UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

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| UNITE HERE LOCAL 2850, UNITE HERE INTERNATIONAL UNION,<br><br>Charging Party,<br><br>v.<br><br>CASTLEWOOD COUNTRY CLUB,<br><br>Respondent. | Case Nos. \| 32-CA-24980<br>32-CA-25397<br>32-CA-25545 |

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

December 21, 2012

LITTLER MENDELSON
A Professional Corporation
ROBERT G. HULTENG
GALEN M. LICHTENSTEIN
JESSICA L. MARINELLI
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Telephone: 415.433.1940

Attorneys for Respondent
CASTLEWOOD COUNTRY CLUB

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## I. INTRODUCTION AND STATEMENT OF THE CASE

This case comes before the National Labor Relations Board ("NLRB") pursuant to Respondent Castlewood Country Club's ("Castlewood," "Respondent," "Club," or "Employer") Exceptions to Administrative Law Judge Clifford H. Anderson's ("ALJ" or "Judge") Decision ("ALJD" or "Decision") issued August 17, 2012 for the above-referenced consolidated cases. This brief is filed pursuant to the Rules and Regulations of the NLRB, including 29 C.F.R. § 102.46 thereof, and an Order from the NLRB extending the page limit for such brief to 100 pages.[1]

A consolidated hearing regarding the above-captioned matters was held before the ALJ at Region 32 of the NLRB between January 9, 2012, and March 1, 2012. Pursuant to the allegations in the General Counsel's Complaint, at issue during this hearing was whether the Club had committed the following unfair labor practices:

(1) whether, on or about August 10, 2010, the Employer introduced an unlawful Union Security proposal to deny locked out employees the right to return to work after the lockout ends or discourage them from engaging in union activity;

(2) whether, on or about August 10, 2010, the Employer introduced a Seniority proposal that was designed to deny locked out employees the right to return to work after the lockout, and in order to retaliate against said employees for their past union activity or discourage them from future union activity;

(3) whether, between approximately August 10, 2010 and November 9, 2010, the Employer conditioned reaching a new collective bargaining agreement, and thereby ending the

[1] Attached hereto as Exhibit A is a true and correct copy of this Order.

lockout, on the Union's ("Charging Party" or "Union") acceptance of the above-mentioned Union Security and Seniority proposals;

(4) whether, between approximately August 10, 2010 and November 9, 2010, the Employer conditioned meeting more frequently with the Union on the Union's acceptance of the Employer's August 10, 2010 proposals regarding Union Security and Seniority;

(5) whether Castlewood conditioned reaching agreement or meeting more frequently on the Union's acceptance of its Union Security and Seniority proposals to deny the locked out employees the right to return to their former positions, and in order to retaliate against said employees for their past union activity or discourage them from future union activity;

(6) whether such conduct prevented the parties from reaching a new agreement and transformed the Employer's undisputedly lawful lockout into an unlawful lockout;

(7) whether Castlewood, acting through its general manager and chief operating officer, unlawfully told employees they could "quit their jobs if they did not like [the Club's] bargaining proposals";

(8) whether Castlewood, acting through a manager, unlawfully threatened to discipline a Union employee for violating overbroad no-access and no-distribution rules;

(9) whether Castlewood, acting through a manager, unlawfully threatened a Union employee by telling her that "locked out employees would never be allowed to return to work at [Castlewood]"; and

(10) whether the Employer unlawfully refused to bargain collectively and in good faith with the Union by subcontracting kitchen cleaning work historically performed by bargaining unit employees.

Despite the record evidence and case law demonstrating that the Employer did not violate the National Labor Relations Act (the "Act") as alleged, and despite the absence of record evidence and case law to support the General Counsel's allegations, the ALJ credited every single one of the General Counsel's witnesses, discredited every single one of the Employer's witnesses, and decided all findings of fact and conclusions of law in the General Counsel's favor. Thus, the ALJ's Decision concluded that Castlewood committed unfair labor practices resulting in violations of Sections 8(a)(1), (3) and (5) of the Act, and converting Castlewood's initially lawful lockout into an unlawful one from August 10, 2010 onward.

As discussed below, the ALJ's legal conclusions are simply not consistent with the facts and the case law, which overwhelmingly demonstrate that the Employer engaged in good faith bargaining from the commencement of negotiations, and that none of the Employer's conduct converted its undisputedly lawful lockout into an unlawful one.[2] Castlewood does not except to the ALJ's findings that are based solely on credibility (including the 8(a)(1) violations alleged with respect to issues (7) and (8) above). Further, Castlewood does not except to the ALJ's credibility determinations – one-sided as they were. However, Castlewood strenuously excepts, on relevance grounds, to the ALJ's consideration of these issues in evaluating Castlewood's bargaining conduct, and ultimately, the ALJ's determination that Castlewood's lockout became unlawful.

[2] Indeed, prior to the trial, Region 32 had performed a thorough investigation of the Union's bargaining-related unfair labor practice charges in 32-CA-25397 and dismissed the charges on December 28, 2011, finding that the Employer had not violated the Act. (Respondent's Exhibit ("Resp. Ex.") 1.)

## II. LEGAL ARGUMENT IN SUPPORT OF EXCEPTIONS TO ALJ'S DECISION

### A. The ALJ Erred in Concluding that Castlewood's Subcontracting of Kitchen Cleaning Work Violated Sections 8(a)(1) and (5) of the Act.

Assuming, *arguendo*, that the ALJ's factual conclusions with respect to the alleged kitchen subcontracting are accurate, such facts still do not amount to violations of Sections 8(a)(1) and (5) of the Act. The ALJ erroneously found that the Employer violated Sections 8(a)(1) and (5) of the Act because, on or about February 1, 2010, the Employer subcontracted kitchen cleaning work historically performed by bargaining unit employees; such subcontracting is a mandatory subject for the purpose of collective bargaining; and the Club subcontracted such work without prior notice to the Union or affording the Union an opportunity to bargain about such subcontracting and its effects. (ALJD 39:12-40:28.) The ALJ further held that, to the extent the work subcontracted in 2010 exceeded the scope of the previously subcontracted work, there was no past practice regarding subcontracting such work, and such work was not *de minimis.* (*Id.* at 40:15-22.)

These legal conclusions are clearly inaccurate given the admitted facts of the instant case. Instead, the ALJ should have concluded that the work Castlewood subcontracted in 2010 was not so different than previously subcontracted work as to render it outside the scope of Castlewood's past practice. Further, the ALJ should have found that, to the extent that the newly-subcontracted work was outside the scope of Castlewood's established past practice, such work was *de minimis*. Thus, the ALJ should have concluded that Castlewood's subcontracting of kitchen cleaning work in 2010 did not violate the Act.

#### 1. Castlewood Has an Established Past Practice of Subcontracting Kitchen Cleaning Work.

The ALJ does not dispute that Castlewood had an established past practice of subcontracting kitchen cleaning work. The ALJ found that, although the bargaining unit

employees historically had performed regular kitchen cleaning, (ALJD 39:21-22), and a weekly more intensive cleaning (*Id.* at 39:22-23), there was also a third type of "deep" kitchen cleaning which subcontractors performed on a monthly basis at least prior to 2008 until early 2009 (*Id.* at 39:23-26). This "deep" cleaning involved cleaning hoods and surfaces with chemical degreasers and associated major cleaning. (*Id.* at 39:24-25). Notably, the ALJ acknowledged that the subcontracting of this deep kitchen cleaning is not at issue. (*Id.* at 39:36-39.)

**2. Castlewood's Subcontracting of Kitchen Cleaning Work in 2010 was in Line with its Lawful Past Practice.**

In light of Castlewood's established past practice of subcontracting kitchen cleaning work, the ALJ's conclusion that Castlewood's 2010 subcontracting violated the Act was erroneous. The ALJ found that the work subcontracted in 2010 was outside the scope of Castlewood's past practice because it was done on a weekly, rather than monthly, basis and, "to a certain degree," was expanded from the work earlier performed by the monthly subcontractor to include work thus far done by the bargaining unit on a weekly basis. (*Id.* at 39:28-31.) Contrary to the ALJ's finding, however, this 2010 subcontracting was in line with Castlewood's lawful past practice, and was consistent with the Act.

As occurred here, the NLRB has permitted subcontracting without bargaining during a hiatus between contracts, so long as the subcontracting is in line with past practice. *See Shell Oil Co.*, 149 NLRB 283, 287 (1964). In *Shell Oil*, the NLRB found that an employer had the right to unilaterally subcontract bargaining unit work without prior notice or consultation, where the prior CBA did not prohibit such subcontracting, the Employer honored the Union's subsequent requests to bargain over subcontracting, the subcontracting during this hiatus period did not *materially* differ in kind or degree from what had been customary in the past, and the Union confirmed it understood the CBA did not prohibit such unilateral subcontracting by acting

indifferently to the employer's unilateral subcontracting of maintenance work in the past. *Id.* at 286-288. The NLRB also examines with particular significance whether the subcontracted work resulted in a *substantial* adverse effect on bargaining unit employees or work. *See Amoco Oil Co.*, 286 NLRB 441, 449 (1987) (*citing Equitable Gas Co. v. N.L.R.B.*, 106 LRRM 2201, 2207 (C. A. 3, 1981); *Dist. 50, United Mineworkers of America v. N.L.R.B.*, 358 F. 2d 234 (C. A. 4, 1966); and *Donald Walker and Arthur Nunez, Co-Partners d/b/a Central Buying Serv. etc.*, 223 NLRB 542, 544-45 (1976) for the proposition that, "[p]erhaps the most significant factor in determining whether a violation has occurred is whether the subcontracting has resulted in a substantial adverse effect on bargaining unit employees or work"), and whether subcontracting the general genre of work at issue was a new way of carrying out the employer's operations. *See Gen. Electric Co.*, 264 NLRB 306, 309 (1982) (declining to find a violation because "[t]he significant fact is that subcontracting of janitorial service work was not a new way of carrying out respondent's operations").

Based on *Shell Oil*, it is clear that the Employer had the right to subcontract its kitchen cleaning work in 2010. In the instant case, like *Shell Oil*, it is undisputed that the Club and the Union (collectively "Parties") were in a period of hiatus between two contracts when the Employer again subcontracted kitchen cleaning work in 2010. Additionally, the CBA between the Parties did not prohibit the type of subcontracting that took place here. Moreover, during negotiations for a successor agreement, the Employer has been willing to bargain over the types of work that may be subcontracted, and the ALJ did not find otherwise. (Tr. 401:10-25 (Ms. Huber); 800:2-5; 802:2-6 (Ms. Norr).) Also, the subcontracting in 2010 is not *materially* different in kind or degree to what took place in the past, as both types of subcontracting involved kitchen cleaning work that took place on a periodic basis. *See Shell Oil*, 149 NLRB at

287. Whether the 2010 work was expanded "to a certain degree" from past work, as the judge found, does not make it *materially* different from past work, as is required to find it out of line with past practice under *Shell Oil*. Regardless, it is undisputed that the general type of work at issue – subcontracting of kitchen cleaning work – is not a new way of carrying out Castlewood's operations. *See Gen. Electric*, 264 NLRB at 309. Further, notably, the Union did not take issue with the Club's subcontracting of kitchen cleaning work in the many years the Club had done so until February 2010, when the Employer gave notice of its intent to lock out the bargaining unit employees. (Tr. 1657:2-5, 19-20 (Mr. Olson).) The ALJ does not dispute this fact. (ALJD at 39:36-39.) As in *Shell Oil*, the Union's acceptance of the Club's past subcontracting verifies its understanding that the CBA did not prohibit such activity. Finally, the Club's subcontracting did not have *any* adverse effect on bargaining unit employees or bargaining unit work, let alone the "substantial adverse effect" required to invalidate an employer's subcontracting. *See Amoco*, 286 NLRB at 449. Therefore, the Employer was not obligated to give the Union prior notice of, and an opportunity to bargain over, its kitchen cleaning subcontracting in 2010.[3]

**3. Even if Part of the Work Castlewood Subcontracted in 2010 was Outside the Scope of its Past Practice, Such Work Was *De Minimis*.**

The ALJ also erroneously rejected the Employer's argument that any work which Castlewood did not have a past practice of subcontracting was *de minimis.* (ALJD at 40:19-20). In support of his conclusion, the ALJ merely cites generally to *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). However, he fails to reference a specific portion of *Fibreboard* supporting his conclusion, nor does he analyze the case or apply it to the instant facts – making it impossible to

[3] The Employer advanced this argument on brief, and the ALJ specifically stated that the Employer had cited "appropriate case law" in support of its "legal position." (ALJD 39:44-47.)

determine how, if at all, *Fibreboard* supports a finding that Castlewood's subcontracting or certain work was not *de minimis.*

However, a close analysis of *Fibreboard* reveals that the case is inapplicable here. In *Fibreboard*, the Supreme Court considered whether a manufacturing company's decision (based, in part, on labor costs) to hire an independent contractor to perform maintenance work previously performed by bargaining unit employees violated the Act. After the independent contractor assumed responsibility for this maintenance work, the company *terminated* its unionized maintenance employees. *Id.* at 206-07. Noting that the company "merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment," the Court ruled that contracting out the company's maintenance work was a "term or condition of employment" that required bargaining, and that the employer's unilateral action thus violated the Act. *Id.* at 215. The Court specifically cautioned, however, that it was

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

*Id*. (emphasis supplied). Further, the Court stated that that its decision did "***not*** encompass other forms of contracting out or subcontracting," and that each situation was to be judged on its facts. *Id.* (emphasis added) (internal quotations omitted).

*Fibreboard*'s narrowly tailored holding is entirely inapposite here, and is critically distinguishable because the employer in *Fibreboard* terminated bargaining unit employees and replaced them with the subcontracted employees. Clearly, those facts are not present here. The ALJ makes no factual or legal conclusions even suggesting that Castlewood's

2010 subcontracting resulted in termination of any bargaining unit employees.[4] Indeed, as stated above, there was *no* adverse effect on bargaining unit employees or bargaining unit work, let alone the "substantial effect" required to find a violation here. *See Amoco*, 286 NLRB at 449.

In fact, the NLRB held, in a case nearly identical to this one, that an employer's subcontracting of unit maintenance work to a subcontractor who had previously performed different maintenance work at the same facility was *de minimis*, even where the newly subcontracted work was outside the scope of previously subcontracted work and actually removed 6.25 hours of work per week from the bargaining unit. *Gen. Electric*, 264 NLRB at 309. As with *General Electric*, Castlewood subcontracted deep cleaning work on a weekly basis in 2010 that had been previously subcontracted on a monthly basis, (ALJD 39:12-26.), some of which may have included "non-deep cleaning work done by the unit employees." (*Id.* at 40:16-17.) However, there was no showing that newly subcontracted work affected any bargaining unit employee's working hours, much less that it specifically removed weekly hours from the bargaining unit, as was the case in *General Electric*, where the NLRB found no violation. Thus, the ALJ erred in rejecting the Club's argument that kitchen cleaning work subcontracted for the first time in 2010 was *de minimis*.

**4. Castlewood's 2010 Subcontracting Did Not Violate the Act and Cannot be a Basis for the ALJ's Determination as to Whether the Club's August 10, 2010 Proposals Rendered its Lockout Unlawful.**

Based on the foregoing, Castlewood did not unlawfully fail and refuse to bargain collectively about kitchen subcontracting. Castlewood acted within its right to subcontract based

[4] To the extent the ALJ discusses Francisca Carranza, a bargaining unit employee with maintenance duties who was coincidentally laid off in early 2010, the ALJ makes no causal or correlative connection between her layoff and the subcontracting. (ALJD 33:28-32) (identifying Carranza, who provided testimony regarding her observations about the subcontractors upon her return to work, by noting that she had been laid off in January 2010—one month *before* the subcontracting at issue commenced).

on established past practice, and thereafter continued to negotiate with the Union over its right to maintain such subcontracting practices under a future CBA. To the extent Castlewood's 2010 subcontracting was outside the scope of its past practice, such subcontracting was *de minimis.* Therefore, Castlewood has, at all times, complied with the Act, and its 2010 subcontracting of kitchen cleaning work cannot support a conclusion that Castlewood's undisputedly lawful lockout was converted into an unlawful one.

### B. The ALJ Erred in Concluding that Castlewood, Through John Hughes, Made an Unlawful Statement to a Bargaining Unit Employees in Violation of Section 8(a)(1) of the Act.

#### 1. Castlewood Did Not Violate Section 8(a)(1) by Telling a Locked Out Employee She Would Never be Allowed to Return to Work for Castlewood.

The ALJ's conclusion that Castlewood violated the Act by telling a locked out employee she would never be allowed to return to work must be rejected. (ALJD 45:15-17 (Hughes told Ruth "Peggy" Duthie that the Board of Directors ("Board") would never allow the locked out employees to return to work), 46:28-34; *see* Compl. ¶¶ 8, 11.) For purposes of these Exceptions, Castlewood is not disputing the ALJ's credibility resolutions. Assuming *arguendo* that Hughes did make the alleged statement, it cannot be imputed to Castlewood because Hughes had no knowledge of Castlewood's lockout-related plans, did not supervise Duthie or any of the bargaining unit employees, and any statements he made were mere opinion or speculation. Accordingly, the Employer has not violated Section 8(a)(1) of the Act, and this allegation must be dismissed.

##### a. Hughes Has Never Had Knowledge of The Board's Plans for Locked Out Workers.

It would have been impossible for Hughes' statement to reflect actual Board intent regarding the locked out workers because Hughes has never had any knowledge of the

subject. Hughes was not a member of the Board of Directors. (ALJD 45:31-32; Tr. 1522:6-8.) He did not work directly with the Club's Board. (ALJD 37:26-27.) He was not involved in the Club's labor relations, labor negotiations, or the Club's formulation or discussion of negotiation strategy. (*Id.* at 37:28-30; Tr. 1521:18-20 (Mr. Hughes); *accord* 1690:9-24 (Mr. Olson).) Additionally, no one had ever told him that the locked-out employees would not be allowed to return to work. (ALJD 37:30-31; Tr. 1522:9-1523:2; 1524:10-13; 1527:21-23.)[5]

No evidence or testimony contradicted these facts. Nevertheless, the ALJ concluded that Hughes nevertheless knew of the Club's position. In so concluding, the ALJ reasons:

> Mr. Hughes was the golfing manager, former general manager, and a longtime club manager. He attended social gatherings, spent time on the golf course, and went to meetings which were frequented by managers and Board officials. In this situation, Mr. Hughes need not have had specific discussions with individual members respecting club board intentions.[19]
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> [19] The Respondent is a country club and golf course catering to its member owners. Board members are members and at least some of them play golf. The golf manager would be expected by a long-term employee to communicate with board members. I so find.

(ALJD 45:36-40, 49-51.) Here, the ALJ argues that, even though it is undisputed that Hughes was not privy to the Board's decision-making process regarding the lockout, or knowledgeable as to any conversations about the same, he must have somehow understood the Board's plans simply by travelling in some of the same social and professional circles as the Board members. This rationale is difficult to credit and unsupported by any record evidence. Furthermore, the

[5] The ALJ states that he does not credit Hughes' testimony where it was contrary to Duthie's. (ALJD 38:39-40.) Other than crediting Duthie over Hughes where their testimony conflicts, the ALJ does not make any other credibility resolutions regarding (or against) Hughes. Thus, this brief assumes that, where Duthie has not provided contradictory testimony, Hughes' testimony is deemed credible.

fact that Hughes acted as interim general manager long *before the labor dispute arose* is irrelevant.

The ALJ also erroneously found that Hughes must have had knowledge of the Board's plans because he "testified that he played golf with the club board members and had conversations with them. Further, he had heard them and club members make comments respecting the labor dispute and the protests, including negative comments." (*Id.* at 37:36-39.) That Board or Club members may occasionally golf with Hughes—and discuss the labor dispute in his presence—does not mean that Hughes necessarily learned about the Board's strategy regarding Union negotiations or the bargaining unit employees' return to work. Neither logic nor the available record evidence—even as credited by the ALJ—suggest otherwise. Thus, there is no evidence that Hughes had any knowledge about the Board's plans.

**b. Statements by a Supervisor to an Employee over Whom the Supervisor has No Authority May Not Be Imputed to the Employer.**

Even if Hughes did make the alleged statement, such a statement cannot be imputed to Castlewood because Hughes had no authority over the bargaining unit employees. In evaluating whether an employer violates Section 8(a)(1) of the Act through the actions of its managerial employees, the NLRB applies common law agency principles "to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence." *Ready Mix Inc.*, 170 LRRM 1401, 1402 (2002). "The test is whether, under all the circumstances, employees would *reasonably* believe that the alleged agent was reflecting company policy and speaking and acting for management." *Id*. (emphasis added).

The NLRB has held that statements made by a managerial employee to another employee cannot be imputed to the employer if that manager had no supervisory authority over

the employee and if the manager was not acting as the employer's agent. *See Zack Company*, 278 NLRB 958, 958-959 (1986) (foreman was not agent, and thus his threats did not impute to employer, where he had no authority to discipline the threatened workers, he did not take part in the employer's decision to carry out the threat, and the employer did not know of his threats); *Glen's Market*, 176 LRRM 1393, 1394 (2005) (supervisors' statements to employees regarding upcoming union election were not attributable to employer where statement-makers did not have supervisory authority over those solicited); *and Ready Mix, Inc.*, 170 LRRM at 1402 (concrete driver's statements not objectionable where there was no evidence that: (1) he was, or was perceived by employees to be, in a managerial or supervisory position; (2) the employer authorized him to direct work or cloaked him with apparent authority to act as its agent; or (3) employees would reasonably believe he was acting on behalf of management).

As with the above cases, Hughes' alleged statements cannot be imputed to Castlewood. It is undisputed that Hughes did not and does not supervise or have any authority over any bargaining unit employees. (ALJD 37:26-28 (Hughes' "responsibilities were associated with the Club's golf operations, which do not utilize represented employees"); Tr. 1520:25-1521:10 (Mr. Hughes); *accord* Tr. 1690:6-8 (Mr. Olson).) Hughes had no disciplinary authority over Duthie or any other bargaining unit employees. (ALJD 37:26-28; Tr. 648:4-10, 21-649:1; 650:16-18.) Additionally, no evidence indicates that Castlewood authorized Hughes to communicate information regarding the Board's intentions to Union employees, as Hughes is not even privy to Board plans or decisions, as discussed above. (ALJD 37:28-30; Tr. 1522:9-1523:2; 1524:10-12; 1527:21-23.) Furthermore, there is no evidence that the Employer cloaked Hughes with the authority to make layoff or reinstatement decisions involving any of the locked out employees—the subject of the alleged statement to Duthie. Finally, the Employer did not even

know about Hughes' alleged comment at the time it was purportedly made (or at all, until the Region apprised it of the Union's allegation roughly six months later), and there was no evidence presented at trial to suggest otherwise. Accordingly, any statements Hughes made cannot be imputed to Castlewood.

The ALJ's contrary conclusion, that Hughes was acting as an agent for Castlewood when the alleged statement was made, is flawed. (ALJD 46:5-10.) In support of this conclusion, the ALJ first reasoned that Castlewood's above-cited cases are inapplicable because those cases hold "that supervisors who did not supervise employees whom they threaten are unable to consummate their threats and therefore the threats are self-evidently impotent and non-coercive." (*Id.*) Conversely, the ALJ held that "Hughes is reporting the intentions of the Board of Directors respecting the locked-out employees—a matter well within the Club's Board's Control." (*Id.*) However, the ALJ's conclusion and reasoning are misguided for several reasons. First, the Employer's cited cases *are* applicable, as it is undisputed that Hughes did not supervise the threatened workers, was "unable to consummate" his threat, and his threat was "self-evidently impotent and non-coercive." Second, whether the threat involves "a matter well within the Club's Board's control" is not a relevant factor in the agency analysis, and the ALJ offered no legal authority suggesting otherwise. Third, as discussed, Hughes could not have been "reporting the intentions of the Board of Directors," because he had no idea what those intentions were, and no evidence was offered at trial suggesting otherwise.

Moreover, the ALJ incorrectly determined that Duthie necessarily believed that Hughes was speaking and acting for management. (*Id.* at 45:40-42; 46:32-34.) As discussed at length above, the ALJ concluded that Duthie's belief was reasonable simply because she knew Hughes occasionally interacted socially, recreationally, and professionally with the Board of

Directors. (*Id.* at 45:40-51.) However, that a speaker occasionally has contact with an employer's board of directors does not give an employee good reason to believe that whenever the speaker discusses management, he is speaking and acting on their behalf. The ALJ did not cite any legal authority to the contrary. To the extent that the General Counsel cited, and the ALJ approved, case law emphasizing whether the speaker is "held out as a conduit for transmitting information from [from management] to other employees," Hughes was only held out as a conduit for transmitting information regarding the Club's golf operations to the Club's golf staff. Hughes was not held out as a conduit for transmitting information about the Board's labor relations strategy, about which he had no knowledge and had never spoken with the Board. Again, no evidence offered at trial supports a conclusion that Hughes was held out as a conduit for transmitting such information. The ALJ's conclusion impermissibly broadens the standard for holding an employee's belief reasonable and imputing a threat to an Employer.

**c. Where the Supervisor is Not Acting as the Employer's Agent, the Supervisor's Remarks of Speculation or Opinion May Not Be Imputed to the Employer.**

Where, as here, the supervisor is not the employer's agent, his remarks of opinion or speculation may not be imputed to the employer as threats. *See Zack Company*, 278 NLRB at 958-959. Even if Hughes *did* make the alleged statement, it would have been mere speculation or opinion, as he was not privy to the Board's plans. Hughes even testified that what little he did tell Duthie was simply his opinion. (Tr. 1535:16-24.) Therefore, any statement attributed to Hughes regarding the locked out employees is mere opinion and not imputable to Castlewood.

The ALJ incorrectly refuted Castlewood's argument, concluding that Hughes' statement to Duthie "was not self-evidently opinion or speculation." (ALJD 45:44-45.) He found that Hughes' statement was, instead, "a statement of fact," because the nature of the statement was a report concerning the Board's intentions and did not include "his own opinion of

what the Board would do nor speculate on the question." (*Id.* at 45:44-46:4.) Once again, the ALJ did not cite any legal authority supporting his argument that whether a statement is a legal opinion in the context of an 8(a)(1) allegation turns on whether the statement contains language indicating that the statement is "self-evidently" an opinion. However, *Zack Company*, *supra*, to which the Employer cited on brief, requires a contrary finding. In *Zack Company*, the statement at issue was, "If they don't be quiet, they're gonna get laid off." 278 NLRB at 958. This statement did not include any "self-evident" indicia of opinion (*e.g.*, "I think" or "probably"). Nor did the NLRB discuss whether the statement included such "self-evident" indicia of opinion in evaluating whether the statement was opinion. Rather, the NLRB determined that, because the speaker had no responsibility for or authority over the discharge of the threatened employees, and neither participated in nor was privy to the employer's decisions regarding the fate of the threatened employees' employment, "his remarks were nothing more than speculation or his personal opinion, not imputable to the Respondent." *Id.* at 958-59. Thus, where, as here, the speaker could not have had knowledge as to the truth or falsity of his statement, the statement is an opinion within the meaning of Section 8(a)(1).

**d. The Statement Attributed to Hughes Was Isolated and *De Minimis.***

Even assuming Hughes made the statement, it must be considered *de minimis*. The General Counsel relied exclusively on Duthie's testimony regarding one purported comment to establish its case. An isolated comment made to a single employee with no one else present, as is the case here, should not constitute an unfair labor practice. This is all the more true because there is no evidence that Duthie informed any of the other 62 unit employees of her conversation with Hughes. *See St. Rita's Med. Ctr.*, 261 NLRB 357, 359 (1982) (holding that a single statement to one of twenty-eight employees, even if unlawful, is isolated and *de minimis*,

and is insufficient standing alone to merit an unfair labor practice finding). This *de minimis* principle has consistently been followed by the NLRB. *Timet*, 274 NLRB 706, 707 (1985) (holding that one isolated threat was *de minimis* and did not warrant the issuance of a remedial order); *Jimmy Wakely Show*, 202 NLRB 620, 622 (1973) (finding that although the employer's conduct "may have been in technical contravention of the statute as interpreted by [the] Board, was nevertheless so insignificant . . . that we will not utilize it as a basis for either a violation or a remedial order"). Therefore, the ALJ erred in finding that Hughes' single statement to Duthie constituted a violation of the Act.

#### e. Respondent Has Complied with the Act at All Times.

In sum, the ALJ wrongly concluded that Hughes' statement violated Section 8(a)(1) of the Act. For all reasons discussed above, Hughes' statement does not impute to Castlewood and is *de minimis.* Therefore, Castlewood did not violate the Act.

### C. The ALJ Erred in Determining that Castlewood's Bargaining Conduct Violated the Act.

#### 1. Castlewood's August 10, 2010 Seniority Proposal Did Not Violate the Act.

The ALJ erred in concluding that Castlewood's Seniority proposal violated the Act because, 1) his findings are not consistent with the General Counsel's allegations, 2) he ignored undisputed record evidence in support of the Employer's position, and 3) his legal analysis focused on wholly distinguishable cases. Castlewood's Seniority proposal complied with the Act, and thus, the General Counsel's allegations with respect to this proposal should be dismissed.

### a. The ALJ's Findings are Not Consistent with the General Counsel's Allegations.

The General Counsel alleged that Castlewood "designed" its August 10, 2010 Seniority proposal to deny locked out employees the right to return to their former positions of employment, and introduced the Seniority proposal to retaliate against the bargaining unit employees for their union activity or to discourage their future union activity. (Compl. ¶¶ 9(a)-(b), 10(b).) Further, the General Counsel alleged that the introduction of Castlewood's Seniority proposal amounts to a failure and refusal to bargain in good faith. (*Id.* at ¶ 13.) Finally, the General Counsel alleged a theory that the mere offering of a proposal on Seniority – a proposal that was admittedly never insisted upon or implemented – constituted a violation of Sections 8(a)(1), (3), and (5) of the Act. (*Id.* at ¶¶ 12, 13.)

While some of the ALJ's conclusions regarding the Club's Seniority proposal address the General Counsel's allegations, many of the General Counsel's allegations are not supported by the ALJ's holding. Specifically, the ALJ's holding does not support a conclusion that Castlewood's Seniority proposal was "designed" to deny the locked out employees the right to return to work, as the General Counsel alleged. Instead, the ALJ actually concluded that the language of Castlewood's Seniority proposal was associated with its "expressed desire to be unfettered in selecting a post-lockout workforce from the ranks of *both returning locked-out employees and the temporary employees*." (ALJD 63:15-17) (emphasis added.) This finding actually militates *against* the General Counsel's allegation that the proposal was "designed" to deny locked out employees the right to return to their former positions of employment.

Therefore, the ALJ's decision does not support the General Counsel's allegation that Castlewood "designed" its August 10, 2010 Seniority proposal for the unlawful purposes alleged.

### b. The ALJ's Decision Ignored Relevant Evidence that Supports Castlewood's Introduction of its Lawful Seniority Proposal.

The ALJ largely excluded from his decision any of the record evidence logically or legally relevant to proving the Employer's defense of its Seniority proposal—even where such record evidence was not disputed by the Parties. Notably, the ALJ completely failed to address the undisputed record evidence demonstrating that, from August 10, 2010 onward, the Employer *repeatedly* explained to the Union that its proposal did not apply to the issue of return to work.[6] Likewise, the ALJ wholly ignored the substance of the Parties' extensive e-mail colloquy following the September 13, 2010 bargaining session, in which the Employer repeatedly and explicitly explained that, under its proposal, all locked out workers would be allowed to return at the end of the lockout, and that none would be displaced by the temporary replacement employees.[7] Instead of acknowledging that the Employer had communicated this message, the ALJ summarily stated that the Parties "exchanged emails discussing the application and consequence of the Respondents' seniority proposals to the recall of the locked out employees." (ALJD 31:40-44.) This selective treatment of the record undermines the Employer's position by eliminating one of its key defenses—that, as soon as it was aware of the Union's concerns, it assuaged any potential concern the Union may have had regarding the bargaining unit

[6] On August 10, when the proposal was introduced, Mr. Hulteng told the Union the proposal was about layoffs, not return to work. (Tr. 361:16-20 (Ms. Huber states Mr. Hulteng said "nothing in this proposal says anything about [trying to settle a dispute]); *accord* 820:8-12 (Ms. Norr).) On September 13, Mr. Hulteng told the Union that its proposal was about layoffs under a new CBA, not about lockout resolution. (*Id.* at 370:19-22 (Ms. Huber admits Mr. Hulteng said at various points "this proposal was about layoffs, it wasn't about lockout resolution"); 506:4-7 (Ms. Huber admits Mr. Hulteng said "our proposal was not a lockout settlement. It's a CBA with duration"; *accord* 832:7-11 (Ms. Norr admits the same, almost verbatim).)

[7] In the series of e-mails between Ms. Huber and Mr. Hulteng following the September 13 bargaining session, Mr. Hulteng repeatedly explained to Ms. Huber that the Club's proposal had nothing to do with the locked out employees' return to work. (Jt. Ex. 1, Tabs 100-107.)

employees' ability to return to work.[8] Also missing from the ALJ's Decision was any discussion of the undisputed fact that the Union did not actually believe the Employer's proposal would displace locked-out employees, or of the Union's unequivocal admission that it knew by as early as October 2010 that the Employer's Seniority proposal was exclusively about layoffs.[9] Instead of discussing whether the Union actually believed that the Seniority proposal would impact bargaining unit employees' ability to actually return to work, the ALJ conversely concluded that the Employer's "seniority contract language . . . made it impossible for the Union and the locked-out employees it represented to intelligently evaluate their position in bargaining during

[8] Again, on November 9, Mr. Hulteng told the Union that the Employer's proposal would not apply to return to work. (Tr. 387:17-388:8 (Ms. Huber admits the Employer said "the purpose had always been to deal with future situations when we were under contract and the Employer had a need for layoffs"); *accord* 876:22-877:4 (Ms. Norr admits Mr. Hulteng said "this provision kicks in when there's layoffs"); and 877:14-18 (Ms. Norr admits Mr. Hulteng said "our proposal is about what, if sometime in the future, a locked out worker leaves and there's a bidding to fill their shifts? It shouldn't be done just on seniority").) Castlewood explained over and over and over that its proposal dealt with layoffs and had nothing to do with return to work.

[9] The record evidence demonstrates that the Union did not truly believe that the Employer's proposal would displace the locked out employees. First, Ms. Huber's repeated e-mails on the subject indicate she did not understand the Employer's proposal to mean locked out workers would be displaced. (Jt. Ex. 1, Tabs 100, 102, 104, 107.) Indeed, Ms. Huber admitted at trial that she continued to e-mail Mr. Hulteng because she was "trying to pin them down on their position with regard to the locked out workers and the replacement workers and keeping the replacement workers." (Tr. 192:21-193:9.) Second, Ms. Huber admitted that by as early as October 25, 2010 she knew the Employer's Seniority proposal was about layoffs alone. (*Id.* at 373:13-375:25 (Ms. Huber admits that she stated in her October 25, 2010 affidavit to the NLRB that she "evaluated the Employer's proposal as being that the Employer that [sic] wanted to make decisions regarding layoffs based not solely on seniority, but also on work performance").) Third, Ms. Huber admitted that by November 2, 2010, she "didn't have any doubt" that all locked out workers would be allowed to return. (*Id.* at 381:15-382:16.) Finally, throughout the lockout, including during the period of August-October, 2010, the Union disseminated numerous fliers and handouts related to its dispute with the Employer, none of which even suggested – much less claimed – that the Employer was proposing or intending to displace locked out workers. (Resp. Ex. 6(a)-(g) (Union fliers focusing exclusively on the Parties' dispute over health insurance).) If the Union truly thought the Employer was proposing or intending to displace the locked out workers, it stands to reason it would have at least mentioned this in its ongoing protest campaign.

their lockout." (*Id.* at 63:15-19.) Indeed, the ALJ's only acknowledgement of the Parties' bargaining history beyond September 13, 2010 is that they "met in two sessions in November 2010 and thereafter. No agreement has been reached. The lockout continues." (*Id.* at 32:5-7.) This recap grossly oversimplifies the post-August 10, 2010 bargaining history and ignores nearly all of the undisputed evidence relevant to proving the Employer's defense.

The ALJ's failure to address this undisputed record evidence allowed for the erroneous conclusion that Castlewood's Seniority proposal violated the Act. Logic and the applicable case law make clear, however, that proper consideration of this evidence would have warranted a contrary result.

**c. The Case Law the ALJ Relied Upon in Erroneously Concluding that Castlewood's Seniority Proposal Violated the Act is Wholly Distinguishable.**

Presumably construing the Employer's Seniority proposal as an ambiguous threat to prohibit some locked out workers from returning to work, the ALJ's legal analysis of the proposal focuses on cases addressing whether an unlawful threat converts a lawful lockout into an unlawful one—*Eads Transfer* and *Ancor Concepts*, discussed *infra*. However, the ALJ improperly relied on these distinguishable cases in concluding that Castlewood's Seniority proposal violated the Act, and ignored the Employer's legal arguments.

Assuming, *arguendo*, that cases addressing whether threats convert lawful lockouts into unlawful ones are relevant to determining the legality of the Employer's Seniority proposal, *Harborlite Corp.*, 2011 NLRB LEXIS 747 (2011), is most on point. In *Harborlite*, the NLRB held that the employer's unlawful threat to permanently replace locked out employees—made both before and during a lockout—did not render the otherwise lawful lockout unlawful. *Id*. at *10-11. There, the employer later retracted its threat to hire permanent replacements, and assured employees that any replacements would be temporary "until further notice" and that

accepting the employer's final offer would end the lockout and allow the locked out employees to come back to work. *Id*. at *9-11. According to the NLRB, the employer's "effective withdrawal or, at least, deferral, of its threats of permanent replacement, and its assurances to the Union that unit employees would be reinstated if the Union accepted the Respondent's terms," means that "the Respondent's statements did not taint the otherwise lawful lockout," but "allowed employees to unambiguously evaluate their bargaining position." *Id.* at *10. The NLRB further held that the employer's reassurance that replacements would only be temporary "until further notice" did not confuse its message to employees about their current status. *Id.* at *11. The NLRB reasoned that, because there was no such further notice, the employees remained free to continue the lockout or agree to the employer's terms and return to work, and had no reason to believe otherwise. *Id.*

By analogy, even if one were to accept the Union's claim here that Castlewood implied that it might replace locked out employees with replacements at some future point when the lockout ended, the Employer unquestionably disavowed that notion on many occasions in October and November 2010. Further, the Employer never actually permanently replaced the locked out employees. Finally, as of the time of trial in this matter, the employees had never received "further notice" that Castlewood would be ending the lockout—the contingency necessary to trigger the possible permanent replacement of bargaining unit employees. The holding in *Harborlite* is very much on point, and requires a finding that Castlewood's Seniority proposal, even if unlawful, did not taint its otherwise lawful lockout.

Instead of acknowledging *Harborlite*, which was decided in late 2011 and which the Employer cited on brief, the ALJ relied on *Eads Transfer* and *Ancor Concepts*, which were decided roughly 20 years ago and are distinguishable from the instant case. The ALJ cites *Eads*

*Transfer, Inc.*, 304 NLRB 711 (1991), *enfd*. 989 F.2d 373 (9th Cir. 1993), for the proposition that "[i]n the absence of notification [of the lockout], . . . . an employer's failure to reinstate economic strikers based on a claimed lockout on their unconditional offer to return to work is inherently destructive of employee rights." *Id.* at 712; (*see* ALJD 56:31-45 (discussing *Eads*).) This proposition is inapposite, however, as Castlewood did not fail to notify its employees of its lockout or the reason for its lockout, nor did it fail to reinstate them.

In *Eads*, the NLRB held that the employer violated Sections 8(a)(3) and (1) of the Act by *failing to reinstate* striking employees upon their unconditional offers to return to work. *Id.* at 713. The NLRB reasoned that, while the employer may have intended its refusal to constitute an economic "lockout" in support of its bargaining position, it never communicated this reasoning to employees. *Id.* The employees, therefore, could not intelligently evaluate their position because the employer did not inform them that they would be reinstated as soon as they yielded to the employer's bargaining demands. *Id.* Thus, the NLRB found the employer's refusal, without a provided justification, to return the employees to work converted the employees' strike into an unlawful lockout upon their offers to return to work. *Id.*

*Eads* is completely distinguishable from the instant case, and therefore not applicable here. Unlike *Eads*, in which the employer actually refused to reinstate employees and failed to communicate its reason for doing so, Castlewood has *not* failed to reinstate employees. It has not even said it would not reinstate employees. Through the time of trial in this matter, Castlewood had not even had the opportunity to decline to reinstate the bargaining unit employees because the lockout had not ended. Moreover, the Employer properly notified the bargaining unit employees of the lockout at its inception, and repeatedly explained its reasons for maintaining such lockout. (Jt. Ex. 1, Tab 48; *see also* Jt. Ex. 1, Tabs 41, 43, 44, 47, 51.) To the

extent the Union may have been confused regarding the Employer's position on the employees' return to work, it is undisputed that the Employer explained its position numerous times, and clarified the Union's confusion on the issue as soon as it became aware of the Union's uncertainty. The employees here, at all times, have been aware of the fact that they were locked out, and that such lockout was in support of the Castlewood's bargaining demands.[10]

The ALJ also cites *Ancor Concepts*, 323 NLRB 742 (1997), *enfd.*, 166 F.3d 55 (2d Cir. 1999), noting that the employer in that case ended the lawful status of its lockout when it "told the union that its replacement workers were permanent employees permanently replacing the other employees." (ALJD 56:48-57:2.) As with *Eads Transfer*, *Ancor Concepts* is completely distinguishable from the instant case. *See Harborlite Corp.*, 2011 NLRB LEXIS 747, at *8-11 (2011) (expressly distinguishing *Ancor Concepts* from *Harborlite*). In *Ancor Concepts*, the employer "initiated a lawful economic lockout of former strikers, hired replacements, and then told the union representing the locked-out employees that the replacements were permanent." *See Ancor Concepts*, 323 NLRB 742, 744 (as summarized in *Harborlite*, 2011 NLRB LEXIS 747, at *8). Thus, the locked-out employees were led to believe they had *already been permanently replaced* and that they had lost the ability to automatically and immediately return to work even if they were to accept the employer's terms. *Id.* The NLRB found that the lawful lockout ended with the declaration that the replacements were permanent because the employees could not "intelligently evaluate their position" after the employer told them "that they would *remain* replaced even if they yielded to the [r]espondent's

[10] Further, *Eads* and its progeny only concluded that the employer's failure to timely inform its employees of the terms necessary to avoid the lockout rendered the lockout unlawful in violation of Section 8(a)(3) of the Act. *Alden Leeds*, 357 NLRB No. 20, slip. op. at 58 n.12 (2011). Thus, the ALJ's reliance on *Eads* would, at best, allow him to find violations of 8(a)(3), but not violations of 8(a)(1) or (5), as alleged in the Complaint.

bargaining demands." *Id*. at *8-9 (citing *Ancor Concepts*, 323 NLRB at 745) (emphasis in original).

As the NLRB held in *Harborlite* -- which has facts nearly identical to the instant case -- *Ancor Concepts* "does not apply here." *Id.* at *9. *Harborlite* noted the following relevant factors distinguishing it from *Ancor Concepts.* In *Harborlite*: 1) the employer had initiated a lockout in support of its bargaining position; 2) although it had threatened to hire permanent replacements, it later informed the union that "it had decided to make the replacements temporary," thus "effectively withdraw[ing]" its threat; 3) there is no evidence that the employer had actually hired any permanent replacements before that date; 4) the employer's "withdrawal" letter also stated that the employer hoped the withdrawal "encourages the membership to accept the terms of our last best and final offer," and that such action would "end the lockout, bring the employees back to work, and allow us to get back to meeting our goal"; and 5) the employees were not informed they were permanently replaced after the fact, as with *Ancor Concepts*, but instead were informed of the threat of permanent replacement and told it would not be carried out, if at all, until some future date. *Id.* at *9-11. The NLRB explicitly concluded that, unlike the communication in *Ancor Concepts*, the employer's letter allowed employees to unambiguously evaluate their bargaining position, and assured them that if they accepted the employer's terms, they could return to work. *Id.* at *10.

Like *Harborlite*, the instant case is entirely distinguishable from *Ancor Concepts*, both factually and legally. As with *Harborlite*, it is undisputed that Castlewood initiated a lawful lockout in support of its bargaining position. It is also undisputed that, to the extent the Union interpreted the Employer's Seniority proposal to potentially displace the locked out workers at the end of the lockout, the Employer "effectively withdrew" this threat. It is further undisputed

that the Employer did not hire any permanent replacements before its "effective withdrawal." *See Harborlite*, 2011 NLRB LEXIS 747 at *9. Additionally, both before and after the presence of any alleged threat contained in or connected with the Seniority proposal, the Employer repeatedly conveyed that it hoped the Union would accept its proposals, end the lockout, and return to work. (*See* Jt. Ex. 1, Tabs 100-107.) Finally, and most importantly, the bargaining unit employees here were not informed that they had already been permanently replaced after the fact, as was the case in *Ancor Concepts.* Rather, the worst-case scenario is that they understood that, under the Employer's proposal, they *might* be replaced if and when the lockout ended. (ALJD 63:27-29 ("The Respondent aggravated the need for time and bargaining by its—at best confusing, if not bad-faith—assertions about the seniority proposal's application to merging the ranks of returning workers and replacements").) Castlewood's arguably "confusing" proposal is a far cry from the *ex post facto* declaration of permanent replacement at issue in *Ancor Concepts.* Thus, the ALJ's reliance on *Ancor Concepts* is misplaced, and such reliance neither mandates nor justifies a finding that Castlewood's Seniority proposal violated the Act.[11]

[11] To the extent the ALJ incorporates *Alden Leeds* into his own analysis by citing to the General Counsel's and Charging Party's briefs, his citation to this case is also unavailing. (ALJD 57:25-58:17.) In *Alden Leeds*, 357 NLRB No. 20, the employer, after only three bargaining sessions during which it provided no proposals, *Id.* at *49, provided a "proposal" that "was confusing, incomplete, and internally inconsistent," *Id.*, and notified the union that if the employees did not vote on and agree to the "proposal," they would be locked out, *Id.* at *51. Although the employer literally provided "no discussion . . . about the terms of the agreement that Respondent was seeking the employees to approve" *Id.* at *33, and the Union twice stated that it "did not know what employees [were] supposed to be voting on," *Id.* at *51, the employer gave the union one working day "in which to evaluate and understand" its "uncertain, ambiguous and confusing offer, vote on it and accept it," *Id*. at *56, before locking the employees out, *Id.* at *32. Further, the employer did not provide a comprehensive proposal until seven days after the lockout had commenced. *Id.* at *35. Under these circumstances, the NLRB found that the employer did not give the union sufficient time to "clarify any ambiguities in Respondent's offer," and failed to timely notify the union of the terms necessary to avoid the lockout in violation of 8(a)(1) and (3) of the Act. *Id.* at *56-68. The instant case is clearly distinguishable, as Castlewood provided a complete, comprehensive and internally consistent proposal on August 10, 2010, did not put any

In addition to relying on inapposite cases in support of his conclusion, the ALJ applies an incorrect test for determining whether any alleged threat carried by the Seniority proposal converted the lawful lockout into an unlawful one. Rejecting the Employer's argument that the applicable test is whether the Union's initial interpretation of the alleged threat was later corrected, the ALJ instead posits that "the test here is what happened on August 10, 2010." (ALJD 57:17-25 (discrediting Castlewood's argument); and 57:23-25 (citing ALJ's iteration of test).) Yet, the ALJ cites no legal authority in support of his articulated "test," which limits the margin of error for threat withdrawal to the same day the threat was allegedly communicated. However, in light of *Harborlite*, it is clear that the NLRB does not apply a 24-hour incubation period to an alleged threat of *future* action, as is at issue here. Indeed, *Harborlite* expressly approved withdrawal of a threat at least six days after it was made. *Harborlite*, 2011 NLRB LEXIS 747, at *5-7 (noting that threat was made on October 8, but not withdrawn until October 14).

Finally, to the extent that the ALJ adopts the General Counsel's and Charging Party's legal theory—that, "once deemed unlawful, a lockout retains its 'taint of illegality until it is terminated and the affected employees are made whole"—that theory is inapplicable. (ALJD 58: 7-17.) Because any alleged threat associated with the Employer's Seniority proposal did not convert the Employer's lawful lockout into an unlawful one, as thoroughly analyzed throughout this brief, the lockout remained untainted.

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time limits on the Union voting on such proposal, and gave the Union ample time and bargaining sessions to clarify any misunderstanding it may have had regarding the Employer's proposal. Furthermore, unlike in *Alden Leeds*, the lockout in this case was already underway when the Seniority proposal was made.

#### d. Castlewood has Complied with the Act at All Times.

The ALJ's legal analysis does not justify a conclusion that the Employer's Seniority proposal was unlawful. The Employer's August 10, 2010 Seniority proposal does not violate Sections 8(a)(1), (3) or (5) of the Act. Therefore, the allegations in paragraphs 9(a)-(b), 10(b), 12 and 13 of the Complaint must be dismissed.

### 2. Castlewood's August 10, 2010 Maintenance of Membership Proposal Does Not Violate the Act.

The ALJ erred in concluding that Castlewood's Maintenance of Membership proposal violated the Act. First, his legal conclusions are not in line with the allegations as stated in the General Counsel's Complaint. Second, maintenance of membership provisions are generally lawful. Third, the ALJ's conclusion that Castlewood's proposal violated the Act is based on a premise which, even if taken as true, does not warrant such a conclusion. Finally, Castlewood's proposal was not unlawfully regressive, but even if it was, it is undisputed that Castlewood continued to bargain about its proposal with the Union, and never implemented the proposal. Therefore, Castlewood's Maintenance of Membership proposal did not violate the Act as alleged in the Complaint.

#### a. The ALJ's Findings Are Not Consistent with the General Counsel's Complaint Allegations.

In the Complaint, the General Counsel alleged that the Employer violated Sections 8(a)(1), (3), and (5) of the Act by introducing its August 10, 2010 Maintenance of Membership proposal specifically in order to deny the locked out employees the right to return to their former positions of employment, and to retaliate against them for their current Union support or discourage them from future Union support. (Compl. ¶¶ 9, 10, 12, and 13.) Furthermore, the General Counsel alleged that the Maintenance of Membership proposal itself was "unlawful." (*Id.* at ¶¶ 12, 13.)

The ALJ's legal conclusions, however, even if true, do not comport with these allegations. The ALJ concluded that the Employer's August 10 proposal was "a significant regression from its earlier April 27 modified agency-shop proposal" (ALJD 59:9-10); that the Respondent's rationale for the proposal was "questionable" *(Id*. at 59:10); and that the proposal was "designed to show the Union who was boss and teach it a lesson for its conduct to date" (*Id.* at 59:20-21). For these reasons, the ALJ generally sustained the General Counsel's allegation that the Employer had bargained in bad faith with the Union regarding the terms of a new contract on and after August 10, 2010. (*Id.* at 63:47-49.)

However, the ALJ did not find, as alleged in the Complaint, that the Maintenance of Membership proposal had anything to do with the locked out workers' return to work, much less that it was "designed" to deny them the ability to return, as the General Counsel alleged. Because the ALJ did not find that all the elements of the General Counsel's *prima facie* case were met, he erred in concluding that Castlewood's Maintenance of Membership proposal violated the Act as alleged.

**b. The ALJ's Findings Do Not Warrant His Conclusion that Castlewood's Maintenance of Membership Proposal Was Unlawful or that it Introduced its Proposal for Unlawful Reasons.**

Contrary to the ALJ's conclusion, Castlewood's Maintenance of Membership proposal was lawful and was introduced for lawful reasons. Maintenance of membership provisions are lawful agreements that require all employees who are union members at the time the contract is executed or at a specified time thereafter, and all employees who later become members, to retain membership as a condition of employment. *Montgomery Ward & Co*., 142 NLRB 650, 653 (1963). However, nonmembers have no duty to join. *Id.* at 653-654. There is

no NLRB law holding that such a proposal is unlawful on its face. Indeed, the only existing law is directly to the contrary.

As Castlewood has always explained, its August 10 proposal was designed and introduced as a maintenance of membership proposal – nothing more and nothing less. (Jt. Ex. 1, Tab 92.) The ALJ apparently understood the proposal as such. (ALJD 58:42-44 ("The August 10 proposal now contractually required only unit employees who were present union members to *maintain membership*, . . .) (emphasis added).) To the extent the Union may have been confused regarding the purpose or effect of this proposal (Tr. 386:2-15 (Ms. Huber)), the Employer clarified the Union's understanding immediately when questions were asked (*Id*. at 386:2-387:2 (Ms. Huber); 1250:12-1251:10 (Mr. Hulteng)).[12] The ALJ's decision does not contradict this evidence.

Moreover, the ALJ's finding that Castlewood introduced its proposal for unlawful reasons is flawed. The ALJ concluded that "Hulteng made it clear" in introducing the August 10 proposal "that things were going to be getting tougher because the Club had simply reevaluated its relationship with the Union." (ALJD 59:17-18.) The ALJ then reasoned that "[s]uch statements reveal the motive of the Respondent was not directed to improving relations among the employees who might view the Union differently [which was, in part, the Employer's asserted justification for the proposal], but rather was designed to show the Union who was boss and teaching it a lesson for its conduct to date." (*Id.* at 59:18-21.)

[12] Ms. Huber asserted on November 9 that she believed the Maintenance of Membership proposal only applied to employees hired after the lockout. The Employer responded by explaining that the proposal had no such limitation in its language, and that it applied equally to all employees covered by the contract. (Tr. 386:2-387:2 (Ms. Huber); 1250:12-1251:10 (Mr. Hulteng).)

However, the ALJ's factual finding and his conclusion are not causally linked. Assuming that Hulteng did indicate that the Employer was taking a tougher stance in negotiations, this does not warrant a conclusion that any subsequently introduced proposals are, therefore, designed for retaliatory or unlawful purposes, as the ALJ's conclusion assumes. Castlewood just as easily could have taken a tougher bargaining position while simultaneously introducing a proposal for lawful reasons—the two concepts logically are not mutually exclusive. Moreover, nothing is patently unreasonable about an employer, having faced a year of protracted negotiations and six months of lockout with no sign of resolution, communicating to a union that it would be taking a tougher position in bargaining. Finally, the ALJ cites no case law suggesting that a tough or changed bargaining stance equates to a retaliatory bargaining position as a matter of law. Thus, the ALJ's conclusion here is unfounded.

**c. Castlewood Did Not Renege or Regress in Introducing its Maintenance of Membership Proposal.**

Although the Complaint did not allege that Castlewood's Maintenance of Membership proposal was regressive, the ALJ nevertheless concluded that it was. (ALJD 59:8-10.)[13] However, the record evidence does not support such a conclusion. And, even if the proposal was less favorable to the Union than previous proposals on the subject, Castlewood was entitled to introduce the proposal in light of changed circumstances since its last proposal.

Absent other evidence of bad faith, regressive contract proposals do not violate the Act. *See National Steel & Shipbuilding Co.*, 324 NLRB 1031, 1042 (1997) (citing *I. Bachall Industries*, 287 NLRB 1257 (1988), enf. denied *sub. nom. Teamsters Local 75 v. NLRB*, 866 F.2d

[13] The Complaint contains no such allegation, and thus, the General Counsel should have been precluded from pursuing such a theory and the ALJ should not have even considered the issue. Whether Castlewood's proposal is regressive is addressed herein only to demonstrate that, even if the General Counsel had articulated a regressive bargaining theory and the ALJ had found it warranted, it would not be supported by the record.

1537 (D.C. Cir. 1989); *Challenge-Cook Bros.*, 288 NLRB 387 (1988); *and Hamady Bros. Food Markets.*, 275 NLRB 1335 (1985)). The totality of circumstances must be examined in order to decide if the particular facts of the case indicate that an employer made an allegedly regressive proposal in order to frustrate bargaining and avoid reaching agreement. *See National Steel,* 324 NLRB at 1042 (citing *NLRB v. American National Insurance Co.*, 343 U.S. 395, 410 (1952) (the meaning of good faith may be derived only from application to the particular facts of a particular case)).

Where the employer offers a less favorable proposal to address circumstances that have changed since its last proposal, rather than to frustrate the bargaining process, the proposal is not unlawful. *See National Steel*, 324 NLRB at 1042-1043. In *National Steel*, the NLRB found that the employer's admittedly less favorable proposals regarding union security did not support a finding of bad faith bargaining. "In particular," the NLRB held, "the changed circumstances of weathering the strike and job actions as well as the new hires questioning traditional union security requirements permitted modification of prior union-security proposals."[14] *Id.* at 1044 (citing *Aero Alloys*, 289 NLRB 497 (1988); *Olin Corp.*, 248 NLRB 1137, 1411 (1980); *Hendrick Mfg. Co.*, 287 NLRB 310, 324 (1987); *Indiana Desk Co.*, 276 NLRB 1429, 1445 (1985); and *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102-103 (1981) (where

[14] Here, of course, the opposition to Union bargaining tactics came not from new hires, but from the bargaining unit itself. The Union had three times directly thwarted the expressed wishes of a majority of the employees to vote on the Employer's Final Proposal. (Jt. Ex. 1, Tabs 40-41, 43; Resp. Ex. 8; Tr. 311:22-312:13; 313:24-314:6; 318:18-319:2; 319:22-320:9; 333:20-334:24 (citing G.C. Ex. 2, Tab P); 513:15-23 (Ms. Huber); 1079:19-23 (referencing G.C. Ex. 13) (Mr. Olson); 1429:13-1431:6; 1431:11-19 (Mr. Murphy).) Furthermore, a significant percentage of the bargaining unit voted to decertify the Union, even after the Employer had locked them out. (Tr. 95:20-22 (Ms. Huber) (61 bargaining unit employees); 939:3-8 (Mr. Olson) (17 opposing votes.) Under these circumstances, it was not unreasonable for the Employer to propose – *i.e.*, to suggest and not to insist – that these same employees should have a choice about mandatory membership.

NLRB held that the critical determination in finding the employer's proposal was not unlawfully regressive was that the employer's asserted justifications for proffering the proposal were "not so illogical as to warrant an inference that by reverting to these proposals Respondent has evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining").

Based on the applicable law and relevant facts, Castlewood's August 10, 2010 Maintenance of Membership proposal has, at all times, been demonstrably lawful. Castlewood did not renege or regress in making this proposal, first, because this was already an open section of the CBA when the proposal was made. (ALJD 58:29-32 (finding that, on April 27, 2010, Castlewood introduced an agency shop proposal in place of the previously tentatively agreed upon Union Shop proposal, and that this proposal would not require employees to join or maintain membership in the Union).) Second, Castlewood's proposal was justified, as there was "apparent employee dissention" in the first several months of 2010, followed by a decertification vote on April 2, 2010. (*Id.* at 58:27-28.) This represented dramatically changed circumstances that justified reassessment of required union membership and dues payment. Third, the General Counsel and Charging Party have never challenged the Employer's April 27, 2010 Agency Shop proposal, which the ALJ concedes may have been justified by changed circumstances. (*Id.* at 58:51-59:1; Jt. Ex. 1, Tab 81.) Thus, there is no dispute that, even though the Parties had reached tentative agreement with respect to this section in the past, the tentative agreement ceased to exist and this section of the CBA was open as of April 27, 2010.

Even if the subject of union security had not been open when Castlewood made its proposal on August 10, 2010, the Employer was entitled to present a different proposal given the changed circumstances. *See National Steel,* 324 NLRB at 1044. Indeed, because of the

established union dissidence prior to the April 27 Agency Shop proposal (ALJD 58:27-28),[15] the length of the lockout and intensity of protests thereafter, (Tr. 242:22-243:1 (Ms. Huber); 771:3-7, 771:24-772:5 (Ms. Norr); 939:3-23, 1683:21-1684:1 (Mr. Olson)), it was clear to the Employer that the new CBA would govern a mixed workforce comprised of staunch Union supporters who appeared on the picket line, strong Union opponents who had voted to decertify the Union, and at least some temporary replacement employees against whom the Union had aggressively targeted its protests, together with potential new hires, (ALJD 58:46-48[16]; Tr. 1188:24-1189:7 (Mr. Clouser).)

The Employer's rationale, which it explained to the Union numerous times, (Tr. 384:19-385:1, 21-387:2 (Ms. Huber); *accord* 1215:24-1217:2; 1218:2-17; 1251:22-1252:19 (Mr. Hulteng)), is entirely logical and does not evince any intent to frustrate bargaining. *See Hickinbotham*, 254 NLRB at 102-103. Nevertheless, the ALJ shunts aside the Employer's changed circumstances argument. The ALJ distinguishes Castlewood's April 27 Agency Shop proposal, which "was made to the Union *after* the decertification election," from the proposal at issue, by reasoning that "no new events relevant to the dissidence question occurred to justify this new regression in the union-security language" after April 27. (ALJD 59:8-13.) This rationale, however, fails to account for the relevant events that did take place between April 27 and August 10, 2010. Specifically, it is undisputed that the Union continued to engage in protests during that time, requiring the temporary replacements to cross picket lines in order to

[15] Noting the "apparent dissention among the unit employees" in the first four months of 2010, which culminated in a decertification election on April 2, 2010 and resulted in a two-thirds victory for the Union.

[16] Noting that, to explain Castlewood's proposal, Hulteng cited the employee dissidence culminating in the NLRB election as well as the prospect of temporary employees becoming unit employees.

get to work. (Tr. 242:22-243:1 (Ms. Huber); 771:3-7, 771:24-772:5 (Ms. Norr); 939:3-23, 1683:21-1684:1 (Mr. Olson).) It is also undisputed that, as a logical matter, the longer the lockout wore on, the less likely it was that all locked out employees would be available to return at the end of the lockout, and the more likely it was that current temporary replacements would need to fill their spaces. Thus, the proposal was designed to apply to a likely mixed workforce, as the Employer had initially explained:1) the existing bargaining unit, whose members were already split regarding their Union support, and 2) any temporary employees hired to fill remaining spaces, "who could be expected to be less than full supporters of the Union." (ALJD 59: 24-25.)

Moreover, rather than credit the Employer's asserted justification for its proposal, the ALJ summarily rejected it as "confusing" and "undermining" of the Union's position. (*Id.* at 59:23-26.) In support of this conclusion, the ALJ only cites *Driftwood Convalescent Hospital*, 312 NLRB 247 (1993), *enfd. Mem.* 67 F.3d 307 (9th Cir. 1995), in which the NLRB found that an employer bargained in bad faith, with the intent of obstructing bargaining, when it withdrew from tentative agreements, withdrew other proposals, substituted regressive proposals, *and provided no explanation for its action to the union or the NLRB.* (ALJD 59:28-35.) This case is inapposite. First, as discussed above, Castlewood's proposal was not regressive under the Act. Second, even if the proposal *was* regressive under the Act, Castlewood still explained to the Union each of its reasons for introducing the Maintenance of Membership proposal—a fact not disputed by the ALJ. (Tr. 384:19-385:1, 21-387:2 (Ms. Huber); *accord* 1215:24-1217:2; 1218:2-17; 1251:22-1252:19 (Mr. Hulteng).) That the ALJ found the Employer's explanation "confusing" or "undermining" of the Union's bargaining position does not warrant a finding that it amounts to *no explanation at all*. *See Driftwood Convalescent Hospital*. Indeed, the

Employer's justification for its proposal was "not so illogical as to warrant an inference that by reverting to these proposals Respondent ha[d] evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining," which is the standard required to validate an employer's changed circumstances argument. *See Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102-103.

**d. Castlewood has Complied with the Act at All Times.**

Castlewood's Maintenance of Membership proposal was entirely lawful. Contrary to the General Counsel's allegations, Castlewood did not "design" this proposal to "deny the locked out workers the right to return to work." Moreover, Castlewood did not design this proposal to discourage the bargaining unit from engaging in Union activities. Those are the allegations of the Complaint, and they find no support in this record or in the ALJ's decision.

Beyond the Complaint allegations, Castlewood also did not impermissibly regress or renege with respect to prior proposals when it introduced the Maintenance of Membership proposal, and it continued to bargain and invite counterproposals regarding the subject. Therefore, Castlewood has not violated Sections 8(a)(1), (3) or (5) of the Act.

**3. Castlewood's August 10, 2010 Subcontracting Proposal Does Not Indicate that Castlewood's Bargaining Position Was Unlawful.**

The ALJ erred in concluding that Castlewood's August 10, 2010 Subcontracting proposal indicated that Castlewood's overall bargaining position was unlawful. (ALJD 60:42-45.) First, the General Counsel did not allege that Castlewood's Subcontracting proposal was unlawful—indeed, the Complaint contains no allegations whatsoever with respect to this proposal. *(Id*. at 4:7-5:3 (discussing all allegations made regarding conduct on or after August 10, 2010, and omitting Castlewood's Subcontracting proposal).) Thus, the ALJ's discussion regarding the proposal's impact on Castlewood's bargaining position is misplaced.

Second, the ALJ even conceded that the Subcontracting proposal does not violate the Act. (ALJD 60:42-43 ("the cited cases do not establish that the subcontracting proposal is a violation").) Where, as here, an employer's subcontracting proposal is inherently lawful, the proposal cannot be evidence of bad-faith bargaining as a matter of law. *See Logemann Bros.*, 298 NLRB 1018, 1021 (1990) (explicitly finding that, where the respondent's management rights proposal was not itself unlawful, the proposal did not indicate bad-faith bargaining.) Thus, the Employer's Subcontracting proposal cannot be a basis for inferring that Castlewood's bargaining position was unlawful.

To the extent the ALJ cites authority in support of a contrary conclusion, such authority is distinguishable from the instant case. ALJD 60:38-42 (citing *A-1 King Size Sandwiches* 265 NLRB 850, 859 (1982), *enfd.* 732 F.2d 872, 877 (11th Cir. 1984) (respondent insisted on management rights clause that would allow it to unilaterally change a host of employee work rules and deny the union notice of such changes); *NLRB v. Johnson Mfg. Co. of Lubbock;* 458 F.2d 453, 455-56 (5th Cir. 1972) (employer insisted on retaining unilateral and final control over all employee working conditions, that the contract prevent the union from bargaining during the term of the agreement over any matters discussed during negotiations, and that the union relinquish its right to bargain over employee grievances or compel arbitration); *E. Me. Med. Ctr. v. NLRB*, 658 F.2d 1, 12 (1st Cir. 1981) (management rights clause would have given employer unilateral control over nearly every aspect of employment relationship, required union to cede nearly all of its representation function as a pre-condition to bargaining, and rendered arbitration an ineffective substitute for the rights thus waived); and *S.C. Baptist Ministries for the Aging, Inc.,* 310 NLRB 156, 157, n.4 (1993) (employer insisted on

implementing sweeping management rights clause which gave employer exclusive right to subcontract unit work and disallowed arbitration).[17]

Unlike these cases, the Employer never insisted on or implemented its Subcontracting proposal. Additionally, the portion of the Employer's proposal at issue only addressed subcontracting—it was not designed to grant the Employer unilateral control over nearly all aspects of the Parties' working relationship. Furthermore, the Employer never proposed to deny the Union notice, bargaining, or arbitration regarding any proposed changes to the employees' working conditions, and the ALJ does not find to the contrary.

For all the foregoing reasons, Respondent's Subcontracting proposal was entirely lawful and is not evidence of bad-faith bargaining. Thus, the ALJ's conclusion that Castlewood's Subcontracting proposal indicated that its overall bargaining position was unlawful was improper.

**4. Castlewood Did Not Condition Reaching Agreement, Nor Did it Condition Further Meetings on the Union's Acceptance of its August 10, 2010 Proposals.**

**a. Castlewood Did Not Condition Reaching a New CBA on Acceptance of its Seniority or Maintenance of Membership Proposals.**

The General Counsel's Complaint alleges that Castlewood conditioned reaching a new CBA on the Union's acceptance of its Seniority and Maintenance of Membership proposals in violation of Sections 8(a)(1), (3), and (5) of the Act. (Compl. ¶¶ 9(c), 10, 12, 13; ALJD 4:43-46.) However, the ALJ failed to address this allegation in its entirety or reach a conclusion as to its viability.

[17] *Cf Logemann Bros.*, *supra,* 298 NLRB at 1020 (in which NLRB *reversed* judge's order that respondent engaged in bad-faith surface bargaining by virtue of its broad management rights proposal), which the ALJ also cites in discussing the Subcontracting proposal.

The record evidence shows that Castlewood never insisted of its Seniority or Maintenance of Membership proposals or conditioned reaching a new CBA on the Union's acceptance of these proposals. (Tr. 1230:17-24; 1246:2-6; 1260:15-19 (Mr. Hulteng); 1729:1-14 (Mr. Olson).)[18] Not a single witness claimed that the Club did so. To the contrary, while Castlewood said it was firm on the *economic* issues, it always said it was willing to bargain about other issues. (Tr. 1219:13-22; 1302:9-25; 1306:12-25; 1307:4-9 (Mr. Olson).) Castlewood also invited counterproposals to its Seniority and Maintenance of Membership proposals. (Tr. 359:21-24; Tr. 372:18-20; Tr. 389:9-13 (Ms. Huber); *accord* 813:8-13; 829:19-21 (Ms. Norr); *and* 1241:19-1242:5 (Mr. Hulteng).) In Mr. Hulteng's October 23, 2010 e-mail to Ms. Huber, he specifically stated that the Employer's Seniority proposal remained a subject over which the Parties needed to bargain, and that the Employer would entertain counterproposals from the Union. (Jt. Ex. 1, Tabs 101, 103, 106, 107; *see also* Tr. 530:21-531:6 (Ms. Huber); 817:14-17; 818:21-819:1; 877:19-22 (Ms. Norr).) Indeed, once Ms. Huber finally presented a proposal to the Employer on November 9, 2010 – the Union's first comprehensive counterproposal since the lockout began – Mr. Hulteng told her the Employer could now stop berating her for failing to provide proposals. (Tr. 393:12-16; 385:9-20; 393:12-16 (Ms. Huber); 862:22-863:11 (Ms. Norr); 1249:11-16 (Mr. Hulteng).) Furthermore, the Parties continued to bargain, and even reached tentative agreement on a number of issues, after the August 10 proposals were made. (Tr. 393:17-25 (Ms. Huber); 1260:20-1261:4; 1263:14-18 (Mr. Hulteng).) By offering counterproposals, the Union effectively conceded that the Employer had not insisted on its Seniority and Maintenance of Membership proposals. (Tr. 208:13-19) (Ms. Huber states she

[18] At no time did either of the Union's bargaining representatives, Ms. Huber or Ms. Norr, testify that Castlewood conditioned reaching a new agreement on acceptance of its Seniority or Maintenance of Membership proposals.

does not *know* why the Union's November 9 "Seniority" counter-proposal regarding training and disciplinary action did not satisfy the Employer, but "*presume*[s]" the Employer wanted the Union's counterproposal to accept the Employer's proposal) (emphasis supplied).) Finally, Castlewood never implemented any of its proposals. If the Employer truly had insisted that the Union accept its August 10 proposals, it stands to reason that it ultimately would have implemented its Revised Final Offer.[19]

The ALJ failed to render a legal conclusion regarding this allegation, and the above record evidence warrants a finding that Castlewood did not condition reaching agreement on acceptance of its Seniority or Maintenance of Membership proposals.

**b. Castlewood Did Not Delay Bargaining or Condition More Frequent Meetings on the Union's Acceptance of its Seniority or Maintenance of Membership Proposals.**

The ALJ erroneously concluded that the Employer delayed bargaining and conditioned more frequent meetings on the Union's acceptance of its Seniority or Maintenance of Membership proposals, in violation of Sections 8(a)(1), (3), and (5) of the Act. (Compl. ¶¶ 9(d), 10, 12, 13; ALJD 60:48-62:18.) The ALJ largely bases his conclusion on the notion that the Employer's post-August 10, 2010 conduct, which he found unlawful, should be examined in an entirely separate light from the Parties' nearly two-and-a-half year bargaining history. (*Id.* at 61:43-62:18.) The ALJ's conclusion and rationale, however, are flawed. First, the standard for

[19] The fact that the Employer labeled its successive proposals as "final," (Tr. 491:3-5 (Ms. Huber)), does not create an implication that the Employer would not move any further. Ms. Huber admitted at trial that she did not believe the Employer's Seniority proposal was the Employer's "last and final" offer as of her October 25, 2010 NLRB affidavit. (Tr. 378:1-13; 527:1-5 (Ms. Huber).) Further, the Employer only called the proposals "revised final" proposals because it was working off of a draft of its December 23, 2009 "final" proposals. (Tr. 1302:3-8; 1308:17-20 (Mr. Hulteng).) Moreover, the Union never asked any questions about the Employer's title or whether it would insist on its proposals, and continued to bargain with the Employer. And, above all, as discussed in detail above, the Employer repeatedly stated it would bargain and would entertain counterproposals.

determining the lawfulness of bargaining conduct requires examination of the *totality* of the circumstances—not examination of only those circumstances discussed in the General Counsel's Complaint. Second, Castlewood never conditioned meeting frequency on the Union's acceptance of its proposals, and has always met at reasonable times, as required by the Act.

**(1) The Employer Has Not Failed to Meet At Reasonable Times to Discuss its August 10, 2010 Proposals.**

As of the hearing in this matter, the Parties had met approximately 30 times in the course of negotiating their successor agreement. (Jt. Ex. 3; Tr. 104:17-18 (Ms. Huber).) And, contrary to any allegations or implications in the Complaint, Castlewood has met at reasonable times as required by the Act. Section 8(d) of the Act requires an employer and union "to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement." 29 U.S.C. § 158(d). Whether an employer has violated the "meet at reasonable times" requirement is determined based on "the totality of the [employer]'s conduct both at the bargaining table and away from it." *Insulating Fabricators Inc., Southern Division,* 144 NLRB 1325, 1326 (1963), *enforced*, *NLRB v. Insulating Fabricators*, *Inc.*, *Southern Div.*, 338 F.2d 1002 (4th Cir. 1964); *see also Honaker*, 147 NLRB 1184, 1194 n.10 (1964); *Exchange Parts Company*, 139 NLRB 710, 711-712 (1962); *enforced*, *NLRB v. Exchange Parts Co.*, 339 F.2d 829 (5th Cir. 1965).

The NLRB determines whether an Employer has met at reasonable times by examining: (1) the number and duration of meetings held during the course of negotiations, *Honaker*, 147 NLRB at 1185; (2) whether the employer explained or provided any apparent basis for its refusal of more frequent meetings, *Garden Ridge Management, Inc.*, 180 LRRM 1030, 1032 (2006); (3) whether the employer's overall "approach to bargaining was cooperative," *Boaz Carpet Yarns*, 122 LRRM 1139, 1143 (1986); and (4) whether the employer

engaged in delaying tactics or ignored the union's requests to meet altogether. *Pavilions at Forrestal*, 185 LRRM 1129, 1132 (2008); *abrogated on other grounds*, *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2652 (Jun. 17, 2010); *aff'd in relevant part*, *Atrium at Princeton*, *LLC*, 2010 NLRB LEXIS 427 (Oct. 22, 2010).

The NLRB has found an employer met at reasonable times in cases involving even fewer or less frequent meetings than the instant case. *See W.B. Mason Company*, Inc., 2004 NLRB LEXIS 674 *20-21 (2004) (eight meetings over eight months sufficient where union was equally responsible for slow pace of bargaining and failed to provide proposals on key issues despite employer's repeated requests); *Boaz Carpet Yarns*, 122 LRRM at 1142-1143 (thirteen meetings over twelve-month period sufficient where employer cooperatively provided timely counterproposals and requested information); *and Honaker*, 147 NLRB at 1186 (despite employer's tardy counter-proposals, eleven meetings over five months sufficient where negotiations lasted 3.5-4 hours, and union did not protest employer's requests to adjourn such meetings).

Like the employers in these cases, Castlewood met at reasonable times. In all, the Parties met twenty-two times over the relevant fourteen-month period ending in November, 2010. (Jt. Ex. 3.) As with the above cases, Castlewood maintained a "cooperative" approach to bargaining by consistently responding to information requests, providing timely proposals, and answering the Union's meeting requests. Furthermore, much of the slow pace of negotiations and long gaps between meetings was attributable to the Union, as discussed further below. Under these circumstances, Castlewood has bargained in good faith and met at reasonable times as required by the Act.

### (2) Castlewood Lawfully Acted Based on its Experience with the Union Throughout the Course of Bargaining.

To the extent that Castlewood declined to meet with the Union as often as the Union requested, Castlewood was reacting to its experience with the Union's tactical delays throughout 2009-2010. For example, the Union delayed bargaining for three months at the outset of negotiations. (Jt. Ex. 1, Tabs 1, 3, 11; Tr. 265:1-266:4 (Ms. Huber); 1411:1-22; 1412:19-22 (Mr. Murphy); 1691:23-1692:15 (Mr. Olson).) In addition, the Union habitually initiated excessively long caucuses during bargaining sessions, and came to meetings unprepared. (Tr. 107:1-7 (Ms. Huber); 1315:6-8; 1397:2-14 (Mr. Hulteng); 1413:6-1414:1 (Mr. Murphy); 1591:15-16 (Mr. Freitas); 1694:12-17; 1711:11-1712:25 (Mr. Olson).) Moreover, the Union regularly failed to provide proposals, despite the Employer's repeated requests for it to do so. (Tr. 275:20-276:4 (Ms. Huber); 1136:22-1137:18 (Mr. Hulteng); 1441:12-18 (Mr. Murphy); 1701:13-1702:4; 1707:11-1708:5 (Mr. Olson).) Not even the Employer's final proposals in December 2009 or the threat of lockout motivated the Union to generate new proposals of its own. Indeed, the Union's behavior was so dilatory that the Employer believed the Union was deliberately trying to delay negotiations to keep in place the health plan from the expired CBA. (Tr. 98:7-11 (Ms. Huber); 1697:24-1699:18 (Mr. Olson).)[20]

Despite many months of the lockout, the Union failed to provide any proposals at all. The Union offered no proposals at the Parties' July 14 meeting (Tr. 355:11-356:16 (Ms. Huber); *accord* 1204:4-7 (Mr. Hulteng)), at the August 10 meeting (Tr. 822:25-823:3 (Ms. Norr)), or at the September 13 meeting (Tr. 371:21-23 (Ms. Huber)). Yet, despite its refusal to offer anything new, the Union suddenly demanded more frequent meetings in September. (Jt. Ex.

[20] Even Steve Freitas, a member of the Union's own bargaining committee, confirmed at trial that "the Union's position at the time was let's slow it down and let's drag this on as long as we can.'" (Tr. 1590:1-17; 1591:15-16.)

1, Tab 96; Tr. 842:25-843:7 (Ms. Norr).) In response, the Employer expressed frustration with the Union for having had the Employer's August 10, 2010 proposals for a month, and yet forcing the Parties to spend all day bargaining with "no real proposals being exchanged." (Tr. 371:21-372:6 (Ms. Huber); 843:8-10 (Ms. Norr).) The Employer said it wanted some sense that the Parties would get somewhere in bargaining. (Tr. 371:21-372:6 (Ms. Huber); 843:12-14 (Ms. Norr).) Notably, the Employer stated that it "didn't want to cut short the opportunity for dialogue, we just didn't want to waste time." (Tr. 372:7-9 (Ms. Huber); 843:15-18 (Ms. Norr).)

In response to the Union's subsequent requests for more frequent meetings (Jt. Ex. 1, Tabs 96, 100, 102, 104; Tr. 188:2-189:9 (Ms. Huber)), the Employer offered to meet on November 8 and 9. (Jt. Ex. 1, Tab. 99; Tr.1246:11-1247:3 (Mr. Hulteng).) The Employer stated it was unwilling to meet just for the sake of meeting, but that it would be willing to schedule more frequent meetings if the Union were to show substantial movement. (Jt. Ex. 1, Tabs 101, 103, 105, 106; Tr. 250:7-22 (Ms. Huber); *accord* 1236:6-14; 1246:11-1247:3 (Mr. Hulteng).) However, the Employer never indicated that such movement was required specifically with respect to the Employer's Maintenance of Membership or Seniority proposals, (Tr. 1260:11-14 (Mr. Hulteng); 356:21-357:19 (Ms. Huber); 812:6-814:9 (Ms. Norr).), and there is no evidence in the record indicating otherwise.

**(3) The Employer's Position that it Would Meet More Frequently Only if the Union Made Proposals or Showed Meaningful Movement was Legitimate.**

As discussed above, Castlewood did not condition meeting more frequently on the Union's acceptance of the Employer's Seniority or Maintenance of Membership proposals. Rather, Castlewood conditioned meeting more frequently on the Union's willingness to make meaningful movement on economic issues in bargaining, as well as its willingness to work toward an agreement. This position was entirely lawful.

Indeed, the NLRB has upheld nearly identical bargaining conduct. In *National Medical Associates,* 318 NLRB 1020 (1995), the employer refused to schedule additional bargaining dates with the union, as it saw "no sense in meeting for meeting's sake unless we can expect some real, significant movement toward agreement on your part," *Id.* at 1024, and was "not hereby refusing to meet, but merely asking for some meaningful indication of a willingness to compromise rather than continuing the current fruitless banter," *Id.* at 1024-25. The NLRB affirmed the administrative law judge's findings that the employer did not violate the Labor Management Relations Act, *Id.* at 1031, because: (1) its refusal to meet did not place a condition on continued contract negotiations, but merely attempted to pressure the union to make some meaningful concessions, *Id.* at 1024-25; (2) the employer still suggested meeting dates in response to the union's request for further bargaining, *Id.* at 1025; and (3) the union never informed the employer of its current position on outstanding issues. *Id*.

The instant case is indistinguishable from *National Medical Associates*. Castlewood always agreed to schedule meetings with the Union (Jt. Ex. 1, Tabs 99, 103, 105, 106) – the issue here was whether the Union was entitled to meet <u>even</u> <u>more</u> <u>frequently</u>. Castlewood did not schedule more frequent meetings with the Union between September and November because it wanted to pressure the Union to make meaningful concessions. (*Id.*) It did so because the Union undisputedly had not provided a comprehensive counterproposal since before the Employer's lockout – *i.e.*, the Union had not informed the Employer about its current position on certain outstanding issues for many months. (Tr. 862:22-863:11 (Ms. Norr).) Thus, it is clear that Castlewood's bargaining position regarding meeting frequency was entirely legitimate.

### (4) The ALJ Erred in Concluding that Castlewood Failed to Meet at Reasonable Times.

The ALJ concedes that Castlewood's unwillingness to meet more frequently with the Union, given the Union's repeated delays throughout bargaining, "is not incorrect in appropriate circumstances." (ALJD 61:25-33.) Indeed, the ALJ correctly notes that the "sufficiency of a party's willingness to meet and bargain is very context and setting specific, and requires consideration and analysis of *all the relevant circumstances at all relevant times.*" (*Id.* at 61:33-35) (emphasis added.)

Troublingly, however, the ALJ fails to apply this standard, as he does not take into account *all* relevant circumstances at *all* relevant times here. Further, he cites no legal authority permitting this selective method of analysis. Rather, the crux of the ALJ's conclusion that Castlewood failed to meet at reasonable times is that the bargaining on and after August 10 "constitute[d] a largely new context" such that all bargaining-related events prior to that date should not be considered. (ALJD 61:38-62:18 "The Respondent's excuse is based on a history that had been rendered inapplicable by its new suite of proposals.") Thus, the ALJ specifically excludes all of the Parties' pre-August 2010 bargaining history from consideration and focuses solely on their bargaining relationship after August 2010. (*Id.* at 61:38-62:18.) The resulting analysis excludes nearly a year of the Union's dilatory tactics and unpreparedness, and focuses only on the two months during which the Union professed to want more meetings. Moreover, although the ALJ was unwilling to consider the Parties' pre-August-10 bargaining history for the purpose of evaluating Castlewood's position on frequency of meetings, he did the opposite when criticizing Castlewood. Specifically, the ALJ chose to selectively focus on a few pre-August-10 incidents of alleged *employer* misconduct to support his conclusions about bad faith bargaining—including Castlewood's access and distribution rules, the various 8(a)(1)

allegations, and the kitchen cleaning subcontracting allegation—almost none of which even remotely involve or are related to the Parties' bargaining history. (*Id.* at 63:31-37)

The ALJ's selective treatment of evidence is clearly at odds with the NLRB's well-established "totality of circumstances" doctrine. Furthermore, because access and distribution rules, the alleged 8(a)(1) violations, and kitchen subcontracting are largely unrelated to CBA negotiations, it was improper for the ALJ to rely on those issues in evaluating the Club's bargaining conduct, while at the same time ignoring the Union's bargaining conduct prior to August 10, 2010. Indeed, he cites no legal authority empowering him to decide a question of good-faith bargaining based on much less than the totality of circumstances, as he does here. Because Castlewood met at reasonable times, and because the ALJ's contrary legal conclusion is improper, Castlewood's bargaining frequency did not violate the Act.

**c. Because Castlewood Did Not Condition Further Meetings or Reaching Contract Agreement on the Union's Acceptance of its August 10, 2010 Proposals, Castlewood Did Not Engage in Such Alleged Activity for Unlawful Purposes.**

In addition to alleging that the Employer conditioned further meetings or reaching agreement on the Union's acceptance of its August 10, 2010 proposals, the General Counsel further alleged that Castlewood did so to prevent locked out employees from returning to work and to retaliate against them for or prevent them from supporting the Union. (Compl. ¶¶ 9(c)-(d), 10.) However, the ALJ did not find that Castlewood conditioned reaching contract agreement on the Union's acceptance of such proposals *at all*, let alone for the alleged unlawful purposes. Additionally, as detailed above, Castlewood did not condition further meetings or reaching contract agreement on the Union's acceptance of its August 10, 2010 proposals. Therefore, Castlewood could not have engaged in such alleged activity for the unlawful purposes alleged.

#### d. Castlewood has Complied with the Act at All Times.

Contrary to the General Counsel's allegations, Castlewood never conditioned meeting or ratifying a CBA on the Union's acceptance of the Employer's August 10, 2010 proposals. Therefore, Castlewood has not violated Sections 8(a)(1), (3) or (5) of the Act. Rather, Castlewood has complied with the Act at all times.

### D. Even if Castlewood's Conduct Regarding its Seniority and Maintenance of Membership Proposals Was Unlawful, Such Conduct Did Not Prevent the Parties from Reaching Agreement, nor did it Transform the Employer's Undisputedly Lawful Lockout into an Unlawful Lockout.

The ALJ incorrectly concluded that Castlewood's bargaining-related conduct rendered its lockout unlawful, in violation of Sections 8(a)(1), (3) and (5) of the Act. As discussed above, Castlewood did not engage in any improper bargaining conduct. However, even if its bargaining conduct was unlawful, such misconduct did not render the lockout unlawful because Castlewood displayed no anti-union animus, its conduct did not impact employee rights, and the issue of Health and Welfare, not the Employer's Maintenance of Membership or Seniority proposals, prevented the Parties from reaching agreement and ending the lockout. Furthermore, to the extent the ALJ considered non-bargaining violations (such as those relating to Castlewood's no-access or no-distribution rules, or 8(a)(1) violations regarding comments made by Club managerial personnel) in determining that Castlewood acted with animus or that the lockout was unlawful, his conclusions as to these issues were made in error.

#### 1. The Legal Standard

"Employer lockouts in support of legitimate bargaining demands (*i.e.*, 'offensive lockouts') are lawful." *Boehringer Ingelheim Vetmedica Inc.* 182 LRRM 1386, 1388 (2007), citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310-313 (1965). However, under certain circumstances, a lawful lockout can become unlawful. Whether an employer's conduct

violates Sections 8(a)(1) and 8(a)(3) typically turns on whether the conduct was motivated by anti-union animus. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (setting forth the standard for finding 8(a)(3) violations); and *NLRB v. Brown Food Store*, 380 U.S. 278, 286-287 (1965) (NLRB applies same analysis for 8(a)(1) and 8(a)(3) violations). However, even absent anti-union animus, some conduct may still violate the Act. Such conduct falls into two categories – conduct that is "inherently destructive of employee interests," and conduct that has a "comparatively slight" effect on employee rights. *Great Dane Trailers*, 388 U.S. at 33-34.

**2. The ALJ Erred in Concluding that Castlewood's August 10, 2010 Proposals Were Motivated by Anti-Union Animus.**

**a. The Employer's Proposals During Lockout Were Not Motivated by Anti-Union Animus.**

To hold that Castlewood acted with anti-union animus, the ALJ needed to find the following: 1) that employees were engaged in a protected activity; 2) that the Employer was aware of that activity; and 3) that the activity was a substantial or motivating reason for the Employer's action. *Medeco Sec. Locks Inc. v. NLRB*, 142 F.3d 733, 741-742 (4th Cir. 1998) (analyzing anti-union animus with regard to a Section 8(a)(3) allegation); *and NLRB v. Galicks, Inc*., 192 LRRM 3027, 3031 (6th Cir. 2012) (using same standard for 8(a)(1) allegation). If the ALJ found that the General Counsel established a *prima facie* case of anti-union animus, the burden would then shift to the Employer to prove by a preponderance of the evidence that it would have taken the same action even absent the protected conduct. *Id.* (citing *FiveCAP, Inc. v. NLRB,* 294 F.3d 768, 778 (6th Cir. 2002)).

To the extent the ALJ concluded that Castlewood's bargaining-related conduct was motivated by any anti-union animus, such conclusion was in error, as neither the General

Counsel nor the Union presented any legitimate evidence that it was.[21] As discussed above, Castlewood had numerous lawful reasons for presenting its Seniority proposal, none of which involved the unit employees' protected activity. (*See,* Respondent's Post-Hearing Brief, Sections III(A)(2)(a)-(b).) Furthermore, it is unclear how a proposal to determine potential future layoff decisions based on performance-related factors in addition to seniority could be construed to show anti-union animus. The Employer's proposal on layoffs bears no relation to Union membership or activities. Rather, the Employer proposed objective factors that directly related to job performance – including seniority. There is no evidence that a single Union supporter would ever have been affected adversely by this proposal, even if the Union had accepted it. Indeed, by giving weight to seniority, the proposal provided locked out employees with a built-in advantage over any retained replacement employees or new employees who could be subject to layoff. It is also significant that the Employer repeatedly justified its Seniority proposal by citing to its experience during the lockout. It is undisputed that many Club members commented on improved customer service from the replacement employees (Tr. 457:16-18 (Ms. Huber); *accord* 1005:16-21; 1138:22-1139:5 (Mr. Clouser); 1398:20-1399:5 (Mr. Hulteng); and 1770:1-15 (Mr.

[21] At no time did either of the Union's bargaining representatives, Ms. Huber or Ms. Norr, testify that Castlewood's bargaining-related conduct was motivated by anti-union animus. To the extent the General Counsel alleged that Castlewood's lawful campaigning during the decertification effort demonstrates animus, the record evidence proves otherwise. Indeed, all witnesses concurred that the Employer recommended that employees support decertification for the principal reason that it would bring an end to the lockout. (Tr. 397:4-13 (Ms. Huber); 1172:21-1173:25, 1196:21-1197:4 (Mr. Clouser); and 1719:20-1720:3 (Mr. Olson).) The Club had the right under Section 8(c) to express its opinions, and nothing the Employer said in the campaign served to undermine or disparage the Union. Moreover, once the employees rejected decertification, the Employer resumed bargaining (even before objections filed by the employee petitioners were resolved; the Employer did not participate in the objections hearing). *See also* Section II(D)(2)(b), *infra*, for discussion regarding why the Charging Party's evidence of Club member opinion was improperly considered by the ALJ.)

Olson)), and the Employer had a legitimate business rationale to maintain the highest level of service for its members. (Tr. 1142:10-20 (Mr. Clouser).)

Likewise, the Employer's Maintenance of Membership proposal does not display anti-union animus, as the proposal would not-- indeed could not -- interfere with or discriminate against any employee's protected activities. To the contrary, the Employer offered ample objective reasons why circumstances warranted providing employees with at least a degree of choice on Union membership. (*See,* Respondent's Post-Hearing Brief, Section III(A)(1)(b).) Those circumstances include: 1) the Union's repeated refusal to allow employees to vote on the Employer's final offer despite their expressed desire to do so; 2) the deep division within the Union's own bargaining committee over its bargaining strategy; 3) significant opposition to the Union among many locked out employees (as demonstrated by the decertification effort); and 4) the certainty – as acknowledged by both Parties – that some of the future bargaining unit would consist of temporary replacements hired during the lockout, and who were the target of Union demonstrations and picketing. (*Id.*) By proposing Maintenance of Membership, the Employer suggested that employees who no longer wished to pay Union dues be given one window of opportunity to opt out of dues payment. (*Id.*) The Union had offered no counterproposals or other suggestions for how to realistically accommodate the obvious split in sentiment among the employees it would represent under a new contract.

As a result, there is simply no evidentiary basis upon which a finding of anti-union animus can be made. Certainly, throughout the lockout, the bargaining unit employees were engaging in the protected activity of protesting, and the Employer knew of such activity. However, there is no properly considered evidence that those activities were a substantial or motivating factor in the Employer's bargaining position as of August 10, 2010. Moreover, even

if the General Counsel could have made a *prima facie* case of animus, Castlewood has repeatedly offered multiple justifications for its bargaining position that are unrelated to the Union's protected activity—indicating that Castlewood would have taken the same stance in bargaining even absent the Union's protected activity. *See Medeco*, *supra*, 142 F.3d at 741-42; *Galicks Inc.*, *supra*, 192 LRRM at 303.

The ALJ's contrary decision does not change this result. To the extent the ALJ held that Castlewood's lockout was motivated by anti-union animus, his only discussion in support of such decision was a conclusory statement that the lockout from August 10 onward was unlawful "by reason of the Respondent's bad-faith bargaining, its inherently destructive conduct, and its anti-union animus," combined. (ALJD 64:19-21.) However, the Judge did not examine the factors or engage in the burden-shifting analysis set forth in *Medeco* and *Galicks*, *supra*, for establishing that an employer acted with anti-union animus. Merely asserting that Castlewood acted with anti-union animus, without engaging in any analysis of the requisite factors, is insufficient.

**b. Evidence of Castlewood's Members' Anti-Union Views Is Irrelevant and Does Not Demonstrate that Castlewood Acted with Anti-Union Animus or Interfered with Bargaining Unit Employees' Rights.**

The ALJ erred in admitting certain evidence of Club member opinion regarding the lockout, and further erred to the extent he determined that evidence of a few Club members' negative feelings toward the Union somehow imputed anti-Union animus to Castlewood. At trial, the Charging Party attempted to introduce into evidence e-mails and other personal statements of opinion by Club members, apparently to suggest some kind of general animus among the membership. (ALJD 6:21-26; *see also* C.P. Exs. 2, 3, 4, 8, 13 (formerly rejected exhibits).) The ALJ properly rejected this evidence at trial as irrelevant, as it could not be shown

to represent views held by the Employer. (Tr. 967:10-983:12; 1054:6-1057:18; 1760:7-1764:18.) Yet, in his Decision, the ALJ reconsidered his rejection of such evidence and received the exhibits into the record, reasoning that the Club made such evidence relevant through testimony that the wishes of the membership were a "cause in part" for the Club's bargaining approach as of August 10, 2010. (ALJD 6:31-7:5.) However, Castlewood only relied on Club member opinion in formulating its Seniority proposal to the extent such opinion involved support of the continued lockout and the level of service provided by the temporary replacement employees as compared with the locked out employees.[22] Thus, to the extent the Charging Party's evidence expressed member opinions on any other subject, such evidence should again be rejected as irrelevant. Castlewood did not rely on such evidence in formulating its proposals, and there is no evidence that it did. Thus, to the extent the ALJ found that evidence of a few Club members' anti-union views indicated that Castlewood acted with anti-union animus or interfered with its employees' rights in violation of the Act, such finding was in error.

**(1) Castlewood Only Relied On Member Opinion Regarding Continued Support of the Lawful Lockout and Quality of Service In Formulating Its Seniority Proposal.**

In formulating its bargaining position, Castlewood only considered the wishes of its members to the extent consistent with law. (*See* note 24, *supra*.) Castlewood did not consider any member views urging unlawful activity or borne out of anti-union animus, and such views,

[22] Castlewood did not present evidence at trial regarding which of its members had reported satisfaction with the service provided by replacement workers. Castlewood's decision not to present such evidence was fully justified by the fact that the Charging Party's exhibits regarding Club members' views and its related argument had been rejected by the ALJ as irrelevant. Castlewood thus was prejudiced when the ALJ reversed his evidentiary ruling in his Decision. In any event, neither the General Counsel nor the Charging Party were able to cite any evidence on brief that Castlewood relied on any anti-union views of its members in formulating its bargaining position. Indeed, no evidence exists on this point. The ALJ cited to none. His conclusions therefore lack substantial evidence to support them.

therefore, may not be imputed to the Club. By analogy, cases discussing union responsibility for opinions expressed by members illustrate why the views of a few country club members cannot be imputed to the Club. Under the Act, a "[u]nion's responsibility for acts by its officers and members is controlled by common-law agency principles." *Did Bldg. Servs., Inc.*, 915 F.2d 490, 496-97 (9th Cir. 1990) (racial and religious slurs of employee authorized to obtain card signatures in course of union election did not impute to union where his participation in union campaign was limited and union "never condoned" the employee's "abhorrent comments"). Thus, the conduct of members, in this context "will only be attributed to a union where the union has instigated, authorized, solicited, ratified, condoned or adopted the conduct." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 809 (6th Cir. 1989) (internal quotations omitted). "Evidence which merely shows that an employee spoke and acted in support of unionization on his own initiative does not demonstrate agency status." *Id.* Finally, "[t]he agency relationship, . . . must be established with regard to the specific conduct that is alleged to be unlawful." *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012) ("name-calling, profanity and other generally reprehensible behavior" of employees in course of election, who were union agents for limited purpose of soliciting authorization cards, did not impute to union where such conduct was unrelated to the narrow topic of card solicitation and thus outside scope of agency relationship).

The above principles make clear that any Club member opinions expressing anti-union viewpoints cannot be legally attributed to Castlewood. When a country club has 800 members, it can be expected that there will be divergent opinions among the membership. The ALJ seizes on a few stated opinions from members who had no connection to the negotiations, and uses them as his principal evidence of anti-union animus. These opinions cannot legally be imputed to Castlewood. *See Kux*, 890 F.2d at 809.

To the extent Castlewood solicited its members' opinions regarding the lockout, its solicitation was limited to requesting that members "[s]imply indicate that we should stay the course or that you disagree with our stance." (C.P. Ex. 10.) In all, Castlewood received dozens of member comments that expressed satisfaction with the continued lockout, the Club's bargaining position, and/or the Club's temporary employees. (*See* C.P. Exs. 5 and 6 (124 comments).) Yet, only a handful of member comments – the vast minority of comments received – expressed any anti-union sentiment at all. (*See* C.P. Exs. 5 and 6 (19 comments).) Moreover, any anti-union opinions were far outside the scope of the solicited response. Thus, Castlewood did not instigate, authorize, or solicit anti-union views. *See Kux*, 890 F.2d at 809. Further, neither the record evidence nor the ALJ's Decision indicate that Castlewood relied on the small minority of members who expressed these anti-union views in formulating its bargaining position. Thus, Castlewood did not ratify, condone, or adopt the anti-union member views. *See Kux*, 890 F.2d at 809. In short, no relationship can be established between Castlewood's conduct and the specific anti-union member opinions, as is required to impute such opinions to Castlewood. *See Downtown Bid Servs.*, 682 F.3d 109.

**(2) The Charging Party's Cases Imputing Client Opinion to Employers Are Distinguishable.**

To the extent the ALJ relied on the cases cited by the Charging Party in admitting or considering evidence of Club members' anti-union opinions, these cases do not support the ALJ's findings. *See Ref-Chem Co.*, 153 NLRB 488, 492-93 (1965) (contractor unlawfully discharged employees at plant-owner's request where: 1) contractor knew owner's request was based on discharged employees' solicitation of union support; and 2) contractor's excuse for the termination—that discharge was for violating no-solicitation rule—was pretext where rule was not necessarily valid and was discriminatorily applied, in any event); *Swain & Morris*

*Construction Co.*, 168 NLRB 1064, 1065-66 (1967), *enfd.* 431 F.2d 861 (9th Cir. 1970) (even if employer discharged employees who refused to cross picket line *at client's request*, discharge still unlawful because it would be direct result of client's pressure to perform an illegal act); *Pacific Intermountain Express*, 250 NLRB 1451, 1451 n.2, 1461 (1980), *enfd.* 672 F.2d 893 (D.C. Cir. 1981) (employer's compliance with clients' threats to withhold business unless unionized employee was removed was unlawful, not because it demonstrated *employer's* anti-union motive, but because it could discourage employee's future union activity by causing him to believe that continued union activities could result in removal of additional accounts and, eventually, his job); *Fid. Maint. & Constr. Co., Inc.*, 173 NLRB 1032, 1038 (1968) (Fidelity's layoff of unionized employee based on joint employer's directive to lay off 35 employees was *not* unlawful because no evidence indicated that layoff was discriminatorily motivated or that Fidelity (which had no reason to believe joint employer was discriminatorily motivated), did anything other than carry out joint employer's directive, as it was contractually bound to do).

These cases simply do not render Castlewood's consideration of its member opinions unlawful. Castlewood's conduct is totally distinguishable from that of the employer in *Ref-Chem*, which discriminatorily enforced a potentially invalid no-solicitation rule. Unlike in *Ref-Chem*, Castlewood did not apply its bargaining position discriminatorily based on Union activity – its Seniority proposal applied to all bargaining unit employees with equal force, and even provided an advantage to locked out employees over the more recently hired temporary employees by maintaining seniority as a primary consideration in the event of future layoffs. Further, the employer in *Ref-Chem* made its decision to discharge employees entirely on the request of one person, – a request it knew to be based on anti-union animus. *Ref-Chem Co.,* 153 NLRB at 492. In contrast, to the extent Castlewood's bargaining position was informed by its

members' wishes, the Club was relying on a vast body of different viewpoints, the majority of which did not express anti-union sentiment.

Moreover, unlike the employer in *Swain & Morris*, who took the patently unlawful action urged by its client, Castlewood has taken no patently unlawful action, despite the few outlier members who may have harbored ill-will toward the Union. Rather, Castlewood simply introduced inherently lawful proposals which were formulated with consideration only of its members' opinions regarding comparative quality of service by the bargaining unit employees and temporary replacements, and whether the Club should continue the lockout.

Furthermore, unlike the employer in *Pacific Intermountain Express*, who took away an employee's work because he was unionized, Castlewood never even suggested that it would make any work unavailable to locked out employees upon their return to work, nor did it take any action that could reasonably be said to interfere with the employees' free exercise of rights under the Act. Castlewood's August 10 proposals allowed bargaining unit employees to become Union members if they had wished to do so and, again, provided an advantage to them in the event of layoff by maintaining seniority as a key factor for consideration. Castlewood's actions in no way discouraged future union activity.

The final case cited by the Union, *Fidelity Maintenance*, actually supports the Club's position. As in *Fidelity Maintenance*, Castlewood's August 10 proposals and continued lockout were not unlawful because no evidence indicates that the Club's conduct was discriminatorily motivated, or that the Club did anything other than carry out the lawful wishes of its members, as it is bound to do. *Fid. Maint.*, 173 NLRB at 1038.

#### (3) Evidence of Club Member Opinion Evidencing Anti-Union Viewpoints Must be Rejected and Must Not Be Imputed To Castlewood.

In short, the fact that Castlewood considered its members' opinions on service, and relied on their overall support of the lockout, does not mean Castlewood acted with or adopted any anti-union animus. This question turns on the very narrow issue of whether the Employer's lawful bargaining position was made unlawful because it was informed by the opinions of its members, a narrow minority of whom may have been motivated by anti-union animus. Given the case law and the record evidence, the answer must be no. Indeed, holding otherwise would lead to an illogical result. As Castlewood successfully urged at trial in opposition to the Charging Party's introduction of this evidence, imputing anti-union animus to Castlewood here is akin to holding a corporation liable for its otherwise lawful actions when any of its shareholders has urged that such actions be taken for an improper or unlawful purpose. (Tr. 415:14-416:12; 1024:8-1025:4 (Hulteng).) It is also akin to holding a Union liable for unlawful statements made internally by a few of some 800 members. There is simply no case law to support the unwarranted leap taken by the ALJ here.

Castlewood did not act with animus or interfere with employees' rights by considering the lawful opinions of its members when formulating its bargaining position, and there is no evidence that the Club considered the minority of members who expressed anti-union views. Thus, the ALJ's admission and consideration of evidence of anti-union Club member opinion was error.

### 3. Castlewood's Bargaining-Related Conduct During Lockout Has Not Affected Union Activity.

Absent specific evidence of anti-union motivation, an employer's conduct can be found to violate Sections 8(a)(1) or (3) of the Act if it is either "inherently destructive" or

"comparatively slight," "depending on the potential effect of the employer's conduct on union activity." *Int'l Paper Co.*, 115 F.3d 1045, 1048 (D.C. Cir. 1997). On the one hand, if the conduct at issue is considered "inherently destructive" of important employee rights, the NLRB can find an unfair labor practice even absent proof of anti-union motivation, and even if the employer introduces evidence that its conduct was motivated by business concerns. *Great Dane Trailers*, 388 U.S. at 33-34. Moreover, the NLRB may "draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.*

On the other hand, "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.* at 34 (emphasis in original).

Because Castlewood has not demonstrated any anti-union animus, the General Counsel could only prove the lawful lockout was converted into an unlawful one by showing that the Employer's conduct had an "inherently destructive" effect on the rights of the bargaining unit employees. As will be shown below, this case does not come close to meeting that standard, and the ALJ erred in concluding that it did. In fact, even if the lesser standard of "comparatively slight" conduct is applied, the record here could not support a finding that the lockout became unlawful. In reviewing these alternative standards, particular focus will be given to the prior cases in which the NLRB has analyzed lockouts.

**a. Castlewood's Bargaining-Related Conduct Was Not Inherently Destructive of the Bargaining Unit Employees' Rights.**

"The [NLRB] and the courts have found lockout-related conduct to be inherently destructive only in rare circumstances," involving "conduct during a lockout that had a severe or

permanent effect on employee rights, such as the discharge or permanent replacement of locked-out employees, and the permanent subcontracting of the unit work." *Advice Memorandum Re: Ralph's Grocery Co.*, 31-CA-26571, et al., 9/24/04, p. 6 (citing *Ancor Concepts*, *supra*, 323 NLRB at 744-745 (with respect to permanent replacements); *Int'l Paper Co.,* 319 NLRB 1253, 1266 (1995), *enf. denied*, 115 F.3d 1045 (D.C. Cir. 1997) (with respect to permanent subcontracting), and *Loomis Courier Serv.*, Inc., 235 NLRB 534, 535-536 (1978), *enf. denied*, 595 F.2d 491 (9th Cir. 1979) (with respect to employee discharge)); *see also Safeway Stores, Inc.*, 148 NLRB 660, 662 (1964) (NLRB found employer converted its lawful lockout into unlawful lockout by replacing locked out employees with management personnel); *Field Bridge Associates*, 306 NLRB 322, 334 (1992) (employer turned lawful economic strike into lawful "lockout," but rendered "lockout" unlawful by failing to offer reinstatement to all strikers who offered to work during the lockout).

Indeed, the Employer is only aware of a handful of cases in which the NLRB has found employer action that converted a lawful lockout into an unlawful one, and each such case involved employer conduct that is much more egregious than, the conduct alleged here. *See, e.g.*, *C-E Natco*, 272 NLRB 502, 506 (1984) (employer's lockout rendered unlawful when employer violated Sections 8(a)(1), (3) and (5) of the Act in bypassing the union by bargaining individually with employees and conditioning their employment on their willingness to sign a letter of understanding that was a clear interference with statutory rights); *Dayton Newspapers,* 339 NLRB 650, 656-658 (2003) (employer converted lawful lockout into unlawful one by providing Union with "unclear and changing conditions" so the Union was incapable of determining how employees could end the lockout and obtain reinstatement).

There is one constant element in all the cases where a lawful lockout was converted to an unlawful lockout: affirmative employer action. In each such case, the employer acted – it fired locked out employees, bargained directly with employees, unilaterally implemented proposals or refused reinstatement. Here, Castlewood took no affirmative action. It made two proposals, but did not implement them or insist upon them. The mere making of proposals does not change anything – the status quo prevails. Thus, there was no action here that could even conceivably convert a lawful lockout into an unlawful one.[23]

Notably, the NLRB has also recently held that, even where employers have violated the Act by engaging in fairly egregious conduct, that still did not render the employer's lockout unlawful. In *Harborlite Corp.*, 2011 NLRB LEXIS 747 (Dec. 22, 2011), as discussed in

[23] The Club is aware of the NLRB's recent decision in *Dresser-Rand Company*. 358 NLRB No. 97, 2012 NLRB LEXIS 481, at *177-180. (August 6, 2012) (holding that where the employer committed several unfair labor practices, all of which were directly related to the strike and ensuing lockout, and had a pervasive effect on the bargaining unit, such conduct permitted a conclusion that the decision to lock out striking employees who had offered to return to work was unlawfully motivated). In holding that the employer's lockout was unlawfully motivated by anti-union animus, the NLRB distinguished the case from *Central Illinois Publishing Services Co.*, 326 NLRB 928 (1998), which held that unfair labor practices that "either had minimal impact on the members of the bargaining unit or little effect on the lockout or labor dispute" do not support a finding of anti-union animus. *Dresser-Rand Company*, 2012 NLRB LEXIS 481, at *178-79. The *Dresser-Rand* decision neither changes the analysis in this case, nor suggests that anti-union animus should be imputed to Castlewood. Unlike in *Dresser-Rand*, where the employer's unfair labor practices tangibly discriminated against employees by denying vested benefits, terminating and suspending union employees for their picket-line activities, and failing to bargain over the terms and conditions of their return to work, *see Id.* at *178-80, Castlewood has taken *no* tangible employment action against any bargaining unit employees. None of the alleged threats attributed to the Club had any tangible effect on bargaining unit employees, as such employees continued bargaining with the Employer after Mr. Olson's alleged threat, continued handbilling after Mr. Hunt's alleged threat, and continued bargaining and engaging in protest activity after Mr. Hughes' alleged threat. Further, the Club's alleged subcontracting of unit work, its alleged *delaying* of bargaining, and its mere *making* of proposals, even if found to be unlawful, cannot be said to have had a sufficiently "pervasive effect on the bargaining unit" to warrant an inference that Castlewood's lockout was unlawfully motivated. *See Id.* at *180.

Section II(C)(1)(c), *supra*, the NLRB held that the employer's unlawful threat to permanently replace locked out employees – made both before and during lockout – did not render the otherwise lawful lockout unlawful. *Id*. at *10-11. The employer later retracted its threat to hire permanent replacements, and assured employees it would only hire temporary replacements and that accepting the employer's final offer would end the lockout and allow the locked out employees to come back to work. *Id*. at *9-11. According to the NLRB, the employer's "effective withdrawal or, at least, deferral, of its threats of permanent replacement, and its assurances to the Union that unit employees would be reinstated if the Union accepted the Respondent's terms," means that "the Respondent's statements did not taint the otherwise lawful lockout," but "allowed employees to unambiguously evaluate their bargaining position." *Id.* at *10.[24]

In those cases where an employer discharged, refused to reinstate, or permanently replaced its locked out workers, or permanently subcontracted their work, the employer unilaterally made decisions that significantly and immediately changed the employees' work conditions. However, it bears repeating that the case at bar is completely distinguishable, as Castlewood merely *made proposals*. Castlewood did not take *any* action during the lockout, let alone action that would severely or permanently affect employees' rights. Additionally, unlike the cases finding inherently destructive employer conduct, Castlewood has repeatedly expressly stated that it would take back all locked out employees if the lockout ended. Furthermore, Castlewood's proposals would allow everyone in the bargaining unit to remain and/or become members of the Union should they choose to do so. (Jt. Ex. 1, Tab 92; Tr. 714:7-21 (Ms. Norr);

[24] By analogy, even if one were to accept the Union's claim here that Castlewood implied that it might replace locked out employees with replacements, the Employer unquestionably disavowed that notion on many occasions in October and November 2010. The holding in *Harborlite Corp.* would then be very much on point.

938:13-22 (Mr. Olson).) Therefore, the General Counsel cannot suggest, and the ALJ could not conclude, that Castlewood's mere proposals were "inherently destructive" of union activity.

Likewise, Castlewood's conduct is distinguishable from the cases that involved less severe or permanent effects on employee rights. Unlike the employers in *Dayton* and *C-E Natco*, Castlewood did not present the Union with unclear and changing conditions for employees' reinstatement, nor did it bypass the Union by directly dealing with employees and presenting them with ultimatums interfering with their statutory rights. To the contrary, Castlewood has exclusively presented all new proposals directly to the Union, and has communicated in writing, since submitting its February 23, 2010 "Proposal to Resolve Pending Lockout," the clear conditions for the Union to consider in determining whether to accept the Club's proposals and, thereby, promptly end the lockout. (Jt. Ex. 1, Tabs 40, 81, 92, 101.)

Even assuming that the Club ambiguously threatened to permanently replace the locked out employees, it is undisputed that the Employer soon clarified its position and the Union soon realized that the Employer would allow all locked out workers to return to work unconditionally. *See Harborlite*, 2011 NLRB LEXIS 747 at * 9-10; *see also* (ALJD 63:27-29 (ALJ acknowledges Castlewood's position regarding return to work could be construed as "ambiguous"); and Tr. 381:15-382:16 (Ms. Huber).) *Harborlite* holds that violating the Act under these circumstances does not convert a lawful lockout into an unlawful one. *Harborlite*, 2011 NLRB LEXIS at *10. Indeed, as noted in *Harborlite*, the NLRB has "recently made clear that not all unlawful conduct by an employer during an otherwise lawful lockout renders that lockout unlawful." *Id.* at *7 n.3 (citing *Peterbilt Motors Co.*, 2011 NLRB LEXIS 348). Furthermore, as the NLRB has emphasized in holding lockouts have remained lawful, the Parties here continued to bargain after the lockout and after the Employer's allegedly unlawful

proposals. *See Peterbilt Motors Co.* at *19. This further demonstrates the Employer's bargaining-related conduct could not have had an inherently destructive effect on Union activity.

The foregoing analysis makes clear that the Employer's conduct was not inherently destructive of employees' rights, and that the instant lockout was, therefore, lawful at all times. Thus, the ALJ's contrary conclusion is flawed. (ALJD 64:7-21.) In support of his conclusion, the ALJ reasoned that the Employer's lawful economic lockout was no longer motivated by an intent to reach agreement, and that the continued employment of temporary replacement workers was thus inherently destructive to the bargaining unit employees' rights. *(Id*. at 64:3-11.) However, as addressed above, the Employer did not bargain in bad faith without a desire or intent to reach agreement. Thus, the ALJ's rationale does not warrant concluding that the Employer's lawful lockout became inherently destructive of employees' rights. To find this lockout unlawful would go far beyond any existing NLRB precedent and contravene the principles laid down by the NLRB very recently in *Harborlite* and *Peterbilt.*

**b. Castlewood's Bargaining-Related Conduct Did Not Have a Comparatively Slight Effect on the Bargaining Unit Employees' Rights.**

This record also does not support a finding that Castlewood's proposals had even a "comparatively slight" impact on union activity, nor does the ALJ find that it did. (*See* ALJD 64:1-21 (failing to address whether Castlewood's conduct was comparatively slight.) The legality of introducing proposals during lockouts is most closely addressed in *International Paper*, although that case turned on the implementation of an employer proposal during lockout, and not the mere making of the proposal, as occurred here. *Int'l Paper Co.*, 115 F.3d 1045 (D.C. Cir. 1997). In *International Paper,* the employer was charged with unfair labor practice violations under Sections 8(a)(1) and 8(a)(3) of the Act. *Id*. at 1048. There, the employer instituted a lockout that did not violate the Act. *Id.* (citing *American Ship Building Co. v. NLRB,*

380 U.S. at 316-317). The employer then temporarily subcontracted out work during the lockout, which also did not violate the Act. *Int'l Paper Co.*, 115 F.3d at 1048. Then, the employer *proposed*, during the lockout, to implement its permanent subcontract proposal when the lockout ended. *Id.* at 1049. Though the NLRB ultimately found International Paper's *implementation* of its permanent subcontracting proposal to be unlawful, it did not find the mere making of the proposal, or the timing thereof, to be unlawful. *Id.* at 1048-1049, citing *Int'l Paper Co.*, 319 NLRB at 1256. Furthermore, the D.C. Circuit, in its review of the NLRB's decision, concluded the proposal was not illegal because the permanent subcontracting of unit work is a mandatory subject of collective bargaining. *Int'l Paper Co.*, 115 F.3d at 1048-1049. Despite the D.C. Circuit's refusal to enforce the NLRB's decision,[25] the NLRB's ruling in *International Paper*, including its finding that the proposal itself was not unlawful, is still good law. *See, e.g.*, *United Steel*, 2009 NLRB LEXIS 364, *9 (2009) (applying the NLRB's decision in *International Paper*).

Like the employer in *International Paper*, Castlewood instituted a lockout that was undisputedly lawful at its inception. Again like the employer in *International Paper*, Castlewood hired temporary replacements during the lockout, which also undisputedly does not violate the Act. Also as in *International Paper*, Castlewood made *proposals* during the lockout – one to incorporate other factors in addition to seniority into its layoff decisions, and the other to only require membership retention by employees who are Union members or choose to become Union members. Like the subcontracting of unit work addressed in *International Paper*, union

[25] The NLRB found International Paper's permanent subcontracting of work during a lockout to be "inherently destructive" of employees' rights, and therefore analyzed the employer's business justification under the more stringent standard. The D.C. Circuit, alternatively, refused to enforce the NLRB's order because it found the employer's conduct to have a "comparatively slight" effect on employee activity, and found the employer's business justification adequate. *International Paper Co.*, 115 F.3d at 1052.

security provisions and layoffs are mandatory bargaining subjects. *See NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 133 (9th Cir. 1949), *cert. denied*, 338 U.S. 827 (1949) (holding that union security is a mandatory bargaining subject); *Odebrecht Contractors of Cal.*, 324 NLRB 396, 397 (1997) (holding that layoffs are a mandatory subject of bargaining). Therefore, as in *International Paper*, Castlewood's mere proposals during the lockout regarding mandatory bargaining subjects are in no way unlawful. Finally, unlike the employer in *International Paper*, Castlewood has expressly stated, numerous times, that it will take back all the locked out employees if the lockout ends. (*See* Respondent's Post-Hearing Brief, Section III(A)(2)(b).)

There is simply no issue here of disadvantaging the locked-out employees. Indeed, it is worth emphasizing that those same employees, by petition signed by a majority of unit employees, had accepted the Employer's December 2009 proposal. (Resp. Ex. 4; Tr. 1432:20-1433:21 (Mr. Murphy); 1609:11-1610:25 (Mr. Freitas).) If the Union had followed the wishes of its members, the lockout would never have happened. Even as of the date of this hearing, the Employer continued to invite the return of all locked out employees who still wished to work – provided that a contract could be reached. The Employer's conduct reflects manifest good faith. Furthermore, even if the Employer's conduct had a "comparatively slight" impact on employee rights, which it did not, the Employer has repeatedly explained its well-proven business justifications for presenting its proposals.

Based on the foregoing, Castlewood's mere making of proposals regarding mandatory bargaining subjects is lawful and, therefore, had neither an "inherently destructive" nor a "comparatively slight" effect on employees' union activity. Therefore, Castlewood did not assume an illegal bargaining position that would render its lockout unlawful.

### 4. Regardless of Whether the Employer Engaged in the Alleged Unlawful Bargaining Conduct, it was Health and Welfare, Not the Employer's August 10, 2010 Proposals, Prevented the Parties from Reaching Agreement.

Assuming *arguendo* that Castlewood had engaged in the alleged unlawful conduct – which it has not – the Employer's proposals on Seniority and Maintenance of Membership clearly did not prevent the Parties from reaching agreement, as alleged in the Complaint. (Compl. ¶¶ 9(e), 10, 12, 13.) Rather, Health and Welfare was the major issue separating the Parties – a fact undisputed by the ALJ. (ALJD 8:28-31 (in 2009, the parties were "far apart on health coverage" and made little headway on that "critical issue"); 9:2-3 (Respondent felt "healthcare was the major matter at issue" as of December 7, 2009); 12:40-44 (Club would reconsider lockout if Parties could agree on healthcare); 48:40-42 ("critical element of healthcare coverage remained fundamentally unresolved.")[26] Thus, even absent Castlewood's Seniority and Maintenance of Membership proposals, the Parties' polar differences regarding healthcare issues still would have prevented them from reaching agreement and ending the lockout. (Tr. 823:15-19) (Ms. Norr testified that neither party moved on health insurance on August 10 or September 13, 2010); 866:14-22 (Union advanced no healthcare proposals between May and November of 2010).)

[26] (*See also* Tr. 267:24-268:7 (Ms. Huber) ("the issue of health insurance remained a central topic of these negotiations"); 276:5-15 (Ms. Huber) ("healthcare was the big issue in the negotiations"); 277:2-20 (Ms. Huber) (Mr. Murphy said healthcare was the "linchpin" of the Parties' positions); 308:23-309:1 (Ms. Huber) (Mr. Murphy said healthcare was the "real bone of contention"); 776:22-777:2 (Ms. Norr) (same); 338:12-23 (Ms. Huber) (Employer agreed to postpone lockout if Union could agree to its healthcare position); 1091:20-1092:5 (Mr. Olson) (same); 470:11-16 (Ms. Huber's March 11, 2010 affidavit states the Parties were far apart on healthcare); 866:14-18 (Ms. Norr's affidavit states the major dispute between the Parties was about healthcare); 920:2-8; 1694:23-1695:8 (Mr. Olson concurs); 1136:2-9 (Mr. Clouser) (healthcare issue was "line in the sand"); 1562:21-25 (Mr. Freitas believed healthcare was biggest issue at time of lockout).)

A Section 8(a)(5) violation will not render a lawful lockout unlawful unless it materially motivates the Employer's decision to continue the lockout. *See Advice Memorandum Re: Ralph's Grocery Co.*, 31-CA-26571 et al., 9/24/04, p. 9 (citing *Redway Carriers*, 301 NLRB 1113, 1114-1115 (1991) (noting that employer's unlawful bargaining position did not convert its lawful lockout into an unlawful one because its bargaining position did not materially motivate its decision to continue the lockout). Similarly, the NLRB repeatedly has recognized that an employer's *other* misconduct *in addition to* Section 8(a)(5) violations cannot render a lawful lockout unlawful where, as here, even absent such misconduct, separate circumstances would have prevented the parties from reaching agreement and ending the lockout anyway. *See Hess Oil & Chemical Corp.*, *Dehli-Taylor Refining Div.*, 167 NLRB 115, 116-117 (1967) (employer's 8(a)(1) and (5) violations did not render lockout unlawful because the parties were so far apart on other items they both deemed to be of fundamental importance that, even if the employer had withdrawn its unlawful proposal from the negotiations, the parties still would not have reached agreement and the lockout would have ensued); *United States Pipe & Foundry Co.*, 180 NLRB 325, 328-329 (1969) (employer's Section 8(a)(1), (3) and (5) violations did not render the lockout unlawful because they did not affect or contribute to the impasse on other issues in bargaining); *and Brewery Prods*, 302 NLRB 98, 103-104 (1991) (employer's lockout remained lawful despite the employer's delay in providing benefits and information to bargaining unit, where the parties' bargaining positions were so polarized at time of lockout that respondent's delay did not preclude meaningful bargaining).

The NLRB has recently confirmed this rationale. In *Peterbilt*, *supra*, 2011 NLRB LEXIS 348, the NLRB held that the employer's unlawful refusal to provide the union with information did not render the employer's lawful lockout unlawful, where the parties were far

apart in their negotiations for a successor contract, there was no evidence that the outstanding information request was the stumbling block to bargaining, and the parties continued to meet and bargain after the lockout and after the employer's refusal to provide requested information. *Id*. at *15-20.[27]

Clearly, the NLRB has unambiguously held for decades that an employer's lockout cannot be rendered unlawful when other factors, beyond the allegations of unlawful conduct, would have kept the parties from reaching agreement even if the unlawful conduct had not occurred. The instant case is no different. Here, it is undisputed that the Parties were intensely polarized regarding Health and Welfare since the outset of negotiations. (Tr. 276:5-15 (Ms. Huber).) Indeed, the Union has admitted the same during bargaining sessions (*Id.*), in its fliers and other lockout-related publications (Jt. Ex. 1, Tabs 51, 57; Resp. Ex. 6(a)-(g)), and during the trial in this matter. (Tr. 276:5-15 (Ms. Huber)).

The Parties' dispute over Health and Welfare was still unchanged during the August 10, 2010 bargaining session when the Employer introduced the proposals with which the General Counsel and Union now take issue. (Tr. 823:15-19 (Ms. Norr).) The Union did not budge on Health and Welfare until November 9, well after Ms. Huber concedes that she knew the Employer would allow all locked out employees to return unconditionally. (Tr. 381:15-382:16 (Ms. Huber knew the locked out employees would return by November 2); 862:22-863:11 (Ms. Norr) (No Union proposal until November 9).) To date, even though the Club has ended the lockout, the Parties still have not been able to resolve the key issue of Health and

[27] The *Peterbilt* Board emphasized that its holding was limited to the issue of whether an unlawful failure to furnish, or delay in furnishing, requested relevant information renders unlawful an ensuing or ongoing lockout. *Id.* at *17 n.15.

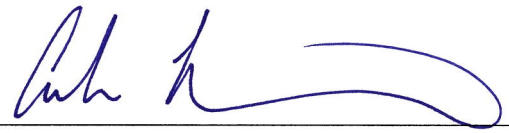
Welfare.[28] Therefore, even if Castlewood's Seniority and Maintenance of Membership proposals somehow violated the Act, they clearly did not convert the undisputedly lawful lockout into an unlawful one. Although Castlewood advanced this argument on brief, the ALJ entirely failed to address it when deciding whether Castlewood's lockout was rendered unlawful. However, nothing in the ALJ's decision contravenes the above record evidence or the Employer's cited case law. Thus, Castlewood's lockout did not violate the Act.

## III. CONCLUSION

Based on the foregoing, the General Counsel has failed to establish any of the claims as pled in the Complaint, and the ALJ's contrary conclusions are erroneous. Castlewood has, at all times, complied with the Act, and respectfully requests that all charges against it be dismissed.

Dated: December 21, 2012.

Respectfully submitted,



Robert G. Hulteng
Galen M. Lichtenstein
Jessica L. Marinelli
LITTLER MENDELSON, P.C.,
650 California Street
20th Floor
San Francisco, CA 94108.2693
415.433.1940

Counsel for Respondent
CASTLEWOOD COUNTRY CLUB

Firmwide:114984185.4 065644.1002

[28] The differences between the Parties centers around dependent coverage. The Union has adamantly insisted that the Club must provide full-family coverage to all unit employees who qualify. (Tr. 309:15-22 (Ms. Huber).) The Club has been equally insistent that it will not do so, for economic and competitive reasons. (Tr. 1136:2-11 (Mr. Clouser).)

**EXHIBIT A**

NATIONAL LABOR RELATIONS BOARD

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FACSIMILE TRANSMITTAL SHEET

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**NLRB REGION 32**

**FROM: FARAH Z. QURESHI**
**ASSOC. EXECUTIVE SECRETARY**

COMPANY:

DATE: **SEPTEMBER 5, 2012**

FAX NUMBERS:
**415-399-8490**
**415-597-7201**
**510-637-3315**

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OPERATORS NAME/NUMBER:
**Sharon Y. Hodge/202-273-1994**

RE: ***CASTLEWOOD COUNTRY CLUB***
**CASES 32-CA-024980, ET AL.**

ALL CONFIRMATIONS: **YES**

NOTES/COMMENTS:

1099 14TH STREET N.W.
WASHINGTON, D.C. 20570
TELEPHONE (202) 273-1067
FAX (202) 273-4270

United States Government
**NATIONAL LABOR RELATIONS BOARD**
Office of the Executive Secretary
1099 14th Street NW, Suite 11600
Washington, DC 20570

Telephone: 202/273-1949
Fax: 202/273-4270
**www.nlrb.gov**

September 5, 2012

Re: *Castlewood Country Club*
Cases 32-CA-024980, et al.

**GRANT OF REQUEST TO EXCEED PAGE LIMITATION**

The Respondent's motion to exceed the page limitation on its brief in support of exceptions is **granted**. The brief is not to exceed **100 pages.**

Farah Z. Qureshi
Associate Executive Secretary

cc: parties
FZQ/syh

## PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On December 21, 2012, I served the within document(s):

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Kristin L. Martin, Esq.
Elizabeth Q. Hinckle, Esq.
Davis, Cowell & Bowe
595 Market Street, #1400
San Francisco, CA 94105
E-Mail: klm@dcbsf.com
E-Mail: eqh@dcbsf.com

Attorneys for Union UNITE HERE Local 2850

George Velastegui, Esq.
Yaromil Ralph, Esq.
National Labor Relations Board
Region 32
Federal Building
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211
Email: george.velastegui@nlrb.gov
Email: yaromil.ralph@nlrb.gov

Matt Peterson, Esq.
Carmen Leon, Esq.
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
Email: matt.peterson@nlrb.gov
Email: carmen.leon@nlrb.gov

Honorable Clifford H. Anderson
Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco CA 94103-1779
E-Mail: Clifford.Anderson@nlrb.gov

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Pamela A. Sloan

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