lerner. By using up bargaining time by constantly revisiting issues which had already been resolved, without good cause, Lerner was prolonging the resolution of the noneconomic issues and, thereby—to his way of thinking—avoiding, as long as possible, the economic issues. As alleged in paragraphs 6(iv) and 7 of the October 29, 2008 complaint, Respondents violated the Act by reneging or withdrawing from tentative agreements without good cause.

Regarding Lerner's refusal to bargain over economic issues, Kipp testified, as noted above, that the parties had a verbal agreement about not starting negotiations over economic issues until the noneconomic issues were finished. However, on cross examination Kipp testified that in her affidavit she indicated that she did not recall ground rules being set, and while her affidavit indicates that Lerner asked that the parties get all of the noneconomic issues settled before moving on to economic issues, she did not indicate in her affidavit that the Union agreed to take this approach. Lerner testified that at the first bargaining session the parties agreed to negotiate noneconomic issues first and then discuss the economic issues. Neither Lerner nor Kipp are credible witnesses. When Neimark attempted to give Lerner a copy of the Union's economic proposal on May 7, 2008, Lerner refused to accept it, indicating that they were still talking about noneconomics and he would not discuss economics until they were done with the noneconomics. On May 7, 2008, when the Union tendered its economic proposal to him, Lerner did not cite any agreement between the parties that precluded consideration of economic issues before concluding bargaining on the noneconomic subjects. Rather, Lerner indicated that he would not discuss economics until they were done with noneconomics. Also, in his September 11, 2008 e-mail (GC Exh. 50), Lerner indicates, inter alia, "We clearly told you previously that we hadn't presented all our non-economic proposals, but because you insisted that we *immediately* discuss economics, we reluctantly agreed to." (Emphasis added.) Again, Lerner does not assert that at the outset the parties agreed to discuss noneconomics first and only after all noneconomics are resolved would the parties discuss economics; and that, therefore, the Union is violating this agreement with Respondents. Lerner's use of the word "immediately" is interesting in that it appears in an e-mail dated almost 9 months after bargaining had begun. And the Union tendered its economic proposal to Lerner almost 4 months after bargaining began. Lerner and Kipp are not credible witnesses. Their testimony is not credited. I find Neimark to be a credible witness. His testimony is credited. When the Un-

ion presented its economic proposal Lerner refused to accept it and he refused to bargain over economic issues. As alleged in paragraphs 6(v) and 7 of the October 29, 2008 complaint, Respondents refused to bargain over economic issues in violation of the Act.

With respect to the allegation that Lerner refused to make economic proposals, as noted above, on May 7, 2008, Lerner refused to accept the Union's first economic proposal. Also, as described above, there was an exchange of e-mails on June 2, 2008, with, as here pertinent, Lerner advising Neimark as follows: "Since we're not yet discussing economics, I see no reason for this [providing specified information to the Union]. Our staff simply doesn't have the time to produce paperwork for you, that isn't immediately necessary for negotiations." Neimark responded as follows: "We are discussing economics. Please send the requested information." Later that same day, Neimark further responded as follows: "This is not only an economic issue. It also relates to working conditions." So almost a month after the Union tried to present its economic proposals Lerner was refusing to bargain over economic issues, he was refusing to make economic proposals, and he was refusing to provide information to the Union which he asserted was related to economic issues. This occurred 6 months after bargaining began. One month later, on July 2, 2008, in an e-mail Lerner advised Neimark ". . . the economic portion of the contract . . . . should be happening pretty soon." On August 28, 2008, over 7 months after bargaining began, Lerner made a wage proposal in that he indicated that he was willing to increase CNA pay by 10 cents and that was it, but nothing for anybody else.[21] Until August 28, 2008, Lerner refused to make an economic proposal. And during the period involved in the October 29, 2008 complaint, Lerner never gave the Union a written proposal on wages or economics. Respondents violated the Act as alleged in paragraphs 6(vi) and 7 of the October 29, 2008 complaint in that they refused to make economic proposals until August 28, 2008.

The May 29, 2009 Complaint

Section 8(a)(5) of the Act requires employers to bargain with collective-bargaining representatives. Section 8(d) defines that duty:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.

The Board, in *Nursing Center of Vineland,* 318 NLRB 901, 905 (1995), indicated as follows:

> In assessing whether an employer has engaged in good-faith bargaining, the Board examines the parties' overall conduct, e.g., delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass a union, [and] failing to designate an agent with sufficient bargaining authority, to be indicative of a lack of good faith.

As the facts of this case demonstrate, the only thing that Respondents'—in their quest to demonstrate a lack of good-faith bargaining—failed to do was to designate an agent without sufficient bargaining authority. There is no question but that Lerner had sufficient authority. What he did with that authority, namely undermining the authority of the Union and engaging in bad-faith bargaining, is something else. As noted above, Lerner's unreasonable bargaining demands include such things as the Union agree not to represent LPNs at either Camelot or Galesburg, the Union agree not to leaflet within a mile of the facilities, employees engage in community service in order to get a raise, and the Union agree to a peer review process without union involvement, instead of a grievance procedure.

Paragraphs 6(a) and (b) of the above-described May 29, 2009 complaint collectively allege that at various times from December 2008 through May 2009, Respondents Camelot and Galesburg, through their representatives, Lerner and Kipp, met with the Union for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment, and during this period, Respondents collectively failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Camelot and Galesburg units in that Respondents (i) restricted the lengths of bargaining sessions; (ii) refused to provide requested information to the Union; (iii) engaged in direct dealing with Camelot bargaining unit members; and (iv) made unilateral changes to unit employees' terms and conditions of employment without providing the Union notice or an opportunity to bargain.

Counsel for the General Counsel on brief contends that the Union and Respondents did not bargain for 20 hours or more in any one month between December 2008 and May 2009; that all of the sessions since December 2008 have lasted less than 5 hours; that Respondents violated the Act by refusing to provide requested and relevant information; that Respondents also unreasonably delayed in furnishing relevant information; that Respondents did not make a reasonable good-faith effort to respond to the Union's information requests as promptly as circumstances allow, *West Penn Power Co.,* 339 NLRB 585, 587 (2003), enfd. in pertinent part 349 F.3d 233 (4th Cir. 2005); that as of August 25, 2009, the Union had not yet received the CNA screening information for employees at Galesburg; that such information is presumptively relevant since CNAs are members of the involved bargaining unit; that Lerner should have provided Rhodes' personnel file immediately upon the Union's request, *Mt. Clemens General Hospital*, 344 NLRB 450 (2005); that while Camelot census information is not presumptively relevant, Camelot was obligated to provide the information since the Union required the information to evaluate Camelot's bargaining position and to formulate its own bargaining position, *Laurel Bay Health & Rehabilitation Center,* 353 NLRB No. 24 slip op. at 1, 37 (2008); that information on

[21] It is noted that on June 18, 2008, the parties discussed the Union's emergency pay proposal. At that time Lerner indicated that he did not see any emergency and he did not see any reason to raise the dollar amount just because the minimum wage went up. Lerner did not offer a counter or any other economic proposal at this session.

employee attendance at Galesburg was also presumptively relevant, as it concerned the bargaining unit, and even if it was not presumptively relevant it should have been produced because the Union requested this information to evaluate Galesburg's bargaining positions; that Camelot's meeting with employees about a proposed health insurance change constituted direct dealing and violated the Act; that in *Southern California Gas Co.*, 316 NLRB 979 (1995), the Board set forth the criteria for determining whether an employer engaged in direct dealing with employees in violation of the Act, namely (1) that the employer was communication directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the role of the union in bargaining; and (3) such communication was made to the exclusion of the union; that Anderson admitted that she met with represented employees for the purpose of changing their health insurance plan and the Union was not included in the meeting; that it is longstanding Board law that an employer violates Section 8(a)(5) of the Act by unilaterally imposing new and different wages, hours, and other terms and conditions of employment upon bargaining unit employees without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain regarding the said change, *NLRB v. Katz*, 369 U.S. 736, 743 (1962); that where the parties are engaged in contract negotiations, ". . . [the] employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain in that it encompasses a duty to refrain from implementation at all unless and until an overall impasse has been reached in bargaining for the agreement as a whole," *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); that the reduction for the housekeeping and laundry staff at Galesburg violated the Act in that the Union was not notified in advance or provided an opportunity to bargain over this change; that work schedules are mandatory subjects of bargaining, *Raven Government Services,* 331 NLRB 651 (2000); that Respondents' change in employee health insurance carrier without first providing the Union notice and an opportunity to bargain violated the Act; that health insurance for current employees is a mandatory subject of bargaining; that Camelot's granting of employee incentive raises during negotiations for an initial contract violated the Act in that an employer cannot make unilateral changes in working conditions during negotiations, even though the terms of employment are improved, lest the union be denigrated in the employees' eyes, *Grosvenor Resort*, 336 NLRB 613, 617 (2001); that Camelot gave these raises without providing the Union with notice and an opportunity to bargain; that, with respect to Camelot's claim of past practice, the party making this claim has the burden of proof on this issue and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis; that it is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees, *Mackie Automotive Systems,* 336 NLRB 347 (2001); that a respondent cannot rely on asserted historic rights to act unilaterally, distinct from established past practice of doing so, *Goya Foods of Florida,* 347 NLRB 1118, 1119 (2006); that the right to exercise sole discretion changes when the union becomes the certified collective-bargaining representative, Id.; that Camelot's granting incentive raises after the Union's certification without providing the Union notice and an opportunity to bargain violated that Act; that Galesburg's unilateral implementation (no prior notice to the Union and no according an opportunity to the Union to bargain over this) of a policy of increased probationary periods for rehired employees, a mandatory subject of bargaining, also violated the Act in that Galesburg produced no evidence that this policy was in place prior to October 2008, a time when the Union was certified to represent specified employees of Galesburg; that Camelot's implementation of the new attendance policy as set forth in General Counsel's Exhibit 91 on March 6, 2009, which is a mandatory subject of bargaining, without providing the Union notice and an opportunity to bargain violated the Act, *Toledo Blade Co.*, 343 NLRB 385, 387 (2004); that even if such attendance policy existed before the Union's certification, it was never provided to the Union, and at a minimum, the evidence establishes that Camelot undertook a more strict enforcement of the alleged policy in March 6, 2009; that an employer's change in enforcement of attendance and disciplinary rules represents a change in the employee's terms and conditions of employment, *San Luis Trucking,* 352 NLRB 211 (2008); that the Board has held that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over, *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005); that Camelot produced no evidence of enforcement of the allegedly pre-existing attendance policy prior to the discharge of Rhodes; that since Rhodes' discharge was based on her violation of the newly implemented and/or enforced attendance policy, her discharge violated Section 8(a)(5) of the Act; that in refusing to bargain over the termination of Rhodes, Camelot violated the Act; that on December 17, 2008, Lerner offered a 10 cents raise for all employees only to retreat on February 3, 2009, to his earlier position of offering a 10 cents raise for CNAs only; that the final tentative agreement for Galesburg contained a starting wage of a 10-cent raise for CNAs only; and that Lerner offered no explanation for his regressive proposals, and, therefore, Respondents, for this reason and for the reasons described above, should be found to have negotiated in bad faith with the Union.

The Charging Party on brief argues that the settlement agreements reached by the parties in December 2008 (GC Exh. 94), required that Lerner meet with the Union for sessions lasting no less than 5 hours, and that the parties meet for 20 hours per month, for each facility; that the very first opportunity that Lerner had to violate the terms of the settlement agreements he did so; that Lerner restricted bargaining sessions to 20 hours a month for both contracts; that Lerner never offered to bargain for 40 hours a month; that Lerner restricted the time of bargaining sessions beyond the 5-hour minimum; that between December 2008 and May 2009 there was not 1 month when Respondents satisfied their bargaining obligation regarding how

long the parties would negotiate; that Lerner's pattern of delays is even more egregious than that of *Celex Corp.*, 322 NLRB 977 (1997), because Lerner's violations continued even after a settlement with the Union and a corresponding promise to meet regularly and to bargain in good faith; that Respondents repeatedly refused to provide the Union with information necessary for bargaining; that when information was provided, it was often late, incomplete and incorrect; that on December 19, 2008, the Union requested information from Lerner on economics to clarify the Union's position of wages and health insurance, and Lerner refused to provide the financial data the Union was requesting; that on June 2, 2008, the Union requested a printout of hours worked by each employee at Galesburg for every pay period from January 1, 2008, to current and Lerner refused to provide the requested information based on his unilateral position that the parties were not discussing economics; that on January 3, 2009, Neimark requested certification of CNA background checks, initially Lerner refused to provide the information, it was alleged that the information for Galesburg was mailed to Neimark at the wrong address in late August 2009 (the week before the trial herein was scheduled to begin which was 7 months after Neimark requested the information), and the information for Camelot was not provided; that on February 9, 2009, the Union requested census information so that it could develop a proposal that would tie the census to bonuses, Lerner indicated that he would not provide the information because it was financial in nature, and about 3 months after it was requested the information was provided for one of the facilities but not the other; that on February 9–10, 2009, the Union requested a copy of the unilaterally implemented healthcare plan and other related materials, Lerner did not provide it immediately, but it was subsequently provided; that on February 25, 2009, the Union requested attendance records for all employees at Galesburg, Lerner refused to provide the records, later Lerner claimed that the information did not exist despite the fact that management had an attendance policy that tracked absences, the Union renewed its request in May 2009, the documents for Camelot were provided several week later, and the information was never provided for Galesburg; that the withholding of Rhodes employment file from the Union until Rhodes authorized its release is further evidence of bad faith, *Deadling Express*, 313 NLRB 1244 (1994) (even if the employer had a good-faith belief that the information requested was not disclosable on privacy grounds, the sincerity of its belief is irrelevant because such information is presumptively relevant to a Union's role as exclusive collective-bargaining representative); that the denial of the requested correct pay information from Respondents made it difficult for the Union to modify and adjust its proposals to be mutually agreeable to the employer, which is further evidence of bad-faith bargaining; that the Union was harmed by the delay in providing information because it involved a current or forthcoming matter in negotiations and would have been used to determine strategy and tactics in forthcoming negotiations; that Lerner engaged in direct dealing with members of the Camelot unit when after October 2008 (after union certification) they signed an agreement that they would be on a 6-month probationary period and agreed to comply with a strict attendance policy; that after the Union was certified, some of the Camelot employees received incentive raises; that the Union was given no prior notice of the raises, the Union was not accorded an opportunity to bargain over them, and the raises were a deviation from the wage policy; and that Respondents' unilateral changes to the terms and conditions of employment without giving the Union prior notice and an opportunity to bargain include the unilateral reduction of housekeeper's hours, the unilateral change of the health care plan, the unilateral implementation of incentive wages for CNAs, the unilateral implementation of a new attendance policy (in the alternative, the Union argues that even if Respondent began strictly enforcing an already existing policy, the Union was not allowed an opportunity to bargain the impact of the change in enforcement), and the unilateral change of the reinstatement policy.

The Respondents on brief contend that since December 2008 "Respondent made itself available to bargain each week for five hours" (Respondents' brief, unmarked page 2); that any session that was shortened was based on mutual consent; that Lerner did not initially provide background checks to the Union because Lerner considered the request to be unwarranted and a harassing tactic by the Union; that in order to be compliant with the Board, Respondents ultimately did spend the many unnecessary hours to gather and mail the background checks to the Union; that Galesburg does not keep the attendance records Neimark requested; that Camelot did not provide the requested census information because it was financial information and Respondent never said that it could not afford the economic requests of the Union; that Neimark asked for census and payer source; that a simple census list would not have been refused, but that is not what Neimark asked for; that when the Board indicated in April 2009 that the census information should be provided it was given to Neimark in May 2009; that Lerner was reluctant to give Rhodes' entire personnel file to the Union without her expressed permission, due to concerns about employee confidentiality; that Camelot did not unlawfully poll its employees about health insurance since in July 2007, before the Union was certified, Anderson allegedly notified Neimark that Camelot was looking for less expensive health insurance and it would be canvassing its employees to see if they would be interested in joining the group; that since no objection was ever made by the Union to the possible change for the 2008 policy year, the canvassing for a change in 2009 policy year, after the Union was certified, was done justifiably; that with respect to the reduction of housekeeper hours, Respondent bargained with the Union over this issue and Babcock made the suggestion that the employees would prefer to each reduce their work by an hour, rather than have an employee lose their job; that the 1 hour reduction was implemented the day after the meeting with the Union at which the reduction was discussed; that it was past policy for Galesburg to have an increased probationary period "for employees that were rehired after previously being terminated with a poor work attendance record" (Respondents' brief, unmarked page 12); that Sangster testified that she always increased the probationary period of rehired employees for anybody that had trouble with call-ins or other work-related problems getting to work; that this was shown to be the past policy by General Counsel's Exhibit 92; that Galesburg's facility pol-

icy-(GC Exh. 100) states, "IF AN EMPLOYEE IS SEPARATED AND SUBSEQUENTLY RE-HIRED,HE/SHE SHALL BE SUBJECT TO ANOTHER PROBATIONARY PERIOD"; that the word "ANOTHER" does not mean "additional" as the General Counsel intimates but rather it means a different period than the standard 30 days, and, as Sangster testified, it was up to her to decide the length; that as past history showed, the probationary period for a rehired employee was always extended to a 6-month period; that the Union clearly waived its right to negotiate about the change in insurance carrier for Camelot and Galesburg when Neimark told Lerner that he did not care about a possible change in insurance carrier since the Union's members were not a part of that, and when Neimark did not respond to Anderson's July 2007 letter (R. Exh. 19); and that

> The Union's contention that the Respondent never notified them that they instituted a new plan, is simply untrue. In (GC 79) Neimark acknowledges "I looked at it (the new plan) for 1 minute." If they weren't notified of the change and weren't provided with a copy, how did he look at it? [Respondents' brief, unmarked page 14 with emphasis in original.]

Respondents argue further that page 14 of Camelot's employee handbook (GC Exh. 14), states, "At the discretion of the administrator and subject to business conditions, increases in pay will be considered"; that Camelot's policy clearly allows raises at the discretion of the administrator, this was Camelot's practice, and it was not a new or a unilateral change made without bargaining with the Union; and that, with respect to Rhodes' termination, Camelot was not aware that other employees had bad attendance, and, therefore, Camelot was not imposing a new policy or newly enforcing an old policy.

Since the allegations in paragraphs 6(a) and (b) of the May 29, 2009 complaint refer to the allegations in other of the paragraphs of this complaint, paragraphs 6(a) and (b) will be covered after the allegations in the other paragraphs are dealt with.

Paragraph 7 of the above-described May 29, 2009 complaint alleges that since about January 3, 2009, the Union has requested Galesburg furnish the Union with proof that CNAs were properly screened by Respondent prior to being hired; that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit; and that since about January 5, 2009, Galesburg, by way of a letter from Lerner, has failed and refused to furnish the Union with this information.

As noted above, on January 3, 2009, Neimark e-mail Lerner as follows:

> At the bargaining session on December 31, you made the claim that you have no difficulty finding CNAs to work at Galesburg Terrace at the current pay rate, minimum wage, and that in order to remain competitive, you intend to not pay workers any more than you have to in order to hire. Furthermore, you indicate that CNAs are satisfied with the wage you offer. The following information is needed in order to evaluate the claim you have made.

The e-mail went on indicate exactly what information the Union requested. Three times Lerner subsequently advised Neimark that "we don't keep lists of background checks" or "we don't have the lists that you requested."

On the last day of the trial herein, Sangster sponsored Respondents' Exhibit 23 which she testified is the CNA background checks Neimark requested, which she mailed to him on August 21, 2009. The postsettlement, reopened, second session of the trial herein began on August 25, 2009. Sangster claims that she did not know that Neimark first requested information on CNA screening in January 2009, and, before it was pointed out to her on cross-examination, she was not aware that on August 21, 2009, she she sent the information to the wrong address. Sangster admitted that Galesburg maintains a copy of each CNA's screening inside their personnel file. Neimark testified credibly that the Union never received the CNA screening information for Galesburg. Such information has been shown to be necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit. As pointed out by counsel for the General Counsel on brief, such information is presumptively relevant since CNAs are members of the involved bargaining unit. The Act was violated as alleged in paragraphs 7 and 13 of the May 29, 2009 complaint.

Paragraph 8 of the above-described May 29, 2009 complaint alleges that since about February 25, 2009, the Union has requested Galesburg furnish the Union with employee attendance information for employees of Galesburg; that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit; and that since about February 25, 2009, Galesburg, by way of a verbal response from Lerner, has failed and refused to furnish the Union with this information.

The Union never did receive employee attendance information for employees of Galesburg. Lerner initially indicated to Neimark that he did not have to give this information to the Union. Subsequently, Lerner took the position that the information does not exist. Lerner did not specifically deny Neimark's testimony that he then asked Lerner how he could have a policy in which management gives somebody a verbal warning after three absences in a year and Lerner responded, "Oh, that's a good point." (Tr. 875.) Lerner is not credible. General Counsel's Exhibits 92 and 99, and Respondents' Exhibit 22 demonstrate that Galesburg does keep track of attendance and who is supposed to be working when. Additionally, there has to be a method for determining whether an employee is in the facility working so that Galesburg can determine what hours they should be paid for. Neimark testified that he made this request because he wanted to verify Lerner's statement that he was satisfied that he was able to get people to work. This information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit. Information on employee attendance is presumptively relevant and the Union requested the information to evaluate Lerner's bargaining positions. The Act was violated as alleged in paragraphs 8 and 13 of the May 29, 2009 complaint.

Paragraph 9 of the above-described May 29, 2009 complaint alleges that since about February 9, 2009, the Union has requested Camelot furnish the Union with census information regarding the patient population at Camelot; that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit; and that since about February 11, 2009, Camelot, by an electronic message from Lerner, has failed and refused to furnish the Union with this information.

At the February 9, 2009 bargaining session Neimark, as here pertinent, requested census information regarding the patient population at Camelot and Galesburg. Neimark testified that he was seeking the historical census information so that it could develop a proposal that would tie the census to bonuses and because Lerner was denying the Union financial information, and it was the Union's way of figuring out what would be a reasonable economic proposal. In his February 11, 2009 e-mail to Neimark, Lerner indicated, "Your request for census information is not being honored, as it is financial in nature." Camelot's administrator, Anderson, testified that the Camelot census information the Union requested in February 2009 was provided in May 2009; and that she did not provide the Camelot census information sooner because Lerner told her that she was not required to provide this information because it was financial information. More than once Neimark testified that the Union never received the census information for Camelot. Neimark also testified that eventually the census information for Galesburg was provided; and that no other nursing home owner ever refused to provide census information. Neimark is a credible witness. For the reasons set forth elsewhere herein, Anderson is not a credible witness. Neimark's testimony is credited. This information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit. Although census information is not presumptively relevant, the Union needed this information to evaluate Lerner's bargaining position and to help formulate its own position. The Act was violated as alleged in paragraphs 9 and 14 of the May 29, 2009 complaint.

Paragraph 10 of the above-described May 29, 2009 complaint alleges that on or about April 6, 2009, the Union requested that Camelot furnish the Union with the personnel file of Kathy Rhodes; that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the involved unit; and that on about April 6, 2009, Camelot, by a statement by Lerner, failed and refused to furnish the Union with this information.

The facts regarding this allegation are not in dispute; a review of Rhodes' personnel file was relevant to the investigation of her discipline and the processing of her grievance. The issue is whether Lerner was entitled to deny the Union access to Rhodes' personnel file until Rhodes signed a written authorization. As pointed out by counsel for the General Counsel on brief, the Board, in *Mt. Clemens General Hospital*, 344 NLRB 450, 463–454 (2005), indicated that under the circumstances existing here, namely that the employer did not show that the personnel file contained information of an "intimate and highly personal nature," than the employer has failed to satisfy its burden of showing that it had a legitimate confidentiality claim, and the employer violates Section 8(a)(5) of the Act by failing and refusing to provide the personnel file of a bargaining unit employee to the union without employee consent. The Act was violated as alleged in paragraphs 10 and 14 of the May 29, 2009 complaint.

Paragraph 11 of the above-described May 29, 2009 complaint alleges that collectively Galesburg and Camelot, without prior notice to the Union and without affording the Union an opportunity to bargain with them with respect to this conduct and the effects of this conduct, engaged in the following conduct regarding matters which collectively relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purposes of collective bargaining:

> (a) In or about January 2009, Galesburg reduced the hours of its housekeeping and laundry employees;
>
> (b) Since about December 2008, Galesburg increased the length of the probationary period for certain bargaining unit employees;
>
> (c) In about February 2009, Respondents Galesburg and Camelot changed their employee health insurance carrier;
>
> (d) On or about February 23, 2009, the Union discovered that on a date or dates unknown prior to February 23, 2009, Camelot gave incentive raises to certain bargaining unit employees;
>
> (e) On about March 6, 2009, Camelot implemented a new attendance policy;
>
> (f) On about March 6, 2009, Camelot began more strictly enforcing its attendance policy, and;
>
> (g) On about March 11, 2009, Camelot discharged employee Rhodes pursuant to this newly implemented and/or more strictly enforced attendance policy.

With respect to the allegation that in or about January 2009, Galesburg unlawfully reduced the hours of its housekeeping and laundry employees, as noted above, Neimark, who I find to be a credible witness, testified that that he learned of the reduction of hours in housekeeping from member Kilpatrick who told him before the January 22, 2009 bargaining session began that she and other housekeepers were reduced in their hours; that management did not inform the Union of any intention to reduce hours in housekeeping or any department; that prior to this session the Union did not receive any notice from Respondent of their change in the hours of the housekeepers at Galesburg and the Union was not given the opportunity to bargain over the decision or its effects; that when the Union tried to discuss this matter at this session, Lerner indicated that he was willing to talk but he wasn't going to change anything; and that it is not true that Lerner was the one who brought up the reduction of hours at Galesburg at the January 22, 2009 bargaining session but rather the Union brought it up because employee Kilpatrick had indicated that Galesburg had already reduced the hours before this meeting.

There is quite a difference between what Respondents' witnesses testified to when they gave affidavits to the Board in May 2009 and what they testified to when they were called as witnesses at the trial herein.

When Sangster gave her affidavit to the Board on May 1, 2009, she testified, "*I do not know if the union was notified of the reduction of employee hours in advance by the employer.*" (Tr. 686 with emphasis added.) When called by counsel for the General Counsel to testify at the trial herein on August 26, 2009, Sangster testified as follows:

> Q. . . . . Do you know if the union was ever notified of the change?
>
> A. Yes, I *believe* they were. After negotiations, he [Lerner] came out to me and brought to me a proposal that someone else had suggested inside the bargaining committee. [Tr. 685, with emphasis added.]

When subsequently called by Lerner on August 26, 2009, Sangster testified as follows:

> Q. In January of 2009, did you propose to your supervisors to make some layoffs?
>
> A. Yes, I did.
>
> Q. And who—which supervisor did you propose to?
>
> A. Brenda Philbee.
>
> . . . .
>
> Q. Did you mention this to your bosses?
>
> A. Yes, I did.
>
> Q. And who did you mention that to?
>
> A. Deb Kipp and Mr. Lerner.
>
> Q. Okay. And tell us what you told them.
>
> A. Just that we were—due to the census being low, our public aid rate being cut that we were going to have to make some cuts somewhere and we chose to—since laundry and housekeeping wasn't as busy, we didn't have as much stuff to do that they would—that that would be the best place to start. But I suggested taking—to layoff one person.
>
> Q. So you suggested to your bosses to layoff one person?
>
> A. Yes.
>
> Q. Okay. And what was their response?
>
> A. That they would take it to the union and discuss it with them.
>
> Q. Okay. And what happened after the meeting with the union?
>
> A. That they suggested that the union—or the girls that were in the union had discussed the fact that it would [be] better to cut everybody back an hour.
>
> Q. So was your original plan approved?
>
> A. No.
>
> Q. Did you implement any changes in the work hours of laundry and housekeeping employees before the union agreed to it?
>
> A. No. [Tr. 742 and 743.]

Kipp gave an affidavit to the Board on May 5, 2009. In it she testified as follows:

> The housekeeping staff at Galesburg has had a reduction in hours worked. Instead of terminating anyone, everyone got to keep their jobs and we cut some hours. *I do not know if the union was provided notice or an opportunity to bargain over the change in advance.* [Tr. 774, with emphasis added.]

When called by Lerner to testify at the trial herein on August 26, 2009, Kipp gave the following testimony:

> Q. In January of '09, did Galesburg Terrace reduce the hours of its housekeeping and laundry employees?
>
> A. Yes, they did. They were told to do a layoff.
>
> Q. Okay. And—okay. Why was there a need to cut hours?
>
> A. The number of residents in the building didn't require the staff that was in housekeeping and laundry. So many of the rooms were empty, don't need to be cleaned. There's fewer clothes to be done and linens to be done in the building.
>
> Q. And how did you go about implementing this reduction? Did you notify someone or you just did it?
>
> A. I didn't do anything.
>
> Q. Okay. Did Galesburg Terrace notify anybody about this layoff with employees?
>
> A. I would assume so.
>
> Q. You what?
>
> A. I would assume so.
>
> Q. Okay. Were you at a meeting with the union where this issue was discussed?
>
> A. Yes.
>
> Q. Okay. And do you remember when that was?
>
> A. Sometime in January.
>
> Q. Okay. And can you tell us what was proposed to the union by management?
>
> A. It was a layoff.
>
> Q. And what exactly was the proposal to layoff?
>
> A. I believe it was one person.
>
> Q. Okay. The union was told that one person—you would like to layoff—Galesburg Terrace wanted to layoff one person?
>
> A. Yes, there was going to be layoffs.
>
> Q. Okay. And who was at this meeting?
>
> A. There was Ron, Chastity Babcock, and Paula Kilpatrick. There was you and there was I. [The credible evidence of record demonstrates that Frascone was also present at this session.]
>
> Q. Okay. And did the union negotiators offer their opinion on this issue after it was brought up?
>
> A. Yes, they did.
>
> Q. And can you tell us what they suggested?
>
> A. It was Chastity Babcock that suggested it, and she said instead of anybody losing their job, what about just taking an hour? And we accepted that proposal.
>
> Q. What do you mean by taking an hour?
>
> A. Cutting an hour off of everyone's—in those two departments, cutting an hour off their daily schedule.
>
> Q. Okay. And did management agree to that—implement that solution?
>
> A. Yes we did.
>
> Q. And can you tell us Chastity's demeanor after that was accepted?
>
> A. She was pleased with herself. I was very pleased with her because she had said very little during negotia-

tions. And she had, you know, contributed then to the negotiations, and she stopped somebody from being laid off.

Q. So what was the resolution of the issue after that meeting?

A. That everyone would have one hour taken off their day that they worked.

Q. And was it the union or management who first brought up the subject of his layoff at the meeting?

A. I don't recall.

Q. And was there a layoff implemented before this meeting?

A. Not that I'm aware of.

Q. Was there a reduction in hours before this meeting?

A. Not that I'm aware of. [Tr. 762–764.]

Lerner then testified that at the January 22, 2009 bargaining session he advised Neimark that the administrator wanted to layoff one person in housekeeping and laundry; that Babcock recommended that instead of laying off an employee, everyone's hours could be reduced by 1 hour a day; and that this alternative suggestion was implemented.

On rebuttal, Frascone, who I find to be a credible witness, testified that she attended a bargaining session at Galesburg at which the reduction of hours for housekeeping and laundry employees was discussed; that the Union became aware that the housekeeping hours had been cut when Kilpatrick told those who had come to this bargaining session, just before the session began, that management had decided to cut the hours in housekeeping and they chose to cut everybody's hours by an hour a day; that Kilpatrick told them that it had already been changed, "they were going to put it into effect" (Tr. 865); that during this bargaining session Lerner was told by the union representatives that he would have to bargain this change with the Union and that the Union's position was seniority should rule ["the junior person should get the hit on the hours, not with everybody" (Tr. 866)]; that Lerner said that he was not going to go by seniority; that management implemented a change where every housekeeper and laundry employee had a 1-hour cut a day; that the Union did not learn of this change from Lerner or Kipp but rather from a bargaining unit employee; that Kilpatrick told them before the bargaining session that the hours were going to be cut and that the employees had already been told about the reduction; that she believed that people's hours were actually shortened before this bargaining session; that Kilpatrick told them that employee's hours were being cut; that Lerner did not announce at this meeting that management was contemplating laying off someone; and that there was no discussion at this bargaining session about a layoff. While there may be a question of whether the reduction was actually implemented before the January 22, 2009 bargaining session, there is no question but that this reduction was announced to employees as a fait accompli before the January 22, 2009 bargaining session, before the Union was given any notice and before the Union was given an opportunity to bargain over this change and the effects of this change.

The testimony of Neimark and Frascone is credited. Neither Lerner nor Kipp have any credibility. The testimony of Kipp and Lerner regarding notifying and according the Union an opportunity to bargain with respect to reducing the hours of housekeeping and laundry employees is a fabrication. Lerner was able to get Sangster to change her testimony in that on May 1, 2009, she testified that she did not know if the Union was notified of the reduction of employee hours in advance by the employer. Sangster's May 1, 2009 testimony does not refute the testimony of Neimark and Frascone. Since here, unlike Kipp's UAW testimony, the testimony Lerner elicited from Sangster deals with a material fact in issue, it appears that Lerner engaged in subornation of perjury. Lerner was there and he knows exactly what happened. The same would apply with respect to the testimony Lerner elicited from Kipp after Kipp originally testified that "*I do not know if the union was provided notice or an opportunity to bargain over the change in advance.*" (Tr. 774, with emphasis added.) Sangster's subsequent testimony, which contradicts her May 1, 2009 testimony, is not credited. Interestingly, as noted above, Lerner sent an e-mail to Neimark on February 23, 2009 (GC Exh. 81), and he indicated, among other things, "Firstly, when there's no union contract in place, it is entirely up to the department heads to decide someone's salary and raises, based on their performance and also on the facilities' staffing needs." If one switched "hours and schedules" for "salary and wages" and deleted the performance language, one is left basically with the position Lerner took on January 22, 2009. As Neimark credibly testified, when the Union tried to discuss this matter at the January 22, 2009 session, Lerner said that he was willing to talk but he was not going to change anything.[22] Work schedules are a mandatory subject of bargaining. The Act was violated as alleged in paragraphs 11(a) and 13 of the May 29, 2009 complaint.

Regarding the allegation that since about December 2008, Galesburg unlawfully increased the length of the probationary period for certain bargaining unit employees, as noted above, during the January 22, 2009 bargaining session the parties discussed the reinstatement of member Woertz, who was a union supporter who had quit. Neimark testified that Woertz did go back to work at Galesburg but instead of complying with the policy manual and past practice, Woertz was put on a 6-month probation instead of the usual 3-month probation; that the Union learned of the 6-month probation from Woertz and not from management; that Lerner indicated that it was the practice to give 6-month probation to those who returned if they had attendance problems; that the Union asked for and received proof of this; that he was not provided any documents indicating that employees were given a 6-month probationary period upon rehire that were dated prior to the time when the Union was certified to represent a unit of employees at Galesburg; that this policy was not part of the information that management provided to the Union regarding management's policies prior to Woertz advising him that she had been placed on a 6-month probationary period; that the Union had never been given notice of a change in the probationary period for rehired employees

[22] It is noted that neither Babcock nor Kilpatrick testified at the trial herein. It is also noted that both of these Galesburg employees attended bargain sessions at Camelot. And it is noted that, as found in Board decisions described above, and as found herein, three Camelot employees were unlawfully terminated.

prior to this session, it had not been given an opportunity to bargain over the increased probationary period for rehired employees or the effects of that decision; and that with respect to the documents Galesburg produced showing that other returning employees had a 6-month probation, the documents were signed after the Union requested them, the facility engaged in deceptive practices in producing these documents, and even if the change occurred when Respondents said it happened, it would have still have happened after the Union was certified.

As noted above, Sangster testified that General Counsel's Exhibit 100, which reads as follows: "AN EMPLOYEE'S PROBATIONARY PERIOD SHALL BE HIS INITIAL THIRTY DAYS OF ACTIVE EMPLOYMENT AS A PROBATIONARY EMPLOYEE. IF AN EMPLOYEE IS SEPARATED AND SUBSEQUENTLY RE-HIRED, HE/SHE SHALL BE SUBJECT TO ANOTHER PROBATIONARY PERIOD" is in the employee packet when they are hired; that the policy has been given to employees as long as she has been at Galesburg; that there is no other written policy at Galesburg concerning probationary periods for employees; that Woertz was a CNA who gave two weeks notice and left Galesburg on good terms; that subsequently she and Orosco rehired Woertz; that Woertz was given a 6-month probationary period instead of 30 days because every second weekend Woertz would take a 4-day weekend; that, while the 6-month probationary period is not a written policy of Galesburg, it is what Galesburg has done since she has been there; that General Counsel's Exhibit 99 are five signed agreements with employees who were rehired between October 31, 2008, and May 5, 2009, to accept a 6-month probationary period; that these are all of the contracts of this nature that Galesburg had signed up until the information was faxed to counsel for the General Counsel on May 5, 2009; that she was not aware of any others since she has been at Galesburg; and that she did not know if the policy had ever been given to the Union.

When called by Lerner later in the trial, Sangster testified that she has increased the number of days in the probationary period for people who have trouble with call-ins or being late or tardy; that people have signed contracts calling for probationary periods longer than 30 days when they returned to work after they've quit(GC Exh. 92); that she put a copy of these contracts at the front desk for Neimark to pick up; that these contracts were in the files when she took them out; that she did not ask someone that day or that week to have them signed; that extending the 30-day probationary period was not a new policy of hers in that it has been in place for as long as she has been at Galesburg, namely 3 years[23]; that before she was hired at Galesburg there are other Galesburg employees whose probationary period was extended but there was no contract for them; and that she implemented an extended probationary period for Woertz because of her frequent call-ins.

I find Neimark to be a credible witness. His testimony that that he was not provided any documents indicating that employees were given a 6-month probationary period upon rehire that were dated prior to the time when the Union was certified to represent a unit of employees at Galesburg is credited. His testimony that this policy was not part of the information that management provided to the Union regarding management's policies prior to Woertz advising him that she had been placed on a 6-month probationary period is credited. His testimony that the Union had never been given notice of a change in the probationary period for rehired employees prior to this session, and the Union had not been given an opportunity to bargain over the increased probationary period for rehired employees or the effects of that decision is credited. I do not find Sangster to be a credible witness. Indeed, as noted above, when she changed her testimony about notification to the Union regarding the reduction of hours for the housekeeping and laundry staff, I believe that she committed perjury. I do not rely in any way on her testimony. The documents received at the trial herein do not demonstrate that the policy in question existed before the Union was certified to represent employees in the involved Galesburg unit. This is a mandatory subject of bargaining. Based on the evidence of record, the conclusion is inescapable that Galesburg unilaterally implemented the 6-month probationary period after the Union was certified, and Galesburg did not give the Union prior notification of this proposed policy nor did Galesburg accord the Union an opportunity to bargain over this policy and the effects of this policy. The Act was violated as alleged in paragraphs 11(b) and 13 of the May 29, 2009 complaint.

With respect to the allegation that in about February 2009, Respondents Galesburg and Camelot unlawfully changed their employee health insurance carrier, as noted above, Respondents on brief argue as follows:

> The Union's contention that the Respondent never notified them that they instituted a new plan, is simply untrue. In (GC 79) Neimark acknowledges "I looked at it (the new plan) for 1 minute." *If they weren't notified of the change and weren't provided with a copy, how did he look at it?* [Respondents' brief, unmarked p. 14, with emphasis in original.]

In my opinion, Lerner has lied under oath, he has suborned perjury—at least with respect to Sangster's and Kipp's testimony regarding the reduction of hours for the housekeeping and laundry staff—and now, on brief, Lerner misrepresents the record. No one is alleging that Respondents never notified the Union that Respondents instituted a new health insurance plan. Lerner's argument is a red herring. The allegation is that Respondents changed their health insurance plans without (a) giving the Union prior notice that they were not just looking but they had actually reached that stage were they were going to make a change, and (b) according the Union an opportunity to bargain over the change and the effects of the change. A change in health insurance coverage is a mandatory subject of bargaining. General Counsel's Exhibit 79 is an e-mail of Neimark dated February 11, 2009, wherein he is referring to what happened at the February 9, 2009 bargaining session when he was advised for the first time of a fait accompli, namely that Respondents had already changed their employees' health insurance coverage. General Counsel's Exhibit 79 does not demon-

[23] Elsewhere, when she testified on August 26, 2009, Sangster testified that she was hired at Galesburg in 2007.

strate that the Union received prior notification and an opportunity to bargain. It is dishonest to imply otherwise.[24]

On the one hand, Lerner testified that the switch from Unicare to Aetna was bargained and the parties in fact negotiated this switch; and that the partied did not memorialize in writing the switch from Unicare and Blue Cross to Aetna. On the other hand, he and Kipp testified that in mid-September 2008 the Union, in effect, verbally waived its right to bargain about the change from Unicare and Blue Cross to Aetna. Neither Kipp nor Lerner is a credible witness. Anderson testified that when Camelot decided to change neither Neimark nor the Union were notified of the change, and Camelot did not offer to bargain over the change; and that Camelot's coverage under Unicare was an annual plan and in July 2007 she sent the above-described letter to Neimark when Camelot was considering changing its insurer at that time. Not only is the July 2007 letter problematic for the above-described reasons, but Camelot did not change its insurer at the time, and the letter is not relevant to what actions Camelot took two insurance seasons later. The July 2007 Anderson letter, which was allegedly sent to Neimark, albeit admitted, is given no weight in deciding the matters pending before me.

Frascone and Neimark are credible witnesses. As noted above, Frascone testified that Neimark was correct in his February 10, 2009 e-mail to Lerner that she recalled it being mentioned when they met at Camelot that the Respondents were looking; that Respondents informed the Union just that they were looking into changing health insurance carriers; that the Union was never told that there was in fact going to be an actual change of insurance carriers for either Respondent; and that the Union was never offered an opportunity to bargain over that change. Frascone's testimony is credited. Also, Neimark testified that he was never given the opportunity to agree or disagree to the change in Respondents' health insurance carrier, which occurred sometime before the February 9, 2009 bargaining session when he was first notified of the change; and that he did not receive any prior notice that management intended to actually change carriers, he did not receive notice of the actual change in carriers, and the Union was not given an opportunity to bargain over the change in health insurance carriers. The testimony of Neimark is credited. A change in the employees' health care plan is a mandatory subject of bargaining. Respondents unlawfully made a unilateral change to an existing term or condition of employment without prior notice to the Union and without according the Union an opportunity to bargain over the change and the effects of the change. The Act was violated as alleged in paragraphs 11(c), 13, and 14 of the May 29, 2009 complaint.

Regarding the allegation that on or about February 23, 2009, the Union discovered that on a date or dates unknown prior to February 23, 2009, Camelot gave incentive raises to certain bargaining unit employees, as noted above, on February 19, 2009, Neimark sent an e-mail to Lerner asking him to explain why a number of named employees received multiple pay raises in a given year (after the Union was certified on October 10, 2007, to represent a unit of employees at Camelot) or received a pay raise in their first year of employment. The latest date cited by Neimark was "12/26/08." Also, as noted above, Lerner replied, as here pertinent, as follows:

> Notwithstanding our doubts if you're legally entitled to request this specific employee information, in the spirit of cooperation, we will provide the information we have. Firstly, when there's no union contract in place, it is entirely up to the department heads to decide someones salary and raises, based on their performance and also the facility's staffing needs. So there can always be inconsistencies, between employees, as the employer can decide what's best for the facility at that time.
>
> In response to your specific questions, unfortunately we don't keep records of why certain staff get different raises than others. We therefore cannot give you completely specific answers to all our questions, but we can give you the general recollections of our administrator.
>
> Fortson, Jackson and Miller were all hired at a time when CNA's were in very short supply. So, beside[s] receiving a 90 day evaluation raise, they likely received an incentive raise to stay.
>
> Rhodes received an extra raise to be on the shower team.
>
> Sorenson worked in laundry, then kitchen, and then got certified and began working as a CNA. There was a pay increase during those changes and her certification.

Neimark testified that he was not given any prior notice of Camelot giving these postcertification raises to certain bargaining unit employees, and he was not accorded an opportunity to bargain over this.

Of Respondents' witnesses, Prang, who worked as a staff nurse, then as DON at Camelot from January to March 2009, and then as a staff nurse, testified that she was not aware of (a) any program of incentive raises for CNAs or (b) CNAs being given incentive raises since the time she worked at Camelot. In her May 5, 2009 affidavit to the Board Camelot Administrator Anderson testified as follows: "We have always given the CNAs short pay. If by census, we are supposed to have three CNAs and only two show up, those two are given extra pay, short pay. I'm not aware of any other incentive pay we give CNAs." (Tr. 643.) When she testified at the trial herein on August 26, 2009 Anderson testified that she did not know if Erica Fortson, Kathy Jackson, and Christina Miller received incentive raises because Camelot was short CNAs, and she thought it was "because they were possibly good workers and we wanted to keep them on board" (Tr. 760); and that it is not a written policy where employees are given incentive pay because Camelot is short on CNAs and it needs them to stay. On redirect, Anderson gave the following testimony:

> Q. BY MR. LERNER: You say it's not a policy, but it's in your past practice to give money as a situation required in order to keep an employee from leaving?

[24] When someone chooses to represent themselves, they should be held to the same standards as an officer of the court. If they are not, then there will be a problem in dealing with unscrupulous individuals who have decided that they can attempt to "game" the system and suffer no consequences if they are caught because they are not an officer of the court.

A. Yes, I would say yes.

Once again a witness of the Respondents, in effect, testifies that her earlier testimony (affidavit) is not correct. Anderson then speculates as to why Fortson, Jackson, and Miller received raises. Finally, Anderson testifies that there is a past practice. I credit the testimony that Anderson gave in her affidavit, as quoted above. I do not credit her equivocal, speculative testimony at the trial herein on this matter.

On brief, Respondents argue that page 14 of Camelot's employee handbook (GC Exh. 14) states, "At the discretion of the administrator and subject to business conditions, increases in pay will be considered"; and that Camelot's policy clearly allows raises at the discretion of the administrator, this was Camelot's practice, and it was not a new or a unilateral change made without bargaining with the Union. Also, as can be seen from Lerner's above-described February 23, 2009 e-mail, Lerner takes the approach that ". . . when there's no union contract in place [notwithstanding that the Union has been certified], it is entirely up to the department heads to decide someone's salary and raises, based on their performance and also the facility's staffing needs." The only explanation for Lerner's stated position is that this is part of Lerner's effort to undermine the Union to the extent possible.

As correctly pointed out by counsel for the General Counsel on brief, Camelot's granting of employee incentive raises during negotiations for an initial contract violated the Act in that the Board in *Grosvenor Resort*, 336 NLRB 613, 617 (2001), indicated that:

> [an] employer is prohibited from make unilateral changes [(no prior notice to the Union or the opportunity to bargain)] in [mandatory] working conditions during negotiations—even though the terms of employment are improved—lest the union be denigrated in the employees' eyes and its existence, as an inevitable result, imperiled. *General Transformer Co.,* 173 NLRB 360, 376 (1968) [citing *NLRB v. Crompton-Highland Mills, Inc.,* 337 U.S. 217 (1949) (employer unlawfully improved wages during bargaining)].

With respect to Camelot's claim of past practice, Camelot has not shown with credible evidence that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. Additionally, as pointed out by counsel for the General Counsel on brief, the Board in *Mackie Automotive Systems,* 336 NLRB 347, 349 (2001), indicated as follows:

> It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees.

As pointed out by the Board in *Goya Foods of Florida,* 347 NLRB 1118, 1120 (2006), a respondent cannot rely on asserted historic rights to act unilaterally, distinct from established past practice of doing so; "that right to exercise sole discretion changed once the Union became the certified representative. Accordingly, the Respondent no longer has a privilege to make these unilateral changes." Camelot's granting incentive raises after the Union's certification without providing the Union notice and an opportunity to bargain violated that Act as alleged in paragraphs 11(d) and 14 of the May 29, 2009 complaint.

Since the allegations that (a) on about March 6, 2009, Camelot implemented a new attendance policy; (b) on about March 6, 2009, Camelot began more strictly enforcing its attendance policy; and (c) on about March 11, 2009, Camelot discharged employee Rhodes pursuant to this newly implemented and/or more strictly enforced attendance policy are interrelated, they will treated together.

As noted above, Rhodes testified that on March 6, 2009, Prang, at a meeting with the nursing staff, told those present "about a new policy that was going into effect . . . . [, namely] [i]f you missed five days in a calendar year, you were terminated." (Tr. 588); that Prang said that this attendance policy was going into effect "immediately" (Ibid.); that General Counsel's Exhibit 91 was not shown to her by Prang on March 6, 2009, but it contains the same terms as Prang verbalized on March 6, 2009; that when Prang terminated her on March 11, 2009, over the telephone, "She [Prang] just told me that they were making her terminate me" (Tr. 591); that she had never received a verbal warning from Camelot for missing days of work; and that the copy of her employee report shown to her at the trial herein is a fabrication to the extent that it contains language about Camelot's absence policy in that the language was not there when she signed the document when she was hired. I find Rhodes to be a credible witness. The testimony of Rhodes is credited. The credible facts of record support her testimony. I do not find Prang or Anderson to be credible witnesses. The credible facts of record demonstrate that they lied under oath regarding this matter.

In her May 5, 2009 affidavit to the Board, Prang testified, "I pulled the attendance policy from the employee handbook that I received when I was hired in April 2007. The policy I presented is exactly as it appears in the employee handbook" (Tr. 614). Prang testified at the trial herein that the testimony that she gave in her affidavit was related to the meeting of March 6, 2009.

In her May 5, 2009 affidavit to the Board, Anderson, referring to the attendance policy at issue, testified, as here pertinent, as follows:

> That policy is contained in the employee handbook. All new hires receive an employee handbook and must sign that they received it. I do not remember if the policy has been posted on the bulletin board, but everyone gets it in the employee handbook. [Tr. 646 and 647.]

In his March 9, 2009 e-mail to Neimark, Lerner indicates, as here pertinent, "Facility didn't post a new attendance policy. The policies that were hung were clearly dated 2/28/07 and 3/1/07. In fact, they weren't ever new then, as they were just a reiteration of what's in the policy book." (GC Exh. 82.) Neimark replied that the policies were not dated and they were not even close to a reiteration of what is in the policy book.

Initially, Camelot's witnesses indicated that the attendance policy discussed with the staff on March 6, 2009, the attendance policy which was allegedly utilized to justify the termination of Rhodes, was the one in the Camelot employees' handbook. As can be seen by a comparison of General Counsel's Exhibits 91 and 93, as set forth above, Neimark was correct when he indicated in his e-mail to Lerner that the policy discussed with the staff on March 6, 2009, is not the policy in the employees' handbook.

As noted above, Neimark testified that Lopez told him that there was a meeting of CNAs at Camelot on March 6, 2009, they were handed a new policy on attendance, and the DON indicated that this was a new policy and posted it at that time; that he had not previously been provided an attendance policy that looked anything like what Lopez told him about; that he had been provided the attendance policy that was in the policy manual; that he was not provided notice of the new attendance policy from management before it was implemented and the Union was not given the opportunity to bargain over the implementation of a new attendance policy; that if it was in fact a stricter enforcement of existing policy (the only existing policy he was provided with by Camelot was the one in the employee handbook), management did not bargain with the Union over its decision to more strictly implement its attendance policy; that management did not bargain with him about the termination of Rhodes; and that management did not contact him to advise him that management intended to discharge Rhodes under this new attendance policy. I find Neimark to be a credible witness. I credit this of his testimony. It is supported by the credible evidence of record.

Camelot's presentation on this issue is not credible. Notwithstanding the fact that Rhodes testified that that the copy of her employee report shown to her at the trial herein is a fabrication to the extent that it contains language about Camelot's absence policy in that the language was not there when she signed the document when she was hired, Camelot did not call DON Huffman, who—along with Rhodes—signed the employee report and allegedly wrote the absence policy. Here, an adverse inference is warranted, namely that had Camelot called DON Huffman, she would not have contradicted Rhodes on this point. Respondent takes an indirect approach in that Sieber's employee report, which also has an absence policy written on it, is presented to show that such an approach was taken. The problem is that DON Huffman, who allegedly wrote the absence policy on Sieber's employee report, is not called by Camelot to testify. Sieber is not called to testify. Prang and Anderson testify about Sieber's employee report but neither one is a credible witness. Indeed, for a reason she could not explain, Anderson signed Sieber's employee report even though Anderson testified that she did not sign Rhodes employee report because "I don't have to sign these. I leave these up to managers." (Tr. 721.) Anderson signed what purports to be Sieber's employee report to inflate her testimony about the existence of such an employee report. Rhodes' testimony that the absence policy language on her employee report is a fabrication has been credited. Only one other such employee report is provided by Camelot and, in my opinion, it too is a fabrication to the extent that it contains a handwritten absence policy.

As noted above, Prang changed her testimony, and she was contradicted on more than one occasion by her affidavit to the Board. After the involved attorneys and Lerner indicated that they did not have any further questions for Prang, I conducted an examination of this witness. Until this examination, Prang did not specifically deny Rhodes' testimony that on March 11, 2009, when she terminated her she told Rhodes, "[T]hey are making . . . [me] terminate . . . [you]." (Tr. 591.) On the one hand, Prang testified that when she became DON she undertook a review of employee personnel files starting with CNAs. On the other hand, Camelot takes the position that when Rhodes was terminated it was not aware that other CNAs had attendance records which were worse than Rhodes. If Prang did review the attendance records of other CNAs, Prangs' testimony that as DON she did not remember ever suspending any employee for violating the attendance policy is problematic.[25] Prang is not a credible witness and no weight is given to her equivocal testimony that while she was DON she verbally warned two unnamed employees and she "believed" that she issued a written warning for violations of the attendance policy but she could not recall any of the employee's names. Prang's explanation as to why, with respect to Rhodes, she did not follow the progressive steps in what she claimed to be Respondent's attendance rules does not hold water. Prang's testimony that during her review of employee files as DON she saw the attendance policy written on the employee report of Shelton raises questions in that Anderson testified that there was a period of time when the absence policy was written on the employee report and when that got tedious they went to a typed form. Anderson forwarded a number of documents, General Counsel's Exhibit 97, to counsel for the General Counsel the day after Anderson gave her May 5, 2009 affidavit to the Board. One of the documents is a copy of Camelot's typed attendance policy (GC Exh. 91), which is purportedly signed by Shelton on "5/8/07." This raises a question in that if Shelton signed Camelot's typed attendance policy, why would it have been necessary, as Prang testified, to handwrite the absence policy on Shelton's employee report. Shelton was not called as a witness by Camelot. It is noted that Anderson testified that the only employee reports with the absence policy written on them that she was aware of was one for Rhodes and one for Sieber. Also, Prang's and Anderson's testimony about the same incident raises questions in that, on the one hand, Prang testified in her affidavit that "[t]hey [Lerner and Anderson] discussed it outside of my presence. They called me back into the office and we were all in agreement to terminate Kathy Rhodes' employment." (Tr. 620.) On the other hand, Anderson testified that she, Lerner, and Anderson discussed terminating Rhodes and there were no further conversations at that time.

Anderson testified that she did not think that anyone was fired before Rhodes for violating the attendance policy and other people who had five absences during 2009 were not terminated. Rhodes' discharge violated the Act. The implementation of a new attendance policy on March 6, 2009, violated the

[25] Prang's testimony that she terminated Jackson for violating the attendance policy after Prang gave her May 5, 2009 affidavit, and then Prang rehired Jackson is entitled to no weight.

Act. And the enforcement of the attendance policy announced on March 6, 2009, violated the Act. Camelot violated the Act as alleged in paragraphs 11(e), (f), and (g) and in paragraph 14 of the May 29, 2009 complaint.

Paragraph 12 of the above-described May 29, 2009 complaint alleges that in about February 2009, Camelot bypassed the Union and unlawfully dealt directly with its employees in the Camelot unit by polling employees regarding a change in insurance carrier. As noted above, Anderson admits, as here pertinent, that she met with Camelot employees in 2008 for the purpose of changing their health insurance plan, and Camelot did not notify the Union of the meeting. Camelot's direct dealing with its unit employees occurred during a time when the parties were in negotiations for an initial collective agreement and, among other things, were negotiating regarding the employees' health insurance coverage. By dealing directly with unit employees and thereby bypassing the Union, Camelot was undermining the Union's authority among the employees whose interests the Union was certified to represent. This was not the first time that Lerner engaged in conduct in his ongoing campaign to undermine the authority of the Union among the employees. Here, Camelot communicated with its represented employees and the discussion was for the purpose of changing a term and condition of employment, the health insurance plan. As Anderson admits, the direct dealing was to the exclusion of the Union. Respondent argues that the Union waived its right to negotiate about the change in insurance carrier for Camelot and Galesburg. This assertion is based on the testimony of Lerner and Kipp who are not credible. To the extent such assertion may be based on the July 2007 letter that Anderson claims was forwarded to Neimark, as noted above, the letter is irrelevant to the matter at hand, and it is not being given any weight whatsoever. The Act was violated as alleged in paragraph 12 of the May 29, 2009 complaint. By this conduct, Camelot failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Paragraphs 6(a) and (b) of the May 29, 2009 complaint for the most part, in effect, collectively reiterate other allegations, in a summary fashion, in the May 29, 2009 complaint. No purpose would be served by reiterating here my findings with respect to those allegations. In my opinion, except for paragraph 6(b)(i), it is sufficient to find that, in view of the findings made above, the Act was violated in each and every way alleged in paragraphs 6(a) and (b) and collectively in 13 and 14 of the May 29, 2009 complaint. With respect to paragraph 6(b)(i) of the May 29, 2009 complaint, namely that Respondents restricted the lengths of bargaining sessions, as pointed out by both counsel for the General Counsel and the Charging Party on brief, all of the pertinent bargaining sessions between December 2008 and May 2009 lasted less than the agreed 5 hours. As pointed out by the Charging Party on brief, (a) between December 2008 and May 2009 there was not one month when Respondents satisfied their bargaining obligation regarding how long the parties would negotiate, and (b) Lerner's pattern of delays is even more egregious than that of *Celex Corp.*, 322 NLRB 977 (1997), because Lerner's violations continued even after a settlement with the Union and a corresponding promise to meet regularly and to bargain in good faith. Lerner's testimony that Neimark always agreed to end sessions early is not credited. Neimark, who denied this testimony, is a credible witness. Lerner is not a credible witness. And, as demonstrated by his testimony about his cancellation on December 10, 2008, of a bargaining session, Lerner's claimed understanding of the meaning of mutual is nothing but self serving. The Act was also violated as alleged in paragraphs 6(b)(i), 13, and 14 of the May 29, 2009 complaint.

CONCLUSIONS OF LAW

1. By (i) restricting the dates for bargaining sessions; (ii) restricting the lengths of bargaining sessions; (iii) repeatedly canceling and shortening scheduled bargaining sessions beyond their unreasonably stated intention not to bargain for more than 4 hours per session; (iv) reneging on or withdrawing from tentative agreements without good cause; (v) refusing to bargain over economic subjects; and (vi) refusing to make economic proposals, Camelot and Galesburg collectively have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By (a) failing and refusing to furnish the Union with (1) proof that CNAs were properly screened by Galesburg prior to being hired; (2) employee attendance information for employees at Galesburg; (3) census information regarding the patient population at Camelot; and (4) the personnel file of Rhodes without requiring Rhodes written authorization, (b) without prior notice to and according the Union the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects, unilaterally (1) reducing the hours of Galesburg's housekeeping and laundry staff; (2) increasing the length of the probationary period for certain Galesburg bargaining unit employees; (3) changing the Camelot and Galesburg employee health insurance carrier; (4) giving incentive raises to certain Camelot bargaining unit employees; (5) implementing a new attendance policy at Camelot; (6) more strictly enforcing the Camelot attendance policy; and (7) discharging Rhodes pursuant to the new more strictly enforced Camelot attendance policy, (c) Camelot bypassing the Union and dealing directly with its employees by polling them regarding a change in insurance carrier, and (d) restricting the length of bargaining sessions, Camelot and Galesburg collectively have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

In view of these conclusions, the settlement agreements the Union and the Respondents entered into on December 4, 2008, will be set aside.

REMEDY

On brief, counsel for the General Counsel contends that all of the remedies that the General Counsel seeks should be granted; that although Rhodes has been reinstated, she should be made whole for any loss of earnings and other benefits suffered as a result of her discharge; that Respondents should be required to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the Board and the courts; that the Board awards such costs under both

Section 10(c) and its "inherent authority to control Board proceedings through the bad faith exception to the American Rule," *Alwin Mfg. Co.,* 326 NLRB 646, 647 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999); that Respondents' violation of the approved settlement agreements is further evidence of bad faith, *Lake Holiday Manor,* 325 NLRB 469, 470 (1998) (awarding litigation expenses where "this litigation could have been obviated had Respondent honored either of its settlement commitments"); that Respondents should reimburse the Union for its bargaining expenses to date in order to restore the status quo ante; that the Board orders such reimbursement in bad-faith bargaining cases where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies; that Respondents' tactics directly caused the Union to waste resources in futile bargaining and, therefore, a reimbursement of those expenses is warranted in order to restore the status quo ante; that Respondents should be ordered to bargain on a specific schedule so as to remedy the delay aspects of Respondents failure to bargain; that the certificate year should be extended at Camelot and Galesburg since the Respondents' unfair labor practices have disrupted the bargaining relationship, *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1007 fn. 5, 1045–1046 (1996), enfd. 140 F.3d 169 (2d Cir. 1998); and that given the lack of progress in bargaining due to Respondents' unlawful conduct, and its potential impact on employee support for the Union, an additional extension of 6 months at Galesburg and an additional extension of 9 months at Camelot are necessary to restore the parties to status quo ante. *D. J. Electrical Contracting,* 303 NLRB 820, 820 fn. 2 (1991), enfd. mem. 983 F.2d 1066 (6th Cir. 1993) (Board ordered complete renewal of certification year because bargaining "never had a chance to get seriously and fairly underway" due to employer's refusal to provide relevant information).

Respondents on brief argue that they are not being willfully defiant; that in the instant case there are no flagrant, aggravated, persistent, and pervasive unfair labor practices; that Respondents' "intent to follow the law is clearly seen by . . . [their] negotiating every week for five hours" (R. Br., unmarked p. 21); that Rhodes was rehired and the attendance policy was not enforced; that all the documents requested were given; that the housekeeping hours were restored; that the probationary periods were decreased; that Respondents' defenses are not frivolous, as they clearly show Respondents' good intentions to follow the Act; that Respondents have "no interest other than amicably and legally working with the union towards a contract[s] . . . . [Respondents] simply want . . . to do the right thing. [Respondents] . . . shouldn't be punished for that" (Ibid.); and that if the financial penalties sought by the General Counsel are imposed, it "would bankrupt these facilities, and put its [sic] residents on the street." (Ibid.)

As noted, Respondents argue on brief that their "intent to follow the law is clearly seen by their negotiating every week for five hours." (Ibid.) With respect to the two settlement agreements involved here, first there was no other schedule mutually agreed to by the parties. Consequently, the applicable bargaining schedule is the one specifically set forth in the two settlement agreements. Second, Lerner, on many occasions, made it clear to the Union that the parties were not bargaining for one contract or the same contracts for both facilities. That being the case, the applicable language in the two settlement agreements called for "bargaining shall be held totaling not less than twenty (20) hours per month, *per facility*, at least five (5) hours per session . . . ." (Emphasis added.) As can be seen from the summary of the record set forth above, Respondents did not bargain for 20 hours per month and at least 5 hours per session for even one of the involved facilities let alone the two involved facilities. Not only did Respondents engage in flagrant, aggravated, persistent, and pervasive unfair labor practices, but if, in addition to avoiding unfair labor practices, Lerner had acted in accord with the bargaining schedule in the two settlement agreements he willingly entered into, the second session of this litigation would not have been necessary. As the Board pointed out in *Lake Holiday Manor,* 325 NLRB 469, 470 (1998), such conduct can and should be redressed.

Upon request by the Union, and to the extent sought by the Union, Respondents shall rescind the changes in terms and conditions described above, restore the status quo ante, and make employees whole for any loss of wages or benefits suffered by them as a result of the above-described changes.

As requested by the General Counsel, with a modification, Respondents shall do the following:

> WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, the General Counsel seeks an Order requiring that Respondent Camelot Terrace promptly reinstate Kathy Rhodes to her former position. The General Counsel also requests that Respondent Camelot Terrace be ordered to make Kathy Rhodes whole for any loss of earnings, and other benefits, suffered as a result of her discharge until such time as she is reinstated.
>
> WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, the General Counsel seeks an Order requiring Respondents to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the National Labor Relations Board and the courts.
>
> WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, and as previously alleged in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, the General Counsel seeks an Order requiring Respondents to reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session.
>
> WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, and as previously alleged in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, the General Counsel seeks an Order requiring Respondents to bargain in good faith with the Union not less than 24 hours per month, at least 6 hours per session for each facility or,

in the alternative, 24 hours per month, at least 6 hours per session for the same contract(s) for both facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

WHEREFORE, as part of the remedy for the unfair labor practices alleged . . . in Cases 33–CA–15780 and 33–CA–15781, and as previously alleged in Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670, the General Counsel seeks an Order requiring Respondents to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate units. Specifically, the General Counsel seeks an Order extending the Union's certification year for an additional 6 months at Respondent Galesburg Terrace and for an additional 9 months at Respondent Camelot Terrace.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

It is ordered that the settlement agreements the Union and the Respondents entered into on December 4, 2008, be, and they are hereby, set aside.

The Respondents, Camelot Terrace of Streator, Illinois, and Galesburg Terrace of Galesburg, Illinois, their officers, agents, successors, and assigns, shall collectively

1. Cease and desist from

(a) (i) restricting the dates for bargaining sessions; (ii) restricting the lengths of bargaining sessions; (iii) repeatedly canceling and shortening scheduled bargaining sessions beyond their unreasonably stated intention not to bargain for more than four hours per session; (iv) reneging on or withdrawing from tentative agreements without good cause; (v) refusing to bargain over economic subjects; and (vi) refusing to make economic proposals.

(b) (1) failing and refusing to furnish the Union with (a) proof that CNAs were properly screened by Galesburg prior to being hired; (b) employee attendance information for employees at Galesburg; (c) census information regarding the patient population at Camelot; and (d) the personnel file of Rhodes without requiring Rhodes written authorization; (2) without prior notice to and according the Union the opportunity to bargain with respect to the change of a mandatory subject of bargaining and its effects, unilaterally (a) reducing the hours of Galesburg's housekeeping and laundry staff; (b) increasing the length of the probationary period for certain Galesburg bargaining unit employees; (c) changing the Camelot and Galesburg employee health insurance carrier; (d) giving incentive raises to certain Camelot bargaining unit employees; (e) implementing a new attendance policy at Camelot; (f) more strictly enforcing the Camelot attendance policy; and (g) discharging Rhodes pursuant to the new more strictly enforced Camelot attendance policy; (3) Camelot bypassing the Union and dealing directly with its employees by polling them regarding a change in insurance carrier; and (4) restricting the length of bargaining sessions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, and to the extent sought by the Union, rescind the changes in terms and conditions of employment described above, and restore the status quo ante.

(b) Reinstate Kathy Rhodes to her former position and make Kathy Rhodes whole for any loss of earnings, and other benefits, suffered as a result of her discharge until such time as she is reinstated.

(c) Reimburse the National Labor Relations Board (the Board) and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the Board and the courts.

(d) Reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33–CA–15780 and 33–CA–15781, and Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670.

(e) Bargain in good faith with the Union not less than 24 hours per month, at least 6 hours per session for each facility or, in the alternative, 24 hours per month, at least 6 hours per session for the same contract(s) for both facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

(f) Bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative of the employees in the appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement or agreements. The Union's certification year is extended for an additional 6 months at Respondent Galesburg Terrace and for an additional 9 months at Respondent Camelot Terrace. The appropriate units are as follows:

> All full-time and regular part-time certified nursing assistants, helping hands, dietary aides and cooks, laundry aides, activity aides, housekeeping, and social service aides, employed by the Employer [Galesburg Terrace] at its Galesburg, Illinois facility; EXCLUDING office clerical employees, professional employees, guards, supervisors as defined in the Act, registered nurses, licensed practical nurses, confidential employees, casual employees, and all other employees.
>
> All full-time and regular part-time certified nurses assistants (CNAs), dietary employees, cooks, housekeeping employees, laundry employees, unit aides (assistants), activity aides, medical records, and rehab aides employed by

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

the Employer [Camelot Terrace] at its facility currently located at 516 W. Frech St., Streator, Illinois; but excluding all other employees, department heads, casual employees, LPN's, RN's, managers, maintenance workers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

(g) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' unfair labor practices, in the manner set forth in the remedy section of the decision.

(h) Within 14 days from the date of the Board's Order, remove from Camelot's files any reference to the unlawful discharge of Kathy Rhodes, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(i) Furnish the Charging Union with requested information which is relevant and necessary to its role as the exclusive bargaining representative of the unit employees in a timely manner.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at their facilities in Galesburg and Streator, Illinois, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Subregion 33, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since January 2008.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Sugregion attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C., December 31, 2009.

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT (i) restrict the dates for bargaining sessions; (ii) restrict the lengths of bargaining sessions; (iii) repeatedly cancel and shorten scheduled bargaining sessions; (iv) renege on or withdraw from tentative agreements without good cause; (v) refuse to bargain over economic subjects; and (vi) refuse to make economic proposals.

WE WILL NOT fail and refuse to timely furnish Service Employees International Union Healthcare Illinois and Indiana (the Union) with requested information that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the involved units.

WE WILL NOT unilaterally modify the terms and conditions of your employment without first bargaining to impasse or agreement with the Union.

WE WILL NOT discharge you pursuant to a unilateral change in the terms and conditions of your employment.

WE WILL NOT bypass the Union and deal directly with you by polling you regarding a change in a term and condition of employment.

WE WILL NOT restrict the length of bargaining sessions.

WE WILL NOT fail and refuse to meet at reasonable times to engage in collective bargaining and to bargain in good faith with the Union over terms and conditions of employment for our employees in the following bargaining units:

All full-time and regular part-time certified nursing assistants, helping hands, dietary aides and cooks, laundry aides, activity aides, housekeeping, and social service aides, employed by the Employer [Galesburg Terrace] at its Galesburg, Illinois facility; EXCLUDING office clerical employees, professional employees, guards, supervisors as defined in the Act, registered nurses, licensed practical nurses, confidential employees, casual employees, and all other employees.

All full-time and regular part-time certified nurses assistants (CNAs), dietary employees, cooks, housekeeping employees, laundry employees, unit aides (assistants), activity aides, medical records, and rehab aides employed by the Employer [Camelot Terrace] at its facility currently located at 516 W. Frech St., Streator, Illinois; but excluding all other employees, department heads, casual employees, LPN's, RN's, managers, maintenance workers, office clerical employees and guards, professional employees

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

and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with requested information which is relevant and necessary to its role as the exclusive bargaining representative of the unit employees in a timely manner.

WE WILL on request by the Union, and to the extent sought by the Union, rescind the unilateral changes in terms and conditions of employment we unlawfully made, and restore the status quo ante.

WE WILL reinstate Kathy Rhodes to her former position and make Kathy Rhodes whole for any loss of earnings, and other benefits, suffered as a result of her discharge until such time as she is reinstated.

WE WILL reimburse the National Labor Relations Board (the Board) and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33–CA–15780 and 33–CA–15781 before the Board and the courts.

WE WILL reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33–CA–15780 and 33–CA–15781, and Cases 33–CA–15584, 33–CA–15587, 33–CA–15669, and 33–CA–15670.

WE WILL bargain in good faith with the Union not less than 24 hours per month, at least 6 hours per session for each facility or, in the alternative, 24 hours per month, at least 6 hours per session for the same contract(s) for both facilities, or another schedule mutually agreed upon by the parties, until a complete collective-bargaining agreement or a bona fide impasse is reached.

WE WILL bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), as the recognized bargaining representative of the employees in the appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement or agreements. The Union's certification year is extended for an additional 6 months at Respondent Galesburg Terrace and for an additional 9 months at Respondent Camelot Terrace.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct in the manner set forth in the remedy section of the decision.

WE WILL within 14 days from the date of the Board's Order, remove from Camelot's files any reference to the unlawful discharge of Kathy Rhodes, and WE WILL, within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

CAMELOT TERRACE

GALESBURG TERRACE