National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 15, 1998

TO: Daniel Silverman, Regional Director, Region 2

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: 10 Sheridan Associates LLC & SDG Management Corp., Joint Employer, Cases 2-CA-30936, 31020

530-6067-2060-0100, 530-6067-2060-1300, 530-6067-2060-1700, 530-6067-2060-3300

These cases were submitted for advice as to whether the Employer violated Section 8(a)(1), (3), and (5) of the Act by engaging in surface bargaining based on the "predictably unacceptable" nature of the Employer's proposals.

FACTS

For many years prior to March 18, 1997,[(1)] the six employees of an apartment building located at 10 Sheridan Square, New York, New York, were represented by Local 32B-32J, SEIU (the Union) and were covered by a collective-bargaining agreement negotiated between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB).[(2)] This agreement was scheduled to expire by its own terms on April 20. It and its successor, which was signed on or about April 21, contained a "most favored nations" clause which provides that RAB and its members receive, on demand, any economic terms or other conditions contained in any agreement between the Union and any other employer more favorable than those contained in the RAB agreement.

Effective March 18, 10 Sheridan Square was purchased by 10 Sheridan Associates, LLC, to be managed by SDG Management Corp. 10 Sheridan Associates and SDG (collectively, the Employer) hired all six of the predecessor's employees -- four elevator operator/doormen, one porter, and one superintendent -- and adopted the RAB agreement then in effect.[(3)]

By letter dated April 11, the Employer notified the Union that it intended to seek to modify the existing collective-bargaining agreement at its expiration and requested bargaining for that purpose. The Union did not respond to this letter. By letter dated May 16, the Employer again requested bargaining for a successor collective-bargaining agreement. The Union did not respond to this letter.

By letter dated June 10, the Employer again requested bargaining, stating that if it received no response by June 19, the Employer would assume that the Union was not interested in bargaining for a successor collective-bargaining agreement. The Employer attached a document setting forth the Employer's bargaining proposals, which included: (1) Reducing wages for the superintendent from $629.50 to $400.00 per week, and reducing wages for the other employees from $13.77 per hour to $6.00 per hour; (2) eliminating the pension plan; (3) eliminating shift differentials; (4) eliminating certain holiday and vacation benefits; (5) eliminating Union visitation rights; (6) eliminating subcontracting protections; (7) replacing the Union's fee-for-service health plan with a less-inclusive HMO managed care plan; and (8) a merit pay increase provision which would grant the Employer the sole discretion to unilaterally increase individual employees' wages based upon employee evaluations conducted every 18 months. The Union did not respond to this letter.

On July 9, the Employer's attorney called the Union's attorney to ask if the Union was interested in bargaining. After Union counsel said that the Union would like to bargain, the parties met the next day for approximately one and one-half hours. During this meeting, the Employer explained its proposal and the Union stated that it wanted something like the RAB agreement. The Union also proposed excluding the four elevator operator/doormen from the six-person unit as "security guards" to allow the Employer to set their terms and conditions unilaterally. Between July 10 and late August, the parties telephonically discussed the Union's proposal to reduce the size of the unit on two or three occasions, but the Union withdrew

its proposal after concluding that the elevator operator/doormen could not be considered guards as defined by the Act.

By letter dated August 25, the Employer increased its wage proposals from $400.00 to $425.00 per week for the superintendent and from $6.00 to $6.25 per hour for the other employees and requested further bargaining with the Union. The Union did not respond to this letter.

By letter dated October 9, the Employer notified the Union that it believed the parties were at impasse and that the Employer would implement its August 25 proposal unless the Union accepted it on or before October 17. The Union did not respond to this letter.

On October 17, a Union representative met with the six unit employees, informing them for the first time that the Employer was not signing the RAB agreement. At least one employee claims that the Union representative told the employees that the Union did not respond to the Employer's requests for bargaining because it is the Union's policy to ignore such requests and wait for the Employer to sign the RAB agreement. The Union representative also apparently told the employees that the Union wanted them to go on strike, and that if they did not do so, the Union would no longer represent them. During the meeting, the building owner's manager called the building and was told about the Union meeting by the superintendent.

Several hours later, private security guards hired by the Employer arrived at the building. While at the building, the guards began to perform bargaining unit work by opening and closing the building doors for tenants, and also asked unit employees to show them how to operate the elevators. The unit employees refused, and when the superintendent asked about the guards' request, the building owner's manager told him that the employees did not have to show the guards how to operate the elevators.

The next day, October 18, one of the bargaining unit employees called the police to remove a guard who was opening building doors. After the police escorted the guard from the premises, the building owner's manager told the unit employee that he would be fired if he called the police again. The next day, October 19, the same employee again called the police to remove a guard. The management company's property manager told the unit employee that the guard was there for the strike. When the employee said that the employees were not on strike, the property manager reportedly said, "Why don't you just walk out," and, "Just walk out."[(4)]

On the next day, October 20, a locksmith changed the locks on several of the doors in the building, including the boiler room, mailroom (where the telephone was located), fire escape, trash compactor, elevator shaft, the superintendent's office, and the front doors. The new keys were given to the guards, but not to unit employees. Thereafter, the guards opened the locked doors and escorted unit employees into any locked room.

On October 21, the Employer implemented its August 25 proposal. On October 23, all six unit employees went on strike. The Employer hired temporary replacements for the porter and the superintendent, apparently employing them pursuant to the unilaterally implemented proposals.

On October 27, the Union called the Employer to continue bargaining, and the parties scheduled a meeting on October 30. The Union asked the Employer to return to the terms of the RAB agreement for 30 days while negotiations continued. The Employer refused.

On October 30, the parties met for their second face-to-face meeting, and explained their positions. The Employer stated its belief that the jobs could be performed at the lower wages and benefits; the Union reiterated its proposal that the Employer accept the RAB agreement and stated that it felt that the Employer's proposals were offensive and that the employees would continue to strike until the Employer became rational and was ready to "toe the line."

The parties next met on December 22. The Employer proposed the reinstatement of some of the eliminated holidays, an annual 2% wage increase instead of its discretionary merit pay increase proposal, and increased its wage proposals from $425.00 to $550.00 per week for the superintendent and from $6.25 to $9.00 per hour for the other employees. The Union rejected this offer and countered by proposing the RAB agreement, with one change -- newly hired employees would be paid 80% of the wage rates in the RAB agreement during their probationary period. The parties agreed to discuss a new hire rate on January 5,

1998.

In response to the Union's questions at the January 5, 1998 meeting, the Employer stated that it was not claiming an inability to pay the RAB rates and that it was not willing to change its bargaining position, but that it did want to discuss wage rates for new hires. When the Union asked what the Employer was looking for, the Employer suggested discussing any wage rate and asked what concessions the Union would agree to. The Union responded that the RAB agreement provides the industry wage. The parties again discussed reducing the bargaining unit, but they agreed that the staff could not be cut under the building's legal requirements. No agreement was reached. The parties have not met since January 5, 1998.

ACTION

We conclude that the instant charges should be dismissed, absent withdrawal.

Section 8(d) of the Act does not require parties engaged in collective bargaining to agree on their respective proposals, but does require "more than a willingness to enter upon a sterile discussion of union-management differences."[(5)] The parties must enter discussions with open and fair minds and with the purpose of reaching agreement.[(6)] Thus, an employer is "obliged to make some reasonable effort in some direction to compose his differences with the union . . ."[(7)]

The Board draws a distinction between lawful "hard bargaining" and unlawful "surface bargaining." In Atlanta Hilton & Tower, the Board set out the following legal principles as relevant to this determination:

Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.[(8)]

A bargaining posture which is calculated to insure that bargaining will be futile is inconsistent with good faith bargaining.[(9)] Accordingly, it is necessary to scrutinize a party's overall conduct to determine whether it has bargained in good faith, or whether it is endeavoring to frustrate the possibility of arriving at any agreement.[(10)] The presence or absence of the intent to find a basis for agreement required by the duty to bargain in good faith set out in Section 8(a)(5) and 8(d) of the Act "must be discerned from the record."[(11)] In determining whether there has been a failure to bargain in good faith, "the Board considers such matters as a party's explanations for positions, its conduct on other issues and the other party's responses."[(12)]

In limited circumstances, the Board will find bad faith bargaining based on the content of the employer's proposals. The Board's examination of a party's "bargaining position and proposals relates to whether they indicate an intention by the Respondent to avoid reaching an agreement; it is not a subjective evaluation of their content."[(13)] Further, the Board looks at the totality of the Respondent's conduct, of which the proposals themselves are a part.[(14)] Thus, in Glenmar Cinestate,[(15)] where the employer proposed wage cuts of greater than 50 percent due to significant economic losses, the Board stated that, "under normal circumstances, the magnitude of the wage decrease proposed by Respondent along with its proposed sharp curtailment of other benefits would be strong evidence of bad-faith bargaining." However, stressing that its decision was "a narrow one," the Board found no violation "in the absence of evidence rebutting Respondent's economic justification for its actions."[(16)]

In A-1 King Size Sandwiches,[(17)] for example, the Board found the employer to have engaged in bad faith bargaining in circumstances where the parties had negotiated for 18 sessions during a 11-month period. They had reached agreement on a number of important issues.[(18)] The employer met at reasonable times and places and bore no animus toward the union. Further, the company did not engage in any conduct away from the table that might tend to show that it would not conclude an agreement with the union. However, during bargaining, the employer insisted on clauses under which management would unilaterally determine wages;[(19)]

manning; scheduling and hours; layoff, recall, and the granting and denial of leave; promotion, demotion and discipline; the assignment of work outside the unit; and changes of past practice. The ALJ's decision, adopted by the Board, concluded that the employer's proposals would strip the union of the ability to represent its members effectively and that, if accepted, would have left the union with substantially fewer rights than if it relied solely on its certification. Accordingly, the Board, in agreement with the ALJ, found that the employer had violated Section 8(a)(5).[(20)]

Similarly, in Mar-Len Cabinets,[(21)] the Board found the employer bargained in bad faith where "it entered into negotiations with full intent to reach accord on any agreement with the Union if the Union would agree to stringent reduction in employee benefits" and deletion or substantial modification of existing contractual provisions covering union security, arbitration, right to strike and observe picket lines, plant access to union representatives, the rights of shop stewards, and seniority. The Board reasoned that the employer's proposals "would have the clear net effect ... of substantially weakening the bargaining power of the unit employees and a material expansion of the prerogatives of management to control virtually all elements of the work and employment relationships, essentially untrammeled by effective interposition of a bargaining representative."[(22)]

In Reichhold Chemicals,[(23)] the Board reiterated these principles, stating that "in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith."[(24)] The Board then clarified its role in this area by stating:

That we will read proposals does not mean, however, that we will decide particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract.[(25)]

Thus, the Board found that the overall conduct of the employer in Reichhold -- including its proposals -- established that it had engaged in lawful hard bargaining. The Board noted that the employer had been willing to meet and bargain, had attended all scheduled negotiating sessions, had fulfilled all its procedural obligations, had exchanged proposals, had worked with a Federal mediator to resolve the matter,[(26)] and had made concessions which had led to agreements on numerous subjects, including grievance and arbitration procedures and seniority. Although the employer adhered to comprehensive management-rights and no-strike provisions, the employer had dropped proposals that would have given it the right to unilaterally change certain wage rates and rules and had agreed to add a paragraph to the management-rights clause providing that those rights should not be exercised in such a way as to conflict with any other provision of the contract.[(27)] Having shown movement in these areas, the Board found that the employer "did not demonstrate the kind of intransigence or insistence on extreme proposals, which is evidence of an overall intent to frustrate the collective-bargaining process."[(28)]

After Reichhold, the Board found no bad-faith bargaining in American Commercial Lines,[(29)] in which the employer insisted on eliminating various benefits under the existing contract, including an exclusive hiring hall, union initiation fee check off, union trust funds, and union health, welfare, pension, and vacation plans, coupled with its insistence on a broad management rights clause, probationary period for new employees, and a limit on the union's access to the employer's vessels. The Board found that the employer's proposals "were not so harsh, vindictive, or unreasonable as to warrant the conclusion they were offered in bad faith."[(30)] The Board also noted that the employer expressed willingness to continue union benefit plans if problems were remedied; proposed duplicating the benefits of the funds at half the existing cost; was willing to discuss levels of coverage; offered to adhere to the union plans if the costs were competitive, administration were improved, and eligibility requirements were loosened; and offered to drop its management rights proposal if the union made concessions in areas of interest to the company. The Board found that the union, on the other hand, insisted on retaining the existing plans without modification.

More recently, the Board found no violation of Section 8(a)(5) in AMF Bowling,[(31)] where an employer proposed a 24% wage reduction, 14% reduction in fringe benefits, elimination of union shop, elimination of seniority job bidding, non-unit personnel performance of unit work, additional employee contributions to the pension plan, cost-shifting in the medical plan, and elimination of the dental plan. Similarly, in Larsdale,[(32)] the employer lawfully proposed elimination of grievance arbitration, elimination of the health plan, elimination of pension plan payments, elimination of dues checkoff, elimination of

seniority job bidding, elimination of superseniority for union officials, elimination of paid time for grievance processing, elimination of successors and assigns clause, and a wage freeze.

Of course, the Board has continued to find bad-faith bargaining where the employers' proposals demonstrate a desire to avoid agreement. Thus, in Modern Manufacturing,[(33)]

the Board found bad faith bargaining where the employer's proposals would deprive the union of a significant representational role. The Board reasoned that the employer had no real intent to reach an agreement with the union since the employer insisted that it retain absolute discretion and control over every important economic term of employment and the right to deal directly with employees, while seeking to exclude almost every matter from arbitration. The Board found that these proposals and tactics, coupled with a broad no-strike clause, "placed the [u]nion in a position where simple reliance on the rights arising from its status as the majority representative would be more advantageous than signing any contract the [r]espondent was prepared to offer."[(34)] The Board also concluded that the employer sought to effectively destroy the union's capacity for resolving disputes on behalf of unit employees and found such conduct "totally at odds with a desire to achieve a collective-bargaining agreement." The Board concluded that the employer's "obstructionist tactics" prevented the union from exploring the employer's position on non-economic matters, thereby substantially reducing the possibility of reaching an agreement on a full contract.[(35)]

In sum, the Board may find a violation based on an examination of an employer's proposals, particularly where the evidence reveals other indicia of bad faith, such as regressive bargaining, delaying tactics, or unexplained inflexibility, or where the employer's proposals would deprive the union of a significant representational role.[(36)] While we are aware of no case finding "predictably unacceptable" proposals to constitute bad-faith bargaining where the employer was seeking only drastic economic reductions and was not also seeking severe curtailment of the union's representational rights, the Board has noted that an unjustified proposal that includes a large wage decrease and sharp curtailment of other benefits is strong evidence of bad-faith bargaining, even in the absence of other objectionable conduct or proposals.[(37)] Thus, harsh, vindictive, or unreasonable proposals, without adequate explanation or rationale, might themselves form the basis for a Section 8(a)(5) complaint. Moreover, to the extent that Reichhold Chemicals represented a real change in the Board's analysis of employer proposals, we would consider presenting an appropriate case to the Board to give it an opportunity to review and clarify its doctrine in this regard.

We conclude, however, that the instant cases are not appropriate for this purpose and do not otherwise establish a violation of Section 8(a)(5). Upon its purchase of 10 Sheridan Square, the Employer hired all six of the predecessor's employees and adopted the RAB agreement then in effect, apparently to postpone an expected labor dispute until after the completion of the acquisition and the ownership transition. Moreover, the Employer was aware of the "most favored nations" clause in the RAB agreement that would make any agreement at terms less favorable to the employees unlikely. Even assuming, arguendo, that the Employer made the draconian proposals at issue in order to reach the expected impasse quickly, it is not clear that this conduct had any discernible impact on the prospects of good-faith bargaining. The only proposals offered by the Union, other than the unaltered continuation of the status quo, was the exclusion of members of the bargaining unit to allow the Employer to unilaterally cut their wages and benefits. The parties apparently bargained in good faith over these proposals, but it was the Union that finally withdrew them. Aside from this, it appears that the "most favored nations" clause would have prevented any agreement on terms much different from those contained in the RAB agreement.

In considering the Employer's conduct here, we note that the Union does not argue that the Employer's declaration of impasse and implementation of its proposals were premature in the absence of bad-faith bargaining. Thus, it appears to be undisputed that if the Employer's proposals were offered in good faith, the parties were in fact at a lawful impasse. The insurmountably wide gulf between the parties can be seen in the Union's continuing insistence on the terms of the RAB agreement, despite the Employer's clear indication that it was willing to improve its proposals if the Union would make some movement as well. It is further underscored by consideration of the "most favored nations" clause of the RAB agreement, which made it unlikely that the Union would agree to any concessions in order to reach an agreement; any such agreement covering these six employees could immediately reduce the terms and conditions of all of the employees the Union represents in all of the buildings covered by the RAB.[(38)] Thus, the only question to be resolved is whether the Employer's proposals were so extreme that, by themselves, they indicate bad-faith bargaining.

Moreover, it is undisputed that, at all relevant times, the Employer sought to meet and bargain with the Union. Indeed, even after the Union failed to respond to the Employer's first three letters requesting bargaining over a period of approximately three months, from April to July, the Employer made additional efforts to bring the Union to the table. Then, after one face-to-face meeting in July, the Employer continued to try to engage the Union in bargaining for three additional months, until it finally implemented its proposals in October, more than six months after it gave the Union notice that it would not be signing the new RAB agreement, and more than four months after it made its initial proposal to the Union. Similarly, there is no contention of any other indicia of bad-faith bargaining, such as delaying tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, or arbitrary scheduling of meetings.[(39)]

Finally, the Employer made significant movement in bargaining, albeit from its initial highly concessionary demands. Thus, despite the Union's unvarying insistence on the terms of the RAB agreement, with its only other proposals involving ways to exclude unit members from the contract's coverage, the Employer increased its wage proposals from $400.00 to $550.00 per week for the superintendent and from $6.00 to $9.00 per hour for the other employees, proposed an annual 2% wage increase instead of its discretionary merit pay increase proposal, and reinstated eliminated holidays.[(40)] This movement clearly belies any allegation of an inflexible bargaining stance.[(41)]

Taken together, these facts do not clearly establish a violation of Section 8(a)(5) of the Act.[(42)] Given the efforts made by the Employer to bring the Union to the bargaining table, the Union's hard bargaining position, the Employer's willingness to bargain over the one issue for which the Union offered counterproposals (unit scope), and the absence of any other indicia of bad-faith bargaining, we conclude that the instant cases are not appropriate vehicles to present the Board with an opportunity to review its holding in Reichhold Chemicals and that they do not otherwise establish a violation of Section 8(a)(5).

Accordingly, the instant Section 8(a)(1), (3), and (5) charges should be dismissed, absent withdrawal.

B.J.K.

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[1] All dates hereinafter are in 1997, unless otherwise noted.

[2] RAB is an association of New York City building owners and managing agents which acts as the members' representative for collective bargaining. RAB members individually sign the collective-bargaining agreements negotiated by RAB on their behalf, and their employees remain in separate bargaining units.

[3] The Employer was aware that it may have been able to set initial terms and conditions of employment after its purchase of the building under Spruce Up Corp., 209 NLRB 194 (1974). It appears that the Employer assented to the RAB agreement to postpone any labor dispute until after the completion of the acquisition and the ownership transition.

[4] Also on October 19, the Union representative asked the building owner's manager if he could go to the other buildings for strike signatures. The manager assented.

[5] NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

[6] NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960); Majure Transport Co. v. NLRB, 198 F.2d. 735, 739 (5th Cir. 1952).

[7] Atlanta Hilton & Tower, 271 NLRB at 1603.

[8] 271 NLRB at 1603 (footnotes omitted).

[9] NLRB v. Herman Sausage Co., supra.

[10] Atlanta Hilton and Tower, supra.

[11] General Electric, 150 NLRB 192, 194 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

[12] Hostar Marine Transport Systems, 298 NLRB 188, 196-97 (1990) (no bad-faith bargaining where the employer explained its positions and made major concessions at the table and the union was unwilling to change its position to meet the employer's need for flexibility). See also Commercial Candy Vending Division, 294 NLRB 908, 908-10 (1989), in which the Board found that the employer did not bargain in bad faith where it modified, redrafted, and withdrew proposals in major areas in response to concerns expressed by the union, and put forth legitimate business rationales and justifications for its bargaining posture.

[13] Litton Systems, 300 NLRB 324, 326-27 (1990), citing Reichhold Chemicals, 288 NLRB 69 (1988).

[14] Ibid.

[15] 264 NLRB 236 (1982).

[16] Id. at 236.

[17] 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1034.

[18] Recognition; plant visitation by union representatives; the number, rights and duties of union stewards; the union's use of a bulletin board; pay for jury duty; leaves of absence; and a procedure for processing grievances and conducting arbitrations.

[19] As in the instant cases, the employer proposed that any increase would be in the employer's sole discretion.

[20] See also, e.g., Port Plastics, 279 NLRB 362 (1986), in which the Board found the employer engaged in surface bargaining, when, inter alia, it was unyielding on all bargaining provisions except two minor ones and where the union, although inflexible on several contract provisions, demonstrated flexibility in several important areas. The employer, prior to bargaining, had made a statement indicating anticipatory refusal to bargain, and unlawfully discharged a union adherent. The Board found that the employer, "sought to ensure that the Union would have no voice in the establishment or maintenance of the warehouse employees' terms and conditions of employment, thereby effectively emasculating and rendering as nugatory the Union's role as the employees' bargaining representative."

[21] 243 NLRB 523, 536 (1979).

[22] Further, in Mar-Len Cabinets, the employer's proffered economic justification was pretextual. Ibid. Compare Litton Systems, 300 NLRB at 326-27, where the Board examined an employer's bargaining proposals and found no bad faith bargaining in circumstances where the employer frequently met with the union, extensively explained its positions and examined the union's proposals, agreed with the union on 23 topics and made numerous significant concessions, and where there was no evidence that the employer procedurally tried to frustrate the bargaining process.

[23] 288 NLRB 69 (l988), reconsidering 277 NLRB 639 (1985).

[24] Id., at 69.

[25] Ibid. See also Prentice-Hall, 290 NLRB 646 (l988), where the Board stated that it would not "scrutinize wage offers to see if they are sufficiently generous."

[26] In this regard, see also Rescar, 274 NLRB 1, 2 (1985).

[27] See also Boaz Carpet Yarns, 280 NLRB 40, 43 (1986) (no bad faith bargaining where employer proposed broad management-rights clause drafted to avoid appearance of waiver of rights and rejected compulsory arbitration and dues checkoff where those proposals were not combined with a demand for no-strike or zipper clauses and the employer made no unilateral changes during negotiations).

[28] 288 NLRB at 71.

[29] 29l NLRB l066 (l988).

[30] Id., at 1079.

[31] 314 NLRB 969 (1994).

[32] 310 NLRB 1317 (1993).

[33] 292 NLRB 10 (l988).

[34] 292 NLRB at 11, citing NLRB v. A-1 King Size Sandwiches, 732 F.2d 872, 877 (11th Cir. 1984).

[35] Id., at 10.

[36] In the instant cases, while the Employer proposed limiting the Union's bargaining rights over subcontracting and merit pay and its visitation rights, we would not characterize these proposals as so severe that they would unlawfully deprive the Union of a significant representational role. Moreover, we note that the Employer dropped its merit pay proposal by the parties' third face-to-face meeting and that the Union appears to have objected primarily to the Employer's economic proposals, rather than these limitations on the Union's representational rights. Indeed, we are not aware that the Union ever specifically objected to any of the Employer's non-economic proposals.

[37] Glenmar Cinestate, *supra*.

[38] We note that, while the Board has found such "most favored nations" clauses to be lawful, Dolly Madison Industries, 182 NLRB 1037 (1970), it has relied upon the constraints imposed by such a clause in finding a lawful impasse. J. D. Lunsford Plumbing, 254 NLRB 1360, 1366 (1981) ("No matter what the starting point of the [c]ompany's offer the [u]nion was simply unprepared to take anything less than it had obtained from the [a]ssociation's members"). Cf., Utah County Tractor Sales, 103 NLRB 1711, 1728-29 (1953) ("negotiations were fruitless" where union would not accept anything but the contract it had with other employers).

[39] Cf., Atlanta Hilton & Tower, 271 NLRB at 1603. The Union apparently contends that certain of the Employer's statements and other actions indicate that the Employer's intent was to provoke the unit to strike. We conclude that the evidence is insufficient to demonstrate such an unlawful intent. Thus, the hiring of security guards and the changing of the building's locks after the Employer became aware of the Union's meeting at the building indicate nothing more than precautionary measures to prevent any strike-related damages. Significantly, there is no evidence which would indicate that the guards' presence or the changing of the locks substantially interfered with the employees' performance of their jobs, other than the guards' opening and closing doors for tenants. An Employer official reportedly did say to one employee, "Why don't you just walk out," and, "Just walk out." These statement, by themselves, are not sufficient to show an unlawful intent, and may indicate little more than the Employer's frustration with the Union's posture and likely strike. Moreover, there is no indication that the Employer's highly concessionary proposals were for the purpose of provoking a strike, particularly given the "most favored nations" clause in the RAB agreement, which appears to have made a strike the inevitable response to *any* concessionary proposal, however slight.

[40] We recognize that most of the Employer's movement occurred after it implemented its August 25 proposals. Given the Union's failure to respond to so many of the Employer's requests to meet and bargain, which resulted in only one face-to-face meeting in the six months prior to implementation, however, the Employer's substantial movement by the parties' third meeting is indicative of some effort to resolve the parties' differences and a willingness to reach agreement.

[41] Cf. Neon Sign, 229 NLRB 861, 862 (1977) (intransigent employer "s[a]t through six bargaining sessions, refusing to change even one word of their contract offer despite a number of counterproposals by the [u]nion responsive to [the employer's] financial needs").

[42] The instant cases also allege that the Employer's conduct violated Section 8(a)(3) as its implementation of its bad-faith proposals and its provocation of the Union's strike were "inherently destructive" of the employees' Section 7 rights. Assuming, arguendo, that such conduct would make out a violation of Section 8(a)(3), we have stated above that there is no indication that the Employer's highly concessionary proposals were for the purpose of provoking a strike and we here conclude that the allegations of bad-faith bargaining should be dismissed. Therefore, we likewise find no basis for issuing a Section 8(a)(3) complaint.