UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

MANAGEMENT & TRAINING CORPORATION

and

Cases 04-CA-095456
04-CA-097114 and
04-CA-104790

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 668

COUNSEL FOR THE GENERAL COUNSEL'S

ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respectfully submitted,

Dated: March 13, 2014

JENNIFER RODDY SPECTOR
Counsel for the General Counsel
National Labor Relations Board
Fourth Region
615 Chestnut Street, Suite 710
Philadelphia, Pennsylvania 19106

Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, hereby files an Answering Brief to Respondent's Exceptions to the Decision of Administrative Arthur Amchan (herein "the ALJ") in the above-captioned matter, and states as follows:

Exceptions 1 and 4

Respondent excepts to the ALJ's conclusion that it violated Section 8(a)(1) of the Act by coercing employees when it announced on April 3, 2013 that bargaining would change because of the Union's filing of unfair labor practice charges. (ALJD 10:13-15)[1] Notably, Respondent's exception does not assert that its chief negotiator and Counsel, Martha Amundsen, did not make the statement found by the ALJ. Rather, Respondent asserts that Ms. Amundsen also said something about "information." Respondent believes this relevant because, it argues, the statement was not actually coercive because Ms. Amundsen was only referring to the Union's charge alleging Respondent's failure to provide information (to which, in Respondent's view, the Union was not entitled). Even assuming, arguendo, that the Union was not entitled to any of the information it requested, and the Region had dismissed the charge it filed concerning that information, Respondent's statement would still have been unlawful. Ms. Amundsen's subjective intent in making the statement is not only absent from the record (as she did not testify), but is wholly irrelevant. *President Riverboat Casinos of Mo.*, 329 NLRB 77, 77 (1999)

By making the statement she did, Ms. Amundsen made clear to the unit employees present at the bargaining table that their employer planned to retaliate for their charge-filing

[1] Throughout this brief, abbreviated references are employed as follows: "ALJD" followed by page and line numbers to designate the ALJ's Decision; "T" followed by page number to designate Transcript pages; "GCX" followed by exhibit number to designate General Counsel's Exhibits; and "RX" followed by exhibit number to designate Respondent's Exhibits.

activity. Such statements coerce employees in the exercise of their Section 7 rights, and the coercive effect does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether, under all the circumstances, the employer's conduct had a reasonable tendency to interfere with the exercise of the employees' rights under the Act. *American Freightways*, 124 NLRB 146, 147 (1959); *Sunnyside Home Care Project,* 308 NLRB 346, 346 fn. 1 (1992).

As the Supreme Court has held, "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission,* 389 U.S. 235, 238 (1967). Thus, statements suggesting that an employer will retaliate against employees who resort to the protection of the Act by filing unfair labor practice charges are particularly pernicious, and blatantly unlawful. *Mesker Door*, 357 NLRB No. 59 (2011), slip op. at 8; *Carborundum Materials Corp.,* 286 NLRB 1321, 1321-1322 (1987); *Norris Concrete Materials,* 282 NLRB 289, 292 (1986).

Exceptions 2, 5-7, and 11-23

Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(5) of the Act by engaging in regressive bargaining on April 4, 2013 in order to frustrate the possibility of reaching agreement with the Union. This finding was unusually well-supported in the record, as after announcing its intent via Ms. Amundsen's statements that "bargaining would be changing" because of the Union's filing of unfair labor practice charges (ALJD 5:17-18), Respondent made proposals without precedent in prior bargaining, and which regressed from Respondent's prior positions at the table without justification or explanation.

The Board holds that regressive proposals are not *per se* unlawful, but can evidence bad faith bargaining if unjustified. *Whitesell Corp.*, 357 NLRB No. 97 (2011), slip op. at 6. The Board examines the timing of the proposal, and the justifications for it, if any, in determining whether it was made in good faith. *Quality House of Graphics*, 336 NLRB 497, 515 (2001). Here, Respondent made its proposal just days after a complaint resulting from the Union's unfair labor practice charges against it issued, and advised the Union that "bargaining would be changing" as a result of the charges. Its explanations for the proposals were as follows:

Employer's Retaliatory Proposal	**Explanation Proffered at the Table**	**Employer's Prior Proposals on this topic**
Eliminate night shift premium pay.	None (T. 53); the ALJ found that on brief, Respondent sought to premise this proposal on the DOL budget. (ALJD 6:10-12, 9:36-38).	None (T. 55)
Bumping rights for layoffs to be eliminated entirely.	In response to Union's proposal to slightly modify current procedure. (ALJD 5:39-40, 9:36-38)	None (T. 55)
Limit number of stewards to three.	"since we were at negotiations" (T. 53, ALJD 6:2-3)	None (T. 53, 55, see Cross-Exception 19)
Leaves of absence.	No explanation for the proposal. (T. 53)	Various. (T. 53)
Eliminate arbitration entirely.	Unsupported assertion that Union files frivolous grievances. (ALJD 5:23-25, 9:33-38)	Change from AAA to FMCS; limit time from grievance to arbitration to six months; grievances become void if grievant fails to appear. (ALJD 5:25-28, GCX2)

As is clear above, Respondent's explanations for these drastic alterations in its position were simply insufficient to establish any legitimate business justification for them. The Board has found that such regressive proposals, absent any reasonable explanation, evidence bad faith bargaining and violate the Act. *Universal Fuel*, 358 NLRB No. 150 (2012), slip op. at 1; *Quality House of Graphics*, supra at 515. Respondent's explanation for the most drastic change, the complete elimination of binding arbitration from the contract, further evidences its pique at the Union's unfair labor practice charges. Respondent's principal argument in its Brief in Support of its Exceptions to the Administrative Law Judge's Decision (herein Respondent's Brief) is that it made these regressive proposals because the Union had refused to agree to its prior proposals, but Respondent is unable to point to any record evidence demonstrating, explaining, or justifying the reasons why it needed to make its proposals worse in these areas. Respondent asserts for the first time in its Brief that because the Union failed to agree to its prior proposal to use arbitrators from FMCS, it was compelled to propose eliminating arbitration altogether. This explanation is absent from the record at hearing; rather, the record reflects that Respondent's only explanation was its wholly unsupported assertion that the Union files "frivolous" grievances. The ALJ considered Respondent's unsupported assertion, properly rejected it, and found that it was insufficient to justify Respondent's proposal to eliminate arbitration. (ALJD 5:23-24)

The sole record evidence concerning the reasons for the other regressive proposals is Union Business Agent Kimberly Yost's unrebutted testimony concerning what was said at the table when the proposals were made. Respondent did not except to the Judge's factual findings that on April 3, 2013, the Union proposed a minor change in the contractual bumping procedure for laid-off employees, explaining that the reason for the proposal was the adverse impact on a recently laid-off employee. (ALJD 5:36-40) Respondent's proposal on April 4, 2013, found

regressive and retaliatory by the Judge, was to eliminate bumping entirely. (ALJD 5:40, 9:25-28, 10:5-7) There was no exception to the finding that Respondent's counterproposal on bumping was regressive. (ALJD 9:25-28) There is no other evidence in the record concerning the reasons for these proposals, though Respondent attempts to add such explanations in its Brief. Respondent further cites cases holding that hard bargaining and adamant adherence to one's position do not evidence bad faith; this may be true, but refusing to move from one's position is simply not the same as regressing from it.

The Board finds bad faith bargaining where the circumstances demonstrate an employer making a regressive proposal has a hidden motive to retaliate for employees' successful pursuit of unfair labor practice charges. *Whitesell Corp.*, supra at 61 (regressive proposals interposed to retaliate for union's successful pursuit of charges requiring it to rescind an unlawfully unilaterally imposed contract); *Quality House of Graphics*, supra at 515 (timing, lack of business justification, and drastic nature of proposals demonstrated motive to retaliate for pursuit of unfair labor practice charges). Here, the regressive proposal came on the heels of a complaint against Respondent,[2] and Respondent failed to demonstrate any business justification for its proposals. But unlike the cited cases, no inference is necessary here: Respondent actually explained directly to its employees that "because you filed charges, bargaining will be changing," then imposed a draconian and unprecedented counterproposal.

Respondent also asserts that as part of the April 4, 2013 proposal, there were two changes in its position which it describes as "concessions." As noted by the Judge, based on the language in the proposal it is "not at all clear that Respondent changed its position on this issue and there

[2]The Order Consolidating Cases and Consolidated Complaint in Cases 4-CA-95456 and 4-CA-97114 issued on March 22, 2013. (GCX 1(e))

is no testimony regarding what the language means." (ALJD 10:1-3) There was no testimony establishing that either of these matters represented a "concession."

Respondent also excepts to the ALJ's failure to find that various asserted conduct on the Union's part privileged its April 4, 2013 proposal. For example, Respondent asserts that Union's retreat from the parties' tentative agreement, which had been conditioned on ratification, after it was not ratified, somehow evidences bad faith. Respondent asserts that the Union "delayed and failed to arrange" bargaining in each of the three bargaining units (Exceptions 16-18). The unrebutted testimony at hearing was that the parties have had difficulty arranging dates to meet, but that in view of Respondent's retaliatory proposal of April 4, 2013, the Union's chief negotiator testified, "I don't hold out a lot of hope that there's going to be any other kind of response." (T. 56)

Exceptions 3 and 8-10

Respondent excepts to the ALJ's conclusion that it violated Section 8(a)(1) and (5) of the Act by failing to provide to the Union its contract with the Department of Labor. (ALJD 10:20-21)

Respondent repeatedly referred to the 0% inflationary increase in its contract with DOL, and expressly linked its financial proposals to the "0% increase" it received from the Department of Labor. It also explicitly linked its proposal on boot reimbursement allowances to the DOL contract. Respondent also represented to the Union that DOL had imposed a new pay scale. Thus, as found by the ALJ, the contract is clearly relevant to negotiations.

In its Brief, Respondent asserts that the contract is irrelevant because it contains proprietary information. Respondent cites no authority for this proposition because there is none, but moreover, there is simply no record evidence supporting the assertion the contract

contains proprietary matter, beyond Respondent's unsupported assertion in its responses to the Union. Respondent excepts to the ALJ's conclusion that Respondent bears the burden of proof of its assertion that its contract with the Department of Labor contained proprietary or confidential material. (ALJD 8:12-13) This is black letter Board law. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); *Northern Indiana Public Service Agency*, 347 NLRB 210 (2006).

Even assuming that Respondent had made any effort to establish that it has a legitimate and substantial confidentiality interest, as it would be required to make out this defense, Respondent may not simply assert the confidentiality concern and refuse to provide the information. *Jacksonville Area Assn. for Retarded Citizens,* 316 NLRB 338, 340 (1995). It is well-settled that even where an employer has a confidentiality interest, it "has the burden to seek an accommodation that will meet the needs of both parties." *National Steel Corp.*, 335 NLRB 747, 748 (2001). Respondent did not even attempt to engage in such bargaining. Cf. *Allen Storage and Moving*, 342 NLRB 501, 502-503 (2004).

Respondent further attempts to belatedly shoehorn the DOL contract into the "financial information" found irrelevant by the Judge. It is not entirely clear what "financial information" the Judge intended to describe at ALJD 7:1-10, as the Complaint did not allege that Respondent had any obligation to respond to the request for financial information found at item 17 of the Union's information request. (ALJD 4:11-14) There is no record evidence concerning the contents of the DOL contract, except Respondent's reliance on it with respect to its proposals. Respondent makes the same argument concerning extra-unit information that is assertedly in the contract, and though the General Counsel cross-excepts to the Judge's conclusions as to the

extra-unit information, there is simply no evidence in the record supporting Respondent's assertions that the contract contains information about employees outside the bargaining unit.

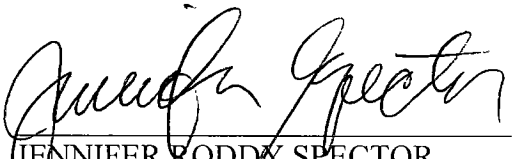
Exceptions 24-26

Respondent excepts to the ALJ's proposed Remedy and Order. Respondent makes no argument as to why these remedies are inappropriate beyond its argument that its conduct did not violate the Act. As the ALJ properly found that Respondent violated the Act in several respects, the proposed remedies are appropriate.

Conclusion

Counsel for the General Counsel respectfully submits that Respondent's Exceptions are without merit, and that the Board should accordingly adopt the findings of Administrative Law Judge Arthur J. Amchan's Decision and recommended Order to which Respondent has excepted.

Respectfully submitted,



Dated: March 13, 2014

JENNIFER RODDY SPECTOR
Counsel for the General Counsel

TABLE OF CASES