

Whitesell Corporation and Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 359. Cases 18–CA–018540, 18–CA–018965, and 18–CA–019008

September 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On March 10, 2010, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Additionally, the General Counsel filed cross-exceptions and a supporting brief, the Union filed a statement of position supporting the General Counsel's cross-exceptions, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified, to modify his remedy,² and to adopt the recommended Order as modified and set forth in full below.³

The judge found that, between April 2007 and April 2009, the Respondent, at its wire form products manufacturing facility in Washington, Iowa, committed numerous violations of Section 8(a)(5) and (1) of the Act. We agree with the judge's findings of violations, subject to minor modifications.⁴

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We also modify the remedy in other respects, as explained below.

³ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We also shall add the standard provision requiring the Respondent to certify its compliance with our Order.

⁴ In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by bargaining regressively and in bad faith regarding the no-strike/no-lockout provision from July 2007 to January 28, 2008, Chairman Pearce and Member Becker find it unnecessary to rely on the judge's discussion of subsequent bargaining over this provision.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by bargaining regressively and in bad faith regarding drug testing, Chairman Pearce and Member Becker find no merit to the Re-

spondent's contention that the Union's proposal on drug testing was regressive. The judge correctly found that the Union's proposal could not be compared to the existing June 13, 2006 drug testing policy, as the record did not show the terms of that policy. Although the Respondent contends that a specific exhibit in the record sets forth the June 13, 2006 drug testing policy, nothing in that exhibit (or in the applicable testimony) identifies the exhibit as the June 13, 2006 drug testing policy.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by insisting on retaining essentially unfettered control over a broad range of mandatory subjects of bargaining, Chairman Pearce and Member Becker rely on the Respondent's bargaining proposals concerning management rights and merit pay, and the overall context of the Respondent's bad-faith bargaining. They find it unnecessary to rely on the judge's consideration of the Respondent's proposed "Article V, Policy, Work Rules & Procedures," "Continuous Improvement References 'A,'" or "Article 36, Shop Rules."

Like his colleagues, Member Hayes would adopt the judge's finding that the Respondent engaged in overall bad faith bargaining in violation of Sec. 8(a)(5). In doing so, he would find that the Respondent's alteration of the bargaining procedure beginning in October 2008 and its bargaining conduct related to the seniority and layoff/recall, no-strike/no-lockout, drug testing, safety committee, merit pay, work rules, and management-rights proposals, are, in the context of this case, evidence of the Respondent's overall bad-faith bargaining. As a result, he would find it unnecessary to pass on whether the Respondent's conduct regarding each of these matters constituted separate, independent violations of Sec. 8(a)(5), as alleged in the complaint. Similarly, Member Hayes agrees that the Respondent used its reinstalled suggestion box to directly deal with employees in violation of Sec. 8(a)(5), but he finds no need to pass on whether the unilateral reinstallation of the suggestion box was a separate 8(a)(5) violation.

Contrary to his colleagues, Member Pearce would additionally grant the Union bargaining expenses incurred from June 12 to October 16, 2008.

Although Member Hayes agrees with his colleagues to order the Respondent to reimburse the Union for its bargaining expenses incurred from October 16, 2008, to April 1, 2009, he disagrees with their decision to award such expenses for the period of April 4, 2007, to June 12, 2008, and thus does not join the decision in that regard. In his view, the Respondent's conduct during this period was not so "aggravated" as to have "infected the core of [the] bargaining process." *Frontier Hotel &*

I. BACKGROUND

The Union has represented the production and maintenance employees at the Washington, Iowa plant since 1967. The Respondent acquired the plant in January 2005, recognized the Union, and adopted the existing collective-bargaining agreement, which was set to expire on June 12, 2006. After starting contract negotiations on May 26, 2006, the Respondent declared impasse on June 13, 2006—1 day after the contract's expiration—and subsequently implemented provisions of its final offer. In an earlier decision, the Board found that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing provisions of its final offer without bargaining to a valid impasse.⁷

On March 16, 2007, 8 months after the Respondent unlawfully declared impasse and implemented provisions of its final offer, the U.S. District Court for the Southern District of Iowa, on the petition of the General Counsel, issued a 10(j) temporary injunction ordering the Respondent to bargain in good faith with the Union, revoke the implementation of its final offer at the request of the Union, and fulfill the Union's outstanding requests for information.⁸

II. BARGAINING CONDUCT AT ISSUE HERE

A. *Bargaining from April 4, 2007, to June 12, 2008*

Pursuant to the injunction, the Respondent resumed negotiations with the Union on April 4, 2007. However, and as more fully set forth in the judge's decision, the Respondent began engaging in bad-faith bargaining soon thereafter. Virtually from the outset, the Respondent—which had recognized the Union since 2005 and had never questioned its majority status—refused to agree to a clause recognizing the Union as the unit employees' bargaining representative. The Respondent persisted in that refusal for 16 months. The Respondent's asserted reason for refusing to agree to the clause—the absence of documents supporting the clause's reference to the Un-

Casino, 318 NLRB 857 (1998), enf. granted in relevant part, denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). Instead, he agrees with the judge that despite the Respondent's unlawful conduct during this period, the Respondent was not intent on avoiding an agreement and its conduct did not completely preclude bargaining progress.

Member Hayes also disagrees with his colleagues' decision, *sua sponte*, to order the Respondent to read aloud the Board's notice.

⁷ The Board found that the Respondent committed other violations of Sec. 8(a)(1) and (5) of the Act, as well. *Whitesell Corp.*, 355 NLRB 648 (2010), enf. 638 F.3d 883 (8th Cir. 2011).

⁸ *Chester v. Whitesell Corp.*, No. 3-07-CV-00009CRW-TJS) (S.D. Iowa, March 16, 2007).

ion's Board certification⁹—was clearly pretextual, because even after the Union removed the reference to certification, the Respondent continued to oppose the recognition clause for almost 1 year without stating any other reason for its opposition. As a recognition clause costs the Respondent nothing, and simply embodies the employer's legal obligation, it should have been the easiest provision to accept.

Regressive bargaining also was a significant component of the Respondent's efforts to obstruct the negotiations. For example, after bargaining resumed in 2007, the Respondent proposed a seniority provision less favorable to employees than its own previously imposed seniority provision and, as bargaining continued, the Respondent made its seniority proposals increasingly harsh, reducing or eliminating the role of seniority in relation to various employment terms. The Respondent injected a further impediment to bargaining by proposing in October 2007 that seniority be measured only from January 3, 2005, the date on which it acquired the facility, notwithstanding that numerous employees had worked many years at the plant, which had been operating since 1967 and their full length of service had previously been credited.¹⁰

As the judge found, the Respondent's regressive seniority proposals clearly were designed to frustrate bargaining and negate the possibility of reaching agreement. To that end, the Respondent used similar regressive bargaining tactics on other subjects, including a no-strike/no-lockout provision, a drug testing provision, and a safety committee provision.

The Respondent's intentional use of regressive bargaining tactics to effectively foreclose agreement was underscored at the parties' October 3, 2007 negotiating session. At this session, the Respondent's chief operations officer, Robert Wiese, told the union bargaining committee that it "should have taken what [was] offered in June of 2006," when the Respondent unlawfully implemented its prior proposals, because it was the "best contract" that the employees "would ever get." Wiese added that "every proposal . . . would become progressively worse," and that he "would bargain until the cows come home but every proposal after that would be worse for the employees." As the judge found, Wiese made

⁹ At some point, the Union provided documentation of the Board's 1967 certification of the Union, but the Respondent refused to accept the document because it lacked a seal and signature.

¹⁰ According to the Respondent's own witness, Director of Human Resources John Tate, when the Respondent made the seniority proposal, the Union bargaining committee "reacted with disgust and frustration." The judge found that "Tate's demeanor betrayed palpable glee" at the Union's reaction to the proposal.

clear that “the Respondent was determined that the Union’s success in forcing the company to rescind the 2006 unilaterally imposed contract and resume good faith bargaining would redound to the detriment of unit employees.”

The Respondent also frustrated bargaining during this period by insisting on retaining control over a broad range of mandatory subjects. As the judge correctly found, “[t]hrough much of the negotiations, the Respondent insisted on proposals that gave it unilateral control over a stunningly wide range of the most important terms and conditions of employment,” including deciding what was bargaining unit work, deciding whether such work would be performed by unit employees, and deciding on wage increases and decreases. Indeed, the Union’s acceptance of such proposals would have left the employees significantly worse off than they were without a contract.

Additionally, the Respondent proposed a new attendance policy that would no longer allow employees time off to participate in contract negotiations. Although the Respondent could not have reasonably expected the Union to accept such a proposal, the Respondent nonetheless insisted on its inclusion for more than 1 year of bargaining.

The Respondent also unreasonably delayed providing the Union with requested information concerning the Respondent’s bargaining proposals. The Respondent waited 14 months before providing the Union with information that it had requested relating to the Respondent’s merit pay system proposal. Additionally, the Respondent waited 10 months before providing the Union a statement of what constituted “full-time” employment for purposes of the Respondent’s proposed health insurance plan. The unlawful failure to timely provide this information, while simultaneously pressuring the Union with regressive bargaining tactics, further undermined the possibility of reaching agreement.¹¹

The Respondent further obstructed negotiations when, after a January 29, 2008 bargaining session, Wiese sent in an email to Dale Jeter, the Union’s chief negotiator, stating that the Respondent would not schedule additional sessions unless the Union provided “proof of its intent to come to an agreement.” Thereafter, the parties did not meet in February, March, or April 2008.

¹¹ As set forth in the judge’s decision, the Respondent also committed other violations of Sec. 8(a)(5) less directly related to contract bargaining. These violations included refusing to provide (or unreasonably delaying the provision of) additional requested information, preventing the Union’s president from assisting employees with health insurance problems, and bypassing the Union through the installation and use of an employee suggestion box.

B. Bargaining from June 12, 2008, to October 16, 2008

On April 24, 2008, the General Counsel filed a petition in district court seeking to have the Respondent held in contempt of the 10(j) injunction. On June 12, 2008, the parties entered into an agreement to hold the contempt proceeding in abeyance. The agreement required the parties to meet for at least eight bargaining sessions (plus two additional sessions at either party’s request) over the next 90 days and bargain for at least 2 consecutive days each session. The agreement also provided that the Respondent’s outside counsel, Charles Roberts, would replace Wiese and Tate as the head of the Respondent’s negotiating team and that the Respondent would rescind certain unilateral changes and provide the Union with certain information.

As the Respondent’s lead negotiator, Roberts presented the Respondent’s proposals individually, article by article, over the course of eight bargaining sessions, and the parties reached agreement on at least 11 items. Significant economic issues that divided the parties were raised but were not a focus of bargaining. Roberts testified that the Union “put honest effort into the negotiations” and that the parties “made considerable progress.”

C. Bargaining from October 16, 2008, to April 1, 2009

On October 16, 2008, the Respondent informed the Union by letter that the time had come to stop presenting individual proposals and, instead, to bargain over comprehensive proposals. The letter warned that unless the Union responded by making “substantial movement, particularly on the core issues . . . the Company reserve[d] the right” to follow up with a “Final Comprehensive Proposal” worse for the Union than the “Last Comprehensive Proposal” enclosed with the letter.

As detailed in the judge’s decision, the Respondent, in subsequent bargaining sessions, stated that its positions on the core issues were “hard and fast” and “would not change today, next week, or next year.” Conversely, the Union, over two sets of bargaining sessions, made numerous proposals on core issues, many of which moved toward the Respondent’s positions. The Respondent did not react favorably, or make counterproposals, to any of the Union’s proposals, but, rather, insisted repeatedly that the parties were at impasse. The Union denied that the parties were at impasse and told the Respondent that the Union was not at its final position. On March 27, 2009, the Respondent declared impasse, and on April 1, 2009, implemented new terms and conditions of employment.

III. DISCUSSION

A. *Bargaining Expenses*

In *Frontier Hotel & Casino*,¹² the Board set forth the standard for determining whether negotiating costs should be awarded. The Board stated:

[W]e do not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations. In cases of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

Id. at 859; see also *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1194 (2001), enfd. mem. No. 01-1513 (D.C. Cir. 2003).

Applying this standard, the judge found that, prior to October 16, 2008, the Respondent engaged in a course of bad-faith bargaining, but the conduct was not so aggravated as to warrant the award of the bargaining expenses. In the remedy section of his decision, the judge stated:

During that period [before October 16, 2008] the Respondent failed to bargain with the required open mind and serious intent to reach common ground, and also engaged in multiple specific bad faith bargaining violations—including attempts to undermine the Union's status as collective-bargaining representative, regressive bargaining intended to frustrate open-minded consideration of compromise, unilateral changes, and failure to provide requested information in a timely manner. Moreover, the Respondent was determined that the Union's success in forcing the company to rescind the 2006 unilaterally imposed contract and resume

good faith bargaining would redound to the detriment of unit employees by leading to a contract that was even worse for employees than the one that the Respondent unlawfully imposed in 2006. Despite the unlawful conduct, however, the record does not show that, pre-October 16, the Respondent was generally intent on avoiding any agreement at all, but rather that it was bargaining with a closed mind. The Respondent's pre-October 16 unlawful behavior was an impediment to progress in negotiations, but it did not completely preclude such progress, and tentative agreements were reached on a number of issues during that time period.

The judge found, however, that as of October 16, 2008, the Respondent's bad-faith bargaining became sufficiently aggravated as to require an award of bargaining expenses to the Union. The judge explained:

[A]t that point . . . the Respondent changed the parties' bargaining procedure with the intention of avoiding further bargaining progress and speeding the parties towards deadlock. During negotiations after the October 16 letter, the Union repeatedly made proposals that moved in the direction of the Respondent's positions on key issues, only to have the Respondent[s] negotiators maintain an attitude of willful blindness to the Union's efforts at compromise. Instead of recognizing the Union's movement, and weighing possible compromises, the Respondent repeatedly asserted that no progress was being made and that the parties were already at impasse. The Respondent's tactics reduced the negotiations to a sham, wasted the Union's time and resources, and undercut the economic strength of the Union in a way that cannot be addressed through the standard remedies.

We agree with the judge, for the reasons he stated, that the Respondent engaged in aggravated misconduct subsequent to October 16, 2008, sufficient to warrant an award of bargaining expenses to the Union for that period. Contrary to the judge, however, we find that the Respondent also engaged in aggravated misconduct during the period of April 4, 2007, to June 12, 2008, sufficient to necessitate an award of bargaining expenses for that period.

As set forth above, it was during the period of April 4, 2007, to June 12, 2008, that the Respondent engaged in bad-faith bargaining by refusing to agree to a union recognition clause, bargaining regressively over a number of subjects and threatening ever-worsening bargaining proposals, insisting on retaining unilateral control over a broad range of mandatory subjects, insisting on an attendance system penalizing employees for participating in contract negotiations, and unreasonably delaying

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

providing information concerning its bargaining proposals. Further, the Respondent brazenly set forth its regressive bargaining strategy at the October 3, 2007 bargaining session, threatening the Union that, if it did not accept the Respondent's bargaining proposal, each subsequent proposal would become progressively worse. Thereafter, in January 2008, the Respondent announced that it would not schedule additional sessions unless the Union provided "proof of its intent to come to an agreement" and, consequently, the parties did not meet in February, March, or April 2008. Only the General Counsel's filing of a contempt petition brought the Respondent back to the bargaining table.

Thus, by engaging in the above-described conduct, the Respondent threw sand in the gears of collective bargaining during the April 4, 2007, to June 12, 2008 period. Even while reaching agreement on some minor subjects during the first 2 months of bargaining, the Respondent simultaneously pursued bad-faith tactics on other subjects, and any further progress was entirely stymied by the Respondent's bad-faith conduct.

We thus agree with the judge that, during the period of April 4, 2007, to October 16, 2008, "the Respondent failed to bargain with the required open mind and serious intent to reach common ground, and also engaged in multiple specific bad-faith bargaining violations—including attempts to undermine the Union's status as collective-bargaining representative, regressive bargaining intended to frustrate open-minded consideration of compromise, unilateral changes, and failure to provide requested information in a timely manner." We do not, however, accept his conclusion that "the record does not show that, pre-October 16, the Respondent was generally intent on avoiding any agreement at all, but rather [the record shows] that it was bargaining with a closed mind." We find the distinction between "bargaining with a closed mind" and engaging in bargaining "generally intent on avoiding any agreement" illusory and, in any event, of little consequence in light of the standard set forth in *Frontier Hotel & Casino*, above.

To be sure, the judge found that, because tentative agreements were reached on a number of individual items prior to October 16, 2008, the Respondent's pre-October 16 unlawful behavior did not completely preclude progress. While some of those agreements were reached during the first 2 months of bargaining, many others were reached between June 12, 2008, and October 16, 2008, during which time the parties negotiated under ground rules that Respondent agreed to only to hold off contempt proceedings. However, the Respondent's bargaining conduct during that period—for which we are not awarding bargaining expenses—does not negate the

detrimental effects that the Respondent's bad-faith tactics had on bargaining during the April 4, 2007, to June 12, 2008 period. Overall, the Respondent's tactics during the period of April 4, 2007, to June 12, 2008, effectively reduced the negotiations to a sham and wasted the Union's time and resources.

Additionally, imposition of the Board's standard remedies have not deterred the Respondent from continuing to engage in the same type of unlawful conduct. As the judge observed, this is the second time during negotiations for the same collective-bargaining agreement that the Respondent has improperly declared impasse and unilaterally imposed its terms on employees. We therefore agree with the judge that:

[I]t is [thus] imperative that the Union be provided with relief that will protect it against the economic consequences stemming from the Respondent's recalcitrance. Without such relief, the Respondent's recalcitrance would be rewarded in that the Respondent will have succeeded in using unlawful conduct to compromise the Union's economic strength at the bargaining table.

Although the judge made this statement with respect to his award of bargaining expenses for the post-October 16, 2008 period, it applies equally to the Respondent's bad-faith bargaining in the April 4, 2007, to June 12, 2008 period.

We thus find that the Respondent's unfair labor practices from April 4, 2007, to June 12, 2008, as well as after October 16, 2008, "infected the core of [the] bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" ¹³ The Board's traditional remedy of an affirmative bargaining order, standing alone, will not make the Union whole for the financial losses it incurred due to the Respondent's strategy of bad-faith bargaining. Reimbursement of negotiation expenses for the period of April 4, 2007, to June 12, 2008, as well as the period after October 16, 2008, is therefore warranted to make the Union whole and to restore the status quo ante so far as possible. ¹⁴

B. Reading of the Notice

In addition to the foregoing bargaining expenses remedy, we shall order that the Board's notice be read aloud

¹³ *Frontier Hotel & Casino*, 318 NLRB at 859.

¹⁴ As noted above, Member Pearce would additionally award bargaining expenses for the period of June 12 to October 16, 2008. In his view, the Respondent's temporary "good behavior" during this period, compelled under threat of contempt sanctions, only served to prolong the Respondent's overall course of bad-faith bargaining designed to frustrate agreement.

to the Respondent's employees by Chief Operations Officer Robert Wiese or Director of Human Resources John Tate, or by a Board agent in the presence of Wiese or Tate. We find that requiring the notice to be read aloud is warranted by the serious, persistent, and widespread nature of the Respondent's unfair labor practices, especially in view of the Respondent's repetition of the same type of misconduct previously found unlawful. Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future. We find that such assurance is clearly warranted under the circumstances of this case. *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), *enfd. mem.* 273 Fed. Appx. 32 (2d Cir. 2008); see also *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 290 fn. 4 (2010). Although the General Counsel did not seek an order requiring the Board's notice to be read aloud, his failure to do so does not preclude our imposing such a remedy. *Allied General Services*, 329 NLRB 568, 569 (1999). The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. E.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). It is well established that remedial matters are traditionally within the Board's province and may be addressed by the Board even in the absence of exceptions. E.g., *Schnadig Corp.*, 265 NLRB 147 (1982); *R.J.E. Leasing Corp.*, 262 NLRB 373 fn. 1 (1982) (modified decision). We also note that the U. S. District Court, in issuing a 10(j) injunction against the Respondent during the pendency of this case, required that the court's order granting the injunction be read to the unit employees by or in the presence of Wiese or Tate.¹⁵

ORDER

The National Labor Relations Board orders that the Respondent, Whitesell Corporation, Washington, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain in good faith within the meaning of Section 8(a)(5) and (1) of the Act with Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 359 (the Union) as the exclu-

sive collective-bargaining representative of unit employees at its facility in Washington, Iowa.

(b) Negotiating with a closed mind regarding the terms of a collective-bargaining agreement; retaliating against employees for exercising their rights under Sections 7 and 8(d) of the Act by insisting that any collective-bargaining agreement must be worse for employees than the contract that the Respondent unlawfully implemented in June 2006; and refusing to bargain in good faith over providing unit employees with benefits that are not provided to the Respondent's nonunion employees.

(c) Attempting to frustrate good-faith bargaining and undermine the Union's status as the collective-bargaining representative of unit employees by refusing to agree to a contract clause recognizing that the Union is the collective-bargaining representative of bargaining unit employees.

(d) Using an employee suggestion box in a manner intended to bypass the Union and otherwise undermine the Union's status as the collective-bargaining representative of unit employees.

(e) Making regressive and/or unreasonable bargaining proposals in order to frustrate good-faith bargaining.

(f) Insisting on contract proposals giving the company essentially unfettered control over a broad range of mandatory subjects of bargaining.

(g) Failing to provide, and/or unreasonably delaying the provision of, information requested by the Union that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of unit employees.

(h) Changing the company's practice of allowing the Union to assist employees with health insurance problems or questions without giving the Union notice and an opportunity to bargain.

(i) Installing an employee suggestion box without giving the Union notice and an opportunity to bargain.

(j) Altering the parties' bargaining procedure for the purpose of impeding good-faith bargaining.

(k) Negotiating without any intent to reach a collective-bargaining agreement with the Union.

(l) Falsely declaring impasse at a time when good-faith negotiations have not led to a valid impasse in bargaining.

(m) Unilaterally implementing proposals over the objections of the Union and in the absence of a good-faith impasse.

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

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

¹⁵ *Osthus v. Whitesell Corp.*, No. 3-09-CV-100-DRW-CFB (S.D. Iowa, Sept. 11, 2009), vacated and remanded on other grounds, 639 F.3d 841 (8th Cir. 2011).

Member Becker notes that the Respondent may file a motion for reconsideration if it wishes to challenge the Board's sua sponte imposition of this remedy.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees employed at the Respondent's plant in Washington, Iowa; excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act.

(b) On request by the Union, retroactively rescind any or all terms that the Respondent unilaterally imposed in April 2009, and restore, honor and continue the wages, benefits, and other terms and conditions of employment that were set forth in the collective-bargaining agreement that expired on June 12, 2006. Maintain the restored terms and conditions from the expired contract until such time as the parties complete a new collective-bargaining agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(c) Make bargaining unit employees whole for any loss of earnings and other benefits they suffered as a result of the unlawful unilateral changes to terms and conditions of employment, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Remit all payments to retirement, health care, and other funds that the Respondent was required to make under the expired collective-bargaining agreement, but failed to make, as set forth in the remedy section of the judge's decision as amended in this decision. In addition, make bargaining unit employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in the remedy section of the judge's decision as amended in this decision.

(e) At the request of the Union, remove the employee suggestion box that the Respondent unilaterally installed at the Washington, Iowa facility.

(f) Rescind the change that the Respondent unlawfully made on April 5, 2007, when it prohibited the Union from continuing to render assistance to unit employees with health insurance problems or questions.

(g) Provide the Union with the information that it requested on April 9, 2009, but which was unlawfully withheld.

(h) Pay to the Union the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations from April 4, 2007, to June 12, 2008, and from October 16, 2008, to April 1, 2009, such

costs and expenses to be determined at the compliance stage of this proceeding.

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

(j) Within 14 days after service by the Region, post at its Washington, Iowa facility, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 4, 2007.

(k) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by Chief Operations Officer Robert Wiese or Director of Human Resources John Tate, or by a Board agent in the presence of either Robert Wiese or John Tate.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 359 (the Union) as the exclusive collective-bargaining representative of bargaining unit employees at our facility in Washington, Iowa.

WE WILL NOT negotiate with a closed mind regarding the terms of a collective-bargaining agreement.

WE WILL NOT retaliate against you for exercising your right to good-faith collective bargaining by insisting that any collective-bargaining agreement must be worse for you than the contract that we unlawfully implemented in June 2006.

WE WILL NOT refuse to bargain in good faith over providing benefits to bargaining unit employees because we do not provide those benefits to our nonunion employees.

WE WILL NOT attempt to frustrate bargaining and undermine the Union's status as the collective-bargaining representative of our bargaining unit employees by refusing to agree to a contract clause recognizing that the Union is the collective-bargaining representative of unit employees.

WE WILL NOT use an employee suggestion box to bypass and otherwise undermine the Union's status as the collective-bargaining representative of our unit employees.

WE WILL NOT make regressive or unreasonable bargaining proposals in order to frustrate good-faith bargaining.

WE WILL NOT insist on contract proposals that give the company essentially unfettered control over a broad range of mandatory subjects of bargaining.

WE WILL NOT fail to provide, or unreasonably delay providing, information requested by the Union that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of unit employees.

WE WILL NOT change our practice of allowing the Union to assist employees with health insurance problems or questions without providing the Union with notice and an opportunity for bargaining.

WE WILL NOT install an employee suggestion box without giving the Union notice and an opportunity for bargaining.

WE WILL NOT alter our bargaining procedure for the purpose of impeding good-faith bargaining.

WE WILL NOT negotiate without any intent to reach a collective-bargaining agreement with the Union.

WE WILL NOT falsely declare impasse when we and the Union have not reached a valid impasse in bargaining after good-faith negotiations.

WE WILL NOT unilaterally implement proposals over the objections of the Union and in the absence of a good-faith impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

All full-time and regular part-time production and maintenance employees employed at our plant in Washington, Iowa; excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act.

WE WILL, on the Union's request, retroactively rescind any and/or all terms that we unilaterally imposed in April 2009, and WE WILL restore, honor, and continue the wages, hours, and other terms and conditions of employment that were set forth in the collective-bargaining agreement that expired on June 12, 2006. WE WILL maintain the restored terms and conditions from the collective-bargaining agreement that expired on June 12, 2006, until we and the Union complete a new collective-bargaining agreement, until good-faith bargaining leads to a valid impasse, or until the Union agrees to changes.

WE WILL make bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes, with interest.

WE WILL make all payments to retirement, health care, and other funds that we were required to make under the expired collective-bargaining agreement, but failed to

make, with interest. In addition, WE WILL make you whole for any expenses you may have incurred as a result of our failure to make such payments, with interest.

WE WILL, on the Union's request, remove the employee suggestion box that we unilaterally installed at the Washington, Iowa facility.

WE WILL rescind our April 5, 2007 unilateral prohibition against the Union's assisting unit employees with health insurance problems and questions.

WE WILL provide the Union with the information that it requested on April 9, 2009, but which we unlawfully withheld.

WE WILL reimburse the Union for its costs and expenses in preparing for and conducting collective-bargaining negotiations from April 4, 2007, to June 12, 2008, and from October 16, 2008, to April 1, 2009. The amount of those costs and expenses will be determined at the compliance stage of this proceeding.

WHITESSELL CORP.

Nichole L. Burgess-Peel, Esq. and *James L. Fox, Esq.*, for the General Counsel.

Charles R. Roberts III, Esq. and *Timothy A. Davis, Esq. (Constangy, Brooks & Smith, LLC)*, of Winston-Salem, North Carolina, for the Respondent.

Jay M. Smith, Esq. (Smith & McElwain), of Sioux City, Iowa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Des Moines, Iowa, on June 1, 2, 3, and 4, 2009. Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 359 (the Union or GMP) filed the charge in Case 18-CA-018540 on October 23, 2007, the charge in Case 18-CA-018965 on February 5, 2009, and the charge in Case 18-CA-019008 on March 31, 2009. On April 13, 2009, the Union filed an amended charge in Case 18-CA-19008. The Regional Director for Region 18 of the National Labor Relations Board (the Board) issued the complaint in Case 18-CA-018540 on December 23, 2008 (complaint (I)), the complaint in Case 18-CA-018965 on April 13, 2009 (complaint (II)), and the complaint in Case 18-CA-019008 on May 14, 2009 (complaint (III)).

Taken together, the complaints allege that, beginning on April 4, 2007, and continuing at least through April 2009, Whitesell Corporation (the Respondent) engaged in a course of bad-faith bargaining in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), and that this unlawful conduct culminated with the Respondent prematurely declaring impasse, and making unilateral changes to employees' terms and conditions of employment on April 1, 2009. The complaints also contain multiple allegations of related violations of Section 8(a)(5) and (1), including that the Respondent: attempted to undermine the Union; made regressive bargaining

proposals that frustrated bargaining; refused to provide, or unreasonably delayed providing, information in response to the Union's valid information requests; and, adhered to an illegal bargaining position regarding the term of the contract. In addition, complaint (I) alleges that officials of the Respondent violated Section 8(a)(1) of the Act by threatening that bargaining was futile. The Respondent filed timely answers in which it denied committing any of the violations alleged in the complaints.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with a place of business in Washington, Iowa, where it manufactures and distributes wire form products, and annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Iowa. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

On January 3, 2005, the Respondent acquired the manufacturing operation involved in this case, formerly known as Fansteel Washington Manufacturing, Inc. (Fansteel). The operation manufactures wire form products. Prior to purchasing the operation, the Respondent was a customer of Fansteel. The operation, which is located in Washington, Iowa, is one of a number owned by the Respondent, but it is the only one at which the Respondent manufactures wire form products. The Respondent's other facilities, located in Alabama, Illinois, and Mississippi, manufacture products that include metal screws and nuts. The Respondent is associated with, but incorporated separately from, a business organization referred to in the record as "the Whitesell Group" that owns approximately 28 production facilities in North America and Asia.

The Union has represented employees at the Washington, Iowa facility since 1967. The bargaining unit consists of all production and maintenance employees at that facility.¹ When the Respondent purchased the facility in January 2005, it retained all of Fansteel's employees, recognized the Union, and adopted the existing contract, which was set to expire on June 12, 2006. In 2007, there were approximately 105 employees in the bargaining unit at the Iowa facility. None of the Respondent's other facilities are unionized.

¹ The bargaining unit is defined as follows:

All full-time and regular part-time production and maintenance employees employed at [the Respondent's] plant in Washington, Iowa; excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act.

B. Prior Violations

Beginning on May 26, 2006, the Union and the Respondent engaged in negotiations for a new contract. The Union's chief negotiator was Dale Jeter. Jeter, an international executive officer with the Union, is not an employee of the Respondent. The Respondent's chief negotiator during the initial period of bargaining was outside legal counsel, Robert Janowitz, Esq. At all material times, Robert Wiese has served as the Respondent's chief operations officer, and Betsy Milam has been the human resources director at the Iowa facility. In May and June 2006, the parties met to bargain eight times. On June 13, 2006—1 day after the existing contract's expiration date—the Respondent declared that the parties were at impasse and unilaterally implemented terms and conditions of employment. The Union filed charges alleging unfair labor practices by the Respondent, and the Director for Region 18 of the Board issued the complaint in the prior case.

On March 2, 2007, Administrative Law Judge Bruce Rosenstein issued a decision finding that the Respondent had violated Section 8(a)(5) and (1) by unilaterally implementing a contract in June 2006 over the objections of the Union and in the absence of a good-faith impasse. *Whitesell Corp.*, 352 NLRB 1196 (2008) (*Whitesell I*). In reaching that conclusion, Judge Rosenstein relied, inter alia, on the fact that the Respondent had "imposed an arbitrary and unreasonable deadline for the completion of negotiations" by declaring that it would not bargain past June 12, 2006—the date when the existing contract was set to expire. *Id.* at 1209. He noted, moreover, that the parties had only met to bargain on eight occasions, and were still reaching new tentative agreements regarding contract articles as late as June 11—2 days before the Respondent unilaterally implemented a contract. *Id.* at 1209–1210. Judge Rosenstein also concluded that the Respondent had unlawfully refused to furnish the Union with requested information that was necessary and relevant to the Union's responsibilities as collective-bargaining representative. Among Judge Rosenstein's other conclusions was that the Respondent had violated Section 8(a)(1) of the Act by precluding employees from using break-time to post pronoun notices, while permitting employees to post other notices.

Although Judge Rosenstein found that the Respondent unlawfully implemented a contract proposal, he declined to find that the Respondent had engaged in surface bargaining, as alleged by the General Counsel. *Id.* at 1210 fn. 10. Judge Rosenstein noted that the parties had met on eight occasions and reached tentative agreements on approximately 30 contract articles. He observed that while the parties were "legitimately deadlocked on a number of mandatory subjects of bargaining," *Ibid.*, both the Respondent and the Union were continuing to make counterproposals, *Id.* at 1210. Judge Rosenstein denied the General Counsel's request that the Respondent be required to reimburse the Union's negotiating expenses, and explained that the parties "for the most part negotiated in good faith with an intention of trying to reach an agreement." *Id.* at 1211 fn. 12.

Shortly after Judge Rosenstein issued his decision, the Director for Region 18 filed a petition in the United States District Court for the Southern District of Iowa seeking a temporary

injunction pursuant to Section 10(j) of the Act. On March 16, 2007, the district court granted the Region's request and ordered the Respondent, inter alia, to: bargain in good faith with the Union; upon request by the Union, revoke the implementation of the final offer, rescind the unilateral changes that the Union wanted rescinded, and fulfill all of the outstanding requests for information relevant and necessary to the Union carrying out its collective-bargaining responsibilities. Following the issuance of the injunction, the Union demanded that the Respondent rescind all elements of the unilaterally implemented terms with the exception of a 25-cent an hour wage increase and shift premium increases.

In April 2007, the Respondent resumed bargaining, now with Wiese (the Respondent's chief operations officer) and John Tate (the Respondent's director of human resources) serving as the Company's chief negotiators. Subsequently, on April 24, 2008, Region 18 returned to district court with a petition to hold the Respondent in civil contempt for its alleged failure to comply with the 10(j) injunction. On June 12, 2008, the parties reached an agreement to hold the contempt proceeding in abeyance.² The agreement set forth a framework for bargaining under which the parties were to operate for 90 days. The requirements of the agreement included: that the parties meet for at least eight bargaining sessions over the 90-day period, and that two additional sessions be scheduled at the request of either party; that the parties bargain for at least 2 consecutive days when they met; that Wiese and Tate step aside as the Respondent's chief negotiators and that Charles P. Roberts III (the Respondent's outside legal counsel in the contempt proceeding and in this litigation) take over that role; that the Respondent provide the Union with certain outstanding information; that the parties reduce information requests to writing; and that the Respondent rescind certain unilateral changes.

On August 29, 2008, the Board issued a decision that affirmed Judge Rosenstein's conclusion that the Respondent had violated Section 8(a)(5) by unilaterally implementing provisions of its contract proposal without first bargaining to a valid impasse. The Board also concluded that the Respondent had unlawfully failed to provide some of the information requested by the Union. In discussing why it was unlawful for the Respondent to withhold information regarding the Respondent's other facilities, the Board stated that "the Respondent consistently maintained that it intended to treat unit employees in the same manner as its nonunit employees at other facilities." 352 NLRB at 1197 fn. 8. In addition, the Board held that the Respondent had violated Section 8(a)(1) of the Act when Milam precluded employees from distributing and posting pronoun materials during breaktime. In the absence of exceptions, the Board adopted Judge Rosenstein's dismissal of the allegation that the Respondent had engaged in surface bargaining. The Board's order automatically dissolved the district court's Sec-

² On June 12, 2008, the agreement was read into the record. It was subsequently reduced to a writing dated June 17, 2008.

tion 10(j) injunction, and the previously suspended contempt proceeding regarding that injunction was, therefore, dismissed.³

C. Overview of Negotiations Involved in the Instant Proceeding

As discussed above, on June 13, 2006, the Respondent unlawfully implemented a contract over the objections of the Union and without bargaining to a good-faith impasse. The 10(j) temporary injunction that the district court issued on March 16, 2007, required the Respondent to resume negotiations and bargain in good faith with the Union. The parties returned to the bargaining table on April 4, 2007, and met on 46 dates thereafter during 2007, 2008, and 2009.⁴

For negotiations during the period from April 2007 until June 2008, the Respondent broke with its past practice of using an outside attorney as its chief negotiator. As alluded to above, the Respondent instead used Tate (who the Respondent hired a month earlier as its new director of human resources)⁵ and Wiese as its chief negotiators during that time period. Milam—the Respondent’s local human resources director—was also on the Respondent’s bargaining committee, although her role was secondary. Later, from June 12, 2008, to January 2009, the Respondent resumed using outside counsel, in this case Attorney Roberts, as its chief negotiator. As discussed above, the Respondent’s use of Roberts in that capacity was a condition of the agreement to hold the contempt proceedings in abeyance. On January 16, 2009, when that agreement expired, Wiese banished Roberts from the Respondent’s negotiating team, and Wiese and Tate returned as the Respondent’s chief negotiators.

Jeter was the Union bargaining committee’s chief negotiator throughout the period relevant to this proceeding. The Union’s bargaining committee also included several employees of the Respondent: Georgia Fort, Mary Westfall, Steve Thomas, and, until October 2007, David Baetsle.⁶ Fort is the president of the union local and has worked at the Iowa facility for 32 years. All the bargaining sessions were held in Washington, Iowa.

1. *Statements by Parties Regarding Their Bargaining Strategies:* When the parties resumed bargaining following issuance of the 10(j) injunction, both sides made statements regarding how they planned to bargain going forward. At the first of these sessions, on April 4, Jeter stated that the Union would no longer recognize the numerous tentative agreements that the parties had reached prior to the Respondent’s unlawful contract implementation in June 2006. His position was that the Union

and the Respondent could still propose terms identical to those in the tentative agreements, but that there were terms the Union had agreed to prior to the Respondent’s unlawful unilateral implementation that the Union was not, as of April 2007, prepared to accept. Jeter testified that he took this position because, in his view, “things had changed radically” from where they stood during the runup to the Respondent’s unilateral implementation as a result of the decision by Judge Rosenstein and the district court’s order granting a temporary injunction that, *inter alia*, reinstated the terms of the expired contract. Jeter testified that in an effort to reach agreement prior to the June 2006 unilateral implementation, the Union “had really went way beyond what would normally be expected the union to do to try to reach agreement, and when that failed” he “pulled [the tentative agreements] off the table.”⁷

The Respondent’s bargaining committee was pleased with the Union’s decision to begin bargaining afresh. When Jeter announced that the Union was rescinding the tentative agreements, either Wiese or Tate stated that the Respondent welcomed the action. Tate testified that the Respondent was pleased because the Union’s decision to rescind the tentative agreements “gave the Company an opportunity to accomplish some things that they were unable to accomplish” during the prior bargaining. On April 26, 2007, the Respondent entered into a memorandum of understanding with the Union, which clarified that temporary agreements could be “removed or deleted” “by either party,” unless and until they became “part of a complete final and duly signed and endorsed agreement.”

During this period, and indeed, throughout bargaining, the Union stated that it would present its proposals only at the bargaining table. The Respondent repeatedly complained that the Union should forward its bargaining proposals by email or other means in advance of the face-to-face negotiations in Washington, Iowa. The Respondent argued that this was necessary so the parties would be better prepared and have more productive bargaining sessions. Jeter responded that the Union would not “bargain in cyberspace” and that all negotiations would take place at the bargaining table. The record shows that both Wiese and Tate are based in Muscle Shoals, Alabama, and had to expend time and resources to travel to Iowa for the bargaining sessions.

Throughout bargaining, the Respondent told the union negotiators that the terms and conditions for the unit employees at the Iowa facility had to be “in line” with those for employees at the Respondent’s other facilities. The Respondent’s bargaining team adopted this approach with respect to specific proposed contract terms. For example, it stated that the Respondent would not agree to a sickness and accident benefit for unit employees because the Company did not provide that benefit at its nonunion facilities, and also stated that the grievance process for the unit employees at the Iowa facility had to be consistent

³ The Respondent has appealed the Board’s decision in *Whitesell I*, supra, and that appeal is pending before the United States Court of Appeals for the Eighth Circuit.

⁴ The record shows that the parties met for bargaining on the following dates: April 4, 5, 24, and 25, 2007; May 22, 23, and 24, 2007; June 5, 6, 7, 26, and 27, 2007; July 17, 18, and 19, 2007; August 7, 8, 9, 21, 22, and 23, 2007; September 12, 2007; October 2 and 3, 2007; November 6, 7, and 8, 2007; December 18, 2007; January 29 and 30, 2008; May 15 and 16, 2008; August 14 and 15, 2008; September 3, 4, 5, 10, 11, and 12, 2008; January 14, 15, and 16, 2009; and March 17, 18, and 19, 2009.

⁵ Tate is also a licensed attorney.

⁶ In October 2007, Baetsle resigned his position with the Respondent.

⁷ This was not the first time that Jeter informed the Respondent that the tentative agreements were no longer in effect. Earlier, in a June 21, 2006 letter to the Respondent, Jeter stated that, “given the Company’s stated intention to unilaterally implement its final offer, the Union advises the Company that all issues addressed by the tentative agreements are hereby reopened for negotiations.”

with the complaint processes the Respondent had its other facilities.⁸ Similarly, in January 2009, the Respondent granted the unit employees an additional holiday when it added the same holiday at its nonunion facilities. When, on April 1, 2009, the Respondent unilaterally implemented a contract for the unit employees, the Respondent provided unit employees with the same benefits package that was in effect for employees at the Respondent's nonunion facilities. In addition, the comprehensive proposals that the Respondent submitted after issuance of the 10(j) injunction had appendices that included provisions from its nonunion facilities that had no apparent relevance for the unit employees who would be covered by the collective-bargaining agreement for the Iowa facility. For example, the Respondent's proposals included an employment-at-will form, and an emergency phone number for use in Alabama.

At the negotiating sessions in 2007, Jeter and Tate discussed what the law required of them with respect to bargaining. During one of the first sessions after issuance of the 10(j) injunction, Tate stated that all Judge Rosenstein had found was that the Respondent did not participate in a sufficient number of bargaining sessions before declaring impasse and implementing its final offer. Tate told Jeter that this time around "there would be plenty of bargaining sessions so that that didn't become an issue." Later, at a session on June 26, 2007, Tate stated that he knew the Respondent had to "come to the table," but that "the law did not say that the company had to agree to anything." Jeter said that his understanding was that "both parties had to bargain in good faith to reach an agreement" and that the Respondent would have "to agree to the things we are going to agree too." Tate responded, "We don't have to agree to anything in order to have a contract, you don't have to agree."

The Respondent's bargaining team made additional statements about its bargaining strategy on October 3, 2007. At a session on that date, Wiese told the union committee that it

⁸ I base these findings on the credible testimony of Jeter and Fort. Wiese denied that he ever told the union negotiators that the terms and conditions of employment at the Iowa facility had to be essentially the same as those at the Respondent's other facilities, however, he did not testify that *no one* on the Respondent's bargaining committee had made such a statement. Wiese did testify that "we said that [the Iowa facility would] have to be cost effective, the same as the other operations are cost effective." To the extent that this can be viewed as a denial that anyone on the Respondent's bargaining committee stated that the terms and conditions of employment at the Iowa facilities had to be consistent with those at the Respondent's other, nonunion, facilities, I credit the testimony of Jeter and Fort over that of Wiese. First, I note that a denial that the Respondent ever made such a statement during bargaining is contrary to the Board's finding, in *Whitesell I*, supra, that "the Respondent consistently maintained that it intended to treat unit employees in the same manner as its nonunit employees at other facilities." I may rely on the findings and evidence in the earlier case against the same employer as background in the instant case. See, e.g., *Stark Electric*, 327 NLRB 518 fn. 1 (1999). Moreover, Jeter's and Fort's testimony on this point is lent support by some of the Respondent's actual behavior. For example, the Respondent granted the same additional holiday to unit employees as it granted for employees at its nonunion facilities, and, unilaterally implemented the same benefits package for unit employees that the company had for employees at the Company's nonunion facilities.

"should have taken what" was "offered in June of 2006" because it was the "best contract" the employees "would ever get." Wiese stated that the Company's "strategy" was "that every proposal" the Company would offer "after that would become progressively worse for the employees." Lest there be any ambiguity about the Respondent's intentions, Wiese went on to say that the Company's September proposal was worse than the earlier ones, the Company's October proposal was worse than the September proposal, and the proposal the Company would make in November would be worse than the October proposal. Wiese said he "would bargain until the cows come home but every proposal after that would be worse for the employees."⁹ Eventually, the Respondent told the Union that the poor state of the economy justified reductions in what the Company was willing to offer employees.¹⁰ However, Jeter credibly testified that those economic conditions did not yet exist when the Respondent announced that its "strategy" was to present worsening proposals.¹¹

2. *Course of Bargaining:* In the immediate aftermath of the district court's issuance of the 10(j) injunction, the pace at which the Union made proposals was quite brisk. The Union began submitting packets of individual proposals to the Respondent on April 4, and during April, May, and June these proposals covered a wide range of subjects including: contract term, credit union, disciplinary policy, picket line recognition, probationary period, grievances, scope of agreement, shop committee policy, parties and intent of agreement, vision care, dues checkoff, nondiscrimination, rest periods, jury duty, bereavement pay, vacation, holidays, leaves of absence and sick leave, retirement benefits, limitation of agreement, seniority, hours of work and overtime, life insurance, supplemental accident benefits, attendance policy, military leave, job descriptions, no strike or lockout, safety and personal protective equipment, joint safety committee, eye protection, prescription safety glasses, clothing, rules and regulations, and medical insurance. During the 2-month period from April to June 6, 2007, while the parties were considering individual contract proposals, they reached agreement on a number of subjects, including: temporary assignments, life insurance, accidental death/disability insurance, payroll transfers, the wording of the cover page, and tuition reimbursement.

On June 26, 2007, the Respondent submitted a comprehensive proposal—the first postinjunction proposal that the record shows the Respondent initiated. On July 17, August 7, and September 11, 2007, the Respondent submitted modified com-

⁹ I base this finding on the credible testimony of Jeter and Fort, Tr. 70–71 and 457, which was not contradicted on this point by Wiese.

¹⁰ See GC Exh. 55 (2/14/08 letter from Tate to Jeter).

¹¹ Wiese testified that in November 2008, the Respondent lost the largest customer of the Iowa facility, but this was well after Wiese first announced that the Company's strategy was to make worsening proposals. The Respondent did not show that it suffered any decline in the demand for its product during the period from 2006 to October 2007. Wiese did testify that the price the Respondent had been paying for steel rose from 2006 to 2008. There is no claim that during bargaining, the Respondent ever said that its proposals would become less or more generous depending on changes in the price of steel.

prehensive proposals.¹² The Union submitted its first comprehensive proposal on about July 17, 2007, and presented modified versions on August 22 and November 7, 2007. After the Respondent presented its first comprehensive contract proposal on June 26, the parties failed to reach another tentative agreement in 2007. This failure occurred despite the fact that the parties met during every month for the rest of that calendar year. Although no tentative agreements were reached during that period, Jeter stated that the parties did “sit and talk about the other’s counter proposal and try to make, you know, a few changes in hopes of getting closer, but it just didn’t work.” During this period, the Union expressed its objections to certain proposals and there were discussions by both sides.

On January 29, 2008, the Respondent made another comprehensive proposal to the Union. The Union responded the same day with a handwritten document that addressed the proposal article-by-article. The Union made movement towards the Respondent’s proposals on a number of issues, and indicated a willingness to make movement, on others. For example, the Union stated that it would agree to the deletion of language requiring that any purchaser of the operation be bound by the labor contract if the Respondent would accept the union proposals on dues checkoff and seniority. The Union also agreed to a proposal from the Respondent regarding the “titles” of sections and subsections in the agreement. In addition, the Union noted that that it would accept, or consider accepting, multiple provisions that the Respondent included in an appendix to its comprehensive proposal, as long as those provisions were moved into the body of the contract itself. These provisions addressed a variety of subjects including insurance, employees’ personal appearance, reporting of on-the-job injuries, and educational assistance for employees. The Union wanted the provisions to be moved into the body of the contract due to concern that the Respondent’s proposals gave the Company authority to unilaterally change rules that were set forth in the appendices. The Union also stated that it was accepting the Respondent’s proposal to delete the no strike/no lockout provision.¹³

The next day, January 30, 2008, Wiese sent an e-mail to Jeter, in which Wiese indicated that the Respondent would not schedule additional bargaining sessions unless the Union provided what he deemed “proof of its intent to come to an agreement.” The email stated:

Whitesell is not interested in expending more time and money for non-productive bargaining sessions. Whitesell will come

back to the bargaining table if and when the Union provides us with proof in advance of a meeting. Upon review, Whitesell will then schedule with the Union any necessary followup bargaining sessions. Unless the Union provides Whitesell substantive proof of its intent to come to an agreement, Whitesell reserves the right to add, delete, change or modify its final offer that it has put on the table today.

Following this letter, the parties did not meet at all in February, March, or April 2008. The record does not show whether the Union contacted the Respondent to request bargaining on specific dates during that period or otherwise tested Wiese’s declared intent not to engage in further bargaining absent “proof.” On April 24, 2008, the Board’s Regional Office filed a petition in district court, asking that the Respondent be held in civil contempt of the 10(j) injunction, which required it to bargain with the Union.

After the Regional Office filed the contempt petition, the Respondent met to negotiate with the Union on May 15 and 16, 2008—the first sessions since January 30. At those sessions, the parties reached tentative agreement on a provision regarding the color of the contract’s cover. The Respondent also stated that it would accede to the Union’s desire to organize the agreement’s sections in the same manner as in the prior agreement with Fansteel, not in the different format that the Respondent had been using in its proposals. Addressing concerns raised by the Union, the Respondent also moved a number of items from the contract appendices, into the body of the contract.

On June 12, 2008, the day of the scheduled district court hearing regarding the contempt petition, the parties entered in an agreement to hold the contempt proceeding in abeyance and continue bargaining for the next 90 days under conditions set forth in that agreement, and discussed above. One of those conditions was that Roberts (outside legal counsel) replace Wiese and Tate at the head of the Respondent’s negotiating team. Another condition was that the parties meet for at least eight sessions and, at the request of either party, for two additional sessions.

Roberts met with Jeter about information requests in June 2008, and acted as lead negotiator at the 11 bargaining sessions held from August 14, 2008, to January 16, 2009. At the first eight of those bargaining sessions, Roberts presented the Respondent’s proposals individually—a return to the bargaining method that had resulted in a number of tentative agreements between the parties early in the 2007 negotiations. During the sessions at which Roberts presented individual proposals to the Union, the rate at which the parties reached tentative agreements accelerated greatly. The parties reached tentative agreements on at least 11 items: the contract’s preamble; recognition of the Union; scope of the agreement; nondiscrimination; no strike or lockout; picket line recognition; rest periods; vision care; no-solicitation policy; an integration clause; and one of three articles concerning “rules and regulations.” During this period, some of the most significant economic issues that divided the parties were raised, but neither party made those issues a focus of bargaining.

¹² The headings on several of these comprehensive proposals indicate that they were offered over the course of multiple consecutive days. I refer to these proposals using the earliest date listed.

¹³ Whether the Union was truly agreeing to the Respondent’s position is somewhat murky given other language in the counterproposal. The Union’s counterproposal to the Respondent’s January 29 comprehensive proposal states, with respect to the Respondent’s no strike/lockout proposal: Union “OK to C[ompany] P[roposal]—see U[nion] P[roposal].” However, in the portion of the Union’s counterproposal discussing modifications to the Union’s own last comprehensive proposal, the Union stated that it would agree to delete the “no lockout” language, but was resubmitting its proposal with respect to the “no strike” language in the union’s comprehensive proposal.

Roberts testified that the Union “put honest effort into the negotiations” (Transcript (Tr.) p. 806), and that the parties had “made considerable progress,” (Tr. 804–805). Notwithstanding the progress that the parties were making, the Respondent abruptly changed course on October 16, 2008, informing Jeter by letter that the time had come to stop presenting individual proposals and revert to the practice of bargaining over comprehensive proposals. The letter was accompanied by what the Respondent described as its “Last Comprehensive Proposal.” The letter warned that unless the Union responded to the Respondent’s “Last Comprehensive Proposal” by making “substantial movement, particularly on the core issues . . . , the Company reserve[d] the right” to follow up with a “Final Comprehensive Proposal” that was worse for the Union than the “Last Comprehensive Proposal.” In its letter, the Respondent identified what it viewed as the “core issues” separating the parties. The issues identified were: successorship; management rights; disciplinary action; seniority; hours and overtime; vacation; medical benefits; sickness and accident benefits; retirement plan; and attendance policy. In the October 16 letter, the Respondent asked the Union to send its counterproposals in advance of the next bargaining session. The Respondent opined that it was “a waste of valuable time and money to attend nonproductive bargaining sessions” and that, as a result, the Company “prefer[red] to hold off scheduling future bargaining dates pending receipt of [the Union’s] response.”

In a letter dated November 21, 2008, Jeter answered the Respondent’s October 16 correspondence. Jeter reiterated his position that the Union would present its proposals only “at the bargaining table and not through cyberspace or regular mail.” He stated that all of the “core issues” identified by the Respondent, as well as other issues “remain on the table and need to be discussed and bargained over face to face in an attempt to reach an agreement.” Jeter stated that the full union bargaining committee had to be present to discuss changes that “may lead us closer to agreement.” He observed that the core issues were “discussed very little during the” previous “eight meetings.” In addition, Jeter stated that the union committee was not at its final position and would “respond to, discuss, and bargain over the comprehensive proposal that accompanied the 10/16/08 letter” at the next bargaining session. Jeter accused the Respondent of attempting to manufacture an impasse.

Wiese, in a letter dated December 12, 2008, responded by accusing the Union of bad-faith bargaining. This assessment is contrary to that of Roberts (the Respondent’s chief negotiator at the time), who testified that the Union had “put honest effort into the negotiations.” In the December 12 letter, Wiese was especially sharp in criticizing the Union’s refusal to submit proposals by email or regular mail in advance of bargaining sessions, stating that this refusal “continues to defeat the entire bargaining process.” Wiese also stated that he agreed with Jeter’s observation that the “core issues” had been discussed very little during the last eight bargaining sessions.

3. *Final Six Bargaining Sessions (January and March 2009)*: The parties next set of bargaining sessions were on January 14, 15, and 16, 2009. On the first day of those sessions, each side expressed disappointment with the other’s behavior. When Jeter said he had reviewed the Respondent’s October 16

proposal for the first time that morning, Roberts questioned why Jeter had not reviewed it during the previous 3 months. Jeter explained that, given his responsibilities at 18 other facilities, that morning was the first chance he had to go over the proposal with the other union bargaining committee members. He said that his review of a proposal would not “mean much” if he did it without the committee.

For his part, Jeter criticized the Respondent’s insistence on changing from an article-by-article bargaining approach to a comprehensive proposal approach. Jeter told the Respondent’s negotiators that the parties had been making good progress towards an agreement by bargaining over individual articles and that the Union wished to continue that bargaining procedure. He stated that “it appeared” as if the Respondent was actually trying to undermine successful bargaining by limiting consideration to comprehensive proposals. Roberts rejected Jeter’s request for further article-by-article bargaining and said that the Union had to respond to the Company’s proposal on a “comprehensive basis.”¹⁴

Another important development during the January 14 to 16 sessions came when the Respondent announced that its positions on the “core issues”¹⁵ were “hard and fast” and “would not change today, next week, or next year.”¹⁶ The Respondent indicated that it had “some flexibility” on the noncore issues, but would not make any movement on those issues unless and until the Union agreed to all the Company’s proposals on the core issues. The record indicates that, after the Respondent sent the letter identifying core issues, it did not make any changes to its positions on those issues.

The Union made numerous proposals on the core issues during the January 14 to 16 bargaining sessions, but that the Respondent did not react favorably to, or even make a counterproposal regarding, any of those union proposals. A number of the Union’s proposals included movement towards the Respondent’s positions, and Roberts grudgingly conceded on the witness stand that the Union made proposals that were “somewhat

¹⁴ At another point during the January sessions, Roberts stated the Union could bargain any way it wanted, including by submitting individual proposals on noncore issues. However, when the Union presented proposals in that manner, the Respondent dismissed them out-of-hand, indicating to Jeter that the Respondent would not give good-faith consideration to individual proposals on noncore issues.

¹⁵ At this meeting, the Respondent stated that the core issues were: management rights, disciplinary action, seniority, hours of work and overtime, vacation, medical benefits, sickness and accident benefits, wages, retirement benefits, and attendance. The Respondent’s October 16, 2008 letter, listed one additional subject as a “core issue”—“Successorship Clause.”

¹⁶ The Respondent concedes that Roberts made this statement and has not denied that its position was that it would not consider making any changes to its proposals on the core subjects. However, Wiese, in a January 25, 2009 letter to Jeter asserted that this position still somehow left room for bargaining on the core subjects. More specifically, the letter included the statement, “There is a substantial difference between the Company stating that its position on certain issues is final and will not change and stating that it will not consider or bargain over Union proposals that do not accept the Company’s position.” I find that the relevant portion of Wiese’s January 25 letter is incoherent and self-serving.

new.” The Union stated that it would delete language requiring that any purchaser assume the labor contract, and substitute language stating that, prior to a transfer of ownership, the Respondent would give the Union 90-day notice of the sale, and set up a meeting between the Union and the purchaser. The Union’s position was that it would agree to this change if the Respondent accepted the Union’s dues-checkoff proposal.¹⁷ Roberts testified that the change from a successorship proposal requiring assumption of the contract to one merely requiring advance notice and a meeting was “a significant move” by the Union. (Tr. 832.)

During the January 2009 session, the Union also submitted a proposal in which it reduced the maximum amount of vacation time it was seeking for long-term employees from 5 to 4 weeks. The Respondent’s bargaining committee thanked the Union for making positive movement on the vacation issue, but rejected the Union’s vacation proposal without making a counterproposal. The Union had been proposing an increase in employees’ sickness and accident benefit in order to keep pace with inflation, and during the January 2009 sessions, the Union reduced the size of the increase it was proposing. The Union made a verbal proposal concerning the bereavement policy, and the Respondent’s bargaining team thanked the Union for “partial movement” on that subject as well, but again rejected the proposal without making a counterproposal. The record also indicates that the Union agreed to accept the Respondent’s proposal on drug testing.

On January 16, the last day of the January 2009 session, the Union made multiple additional moves towards the Respondent’s positions by: reducing the size of the wage increase it was seeking; withdrawing the union proposal on sick pay and agreeing to the Respondent’s proposal; withdrawing the Union’s proposal regarding safety equipment and agreeing to the Respondent’s proposal; withdrawing the Union’s proposal regarding “lead persons” and proposing a tentative agreement; withdrawing the Union’s proposal regarding contract dates; reducing the increase the Union was seeking in the short-term disability benefit; and, making a new seniority proposal that increased the Respondent’s authority to base layoff and recall decisions on factors other than seniority. In addition, during the January session, the Union attempted to address the Respondent’s desire for a merit pay program by asking the Respondent to consider combining an efficiency-based wage increase or profit-sharing plan with some minimum, across-the-board, wage increase. The Union also stated that it was willing to consider accepting a very large increase in employees’ health insurance premiums if that increase was phased in over the term of the agreement and employees were given a wage increase to offset a portion of the premium increase.

¹⁷ This proposed successorship provision was more favorable to the Respondent than the Union’s January 29, 2008 proposal, which offered to delete the contract assumption language only if the Company accepted the Union’s proposals on both dues-checkoff and seniority. The proposal was also more favorable to the Respondent than the provisions in the Fansteel contract and the Union’s 2007 proposals—which required that any purchaser assume the collective-bargaining agreement.

The record indicates that during the January 14, 15, and 16, 2009 bargaining sessions the Respondent did not agree to a single one of the Union’s new proposals on core issues, or even make any counterproposals. The Respondent told the union negotiators why it found some of the Union’s proposals unacceptable, but these explanations were by and large confined to statements that the Respondent had to be more cost effective or cut costs. In isolated instances, the Respondent gave a more specific explanation. For example, Wiese stated that the Respondent’s proposal on successor notification was not acceptable because the 90-day notice period was too long. The Respondent did not, however, make a counterproposal that provided for a shorter notice period. Not only did the Respondent fail to agree to, or counter, any of the Union’s January proposals, but during the 3 days of negotiations in January 2009, the Respondent did not make any meaningful changes to its own comprehensive proposal of October 16, 2008.

On January 16, after the Respondent had rejected all of the Union’s proposals, Roberts identified the open issues one-by-one, and asked the Union whether it had any additional proposals on those issues. In each instance, Jeter answered that the Union did not have any additional proposals at that time, but might make movement later. Jeter testified that the Union did not make any other proposals at that time because it had just made new proposals and the Respondent had not offered any counterproposals.

At the close of the January 16, 2009 bargaining session, the Respondent stated that the parties were at impasse. Jeter denied that the parties were at impasse and told the Respondent that the Union was not at its final position. At trial, Jeter pointed to the changes that the Union made to its positions in January 2009 as evidence that its own positions were not “hard and fast.” Wiese stated that he would give the Union 30 days to submit any other proposals, after which time the Respondent would send the Union a “final offer.”

Jeter stated that he would be sending Roberts a letter requesting additional bargaining dates, since the Union’s view was that the parties were not at impasse. At this point, Wiese stated that correspondence should be sent to him, not to Roberts. When Roberts asked that Wiese forward correspondence from the Union to him, Wiese responded: “No, Mr. Roberts. Your party is over. Your game is over.” The January 15 meeting had been the last of the 10 contemplated by the parties’ agreement to hold the contempt proceeding in abeyance, and on January 16 the Respondent was no longer bound by that agreement to use Roberts as its chief negotiator. After Wiese told Roberts that his “party” and “game” were over, the Respondent ceased to include Roberts in negotiating sessions.

The parties did not meet again until March 17, 2009. However, during the interim, the parties communicated through correspondence. On January 23, 2009, Jeter sent an e-mail to the Respondent proposing future bargaining dates. Wiese responded on January 24, with a letter stating that Jeter’s e-mail request for bargaining dates “only confirms . . . we are at Impasse.” He stated that “[I]t is [a] silly and foolish waste of time, effort and precious money,” for the Respondent to agree to meet “before determining if there would be anything substantive to bargain or discuss.” Wiese declared that Jeter’s

bargaining approach was “dead”—“a union bargaining process that is extinct.” Wiese stated that at the January bargaining session, “The union did not change or move.” He made general reference to “deteriorating market conditions,” and warned that the Respondent “may have to submit a far less favorable offer for your consideration prior to implementation.”

The Union did not submit new proposals within the 30-day deadline that Wiese said he was imposing on January 16, 2009. On February 28, 2009, Wiese transmitted what he titled the Respondent’s “Last, Best, and Final Offer dated March 1, 2009.” The Respondent offered to meet with the Union during the week of March 17, but repeated that the offer was “final.” Wiese urged the Union to submit the proposal to the membership for a vote. In his January 24 letter to Jeter, Wiese stated that once the Respondent prepared and transmitted the “final” proposal, “we are not going to be modifying any positions.”

The Union and the Respondent met on March 17, 18, and 19, 2009, for what turned out to be the last bargaining sessions before the Respondent implemented contract terms unilaterally for a second time. At these meetings, Weise and Tate acted as the Respondent’s chief negotiators. In advance of the meetings, Wiese sent the Union a letter, dated March 14,¹⁸ in which he repeatedly asserted that the parties were at impasse. In spite of the numerous changes in position that the Union had made during the January 2009 bargaining sessions, Weise insisted that the January 2009 “session was a complete deadlock and waste of time = IMPASSE.” Later in the letter, Wiese characterized the negotiations as moving “at a snail[’]s pace.”

When the parties met in March 2009, the Respondent did not present any new or revised proposals. The Union presented a number of new proposals in which it attempted to address the Respondent’s stated concerns regarding core issues. Even Tate testified that “[t]he Union . . . did come up with some proposals, some ten issues that encapsulated the objectives that we had, which were the ten core components and the framework of what we feel would make us successful.” (Tr. 631.) Wiese testified that the Union made proposals on all of the core issues, and made what Wiese considered “actual changes” on six of the ten core issues.¹⁹ (Tr. 691.) The changes that the Union made to its proposals on the core issues are described below.

At the March 17 meeting, Wiese asked whether the Union had proposals on the core issues. The Union responded by making a presentation of its proposals on each of the core issues. When the Union was done presenting its proposals on the core issues, Wiese did not respond to those proposals, but rather asked whether the Union had any new proposals on the noncore issues. Jeter answered that the Union had been busy working on the proposals regarding the core issues and did not have proposals ready on the noncore issues. The Union’s proposals on the core issues included the following. On the sub-

ject of vacation benefits, the Union for the first time included a requirement, sought by the Respondent, that employees work a certain number of hours in a given year in order to qualify for full vacation benefits. The Union’s proposal on this requirement was, however, less strict than the Respondent’s—providing the full vacation benefit to employees who worked at least 1560 hours per year, whereas the Respondent’s provided the full vacation benefit only to employees who worked 2000 hours per year. Regarding the issue of overtime, the Union changed its proposal to state that the overtime rate of pay would not apply even if the employee worked more than 8 hours on a particular day, if that day fell during a week when the employee had an unexcused absence and did not work a total of at least 40 hours. Previously, the Union had proposed that employees receive the overtime rate whenever they worked more than 8 hours on a given day, regardless of how many hours they worked that week. The change was a move towards the Respondent’s position that the overtime rate would never be paid until the employee worked more than 40 hours during the week. The Union altered its seniority proposal to adopt, word-for-word, a portion of the Respondent’s seniority proposal, but retained much of the wording from the Union’s prior proposal. Regarding employees’ sickness and accident benefits, the Union again reduced the increase it was seeking—this time asking for an increase of \$10 in the weekly payment that employees would receive if they were unable to work due to sickness or accident. The Respondent’s proposal was that the existing sickness and accident benefit be discontinued entirely since it was not provided at the Respondent’s other facilities.

Regarding retirement benefits, the Union made a proposal that reduced the Respondent’s automatic contribution into employees’ 401(k) accounts to 50 cents per hour from the 84 cents per hour that was contributed under the Fansteel contract. This proposal was also a reduction compared to the Union’s earlier proposal for a 90-cent per hour contribution. The Respondent’s proposal was that it would not make any automatic contribution at all to employees’ 401(k) accounts, but would match 25 percent of any contribution that the employee made. This was the same retirement program that the Respondent had at its nonunion facilities. The Union also agreed to accept the Respondent’s plan on healthcare benefits, although there remained an issue about some of the cost figures for that benefit and how increases in employee premiums would be implemented.

The Union made a proposal on one issue that moved the parties somewhat further apart. The Union’s March 2009 proposal included a requirement that a union committee member be present at all employer-employee meetings that might lead to discipline. A previous union proposal had provided that a committee member would attend disciplinary meetings when the employee involved *requested* such attendance. The parties continued to disagree, as they had since the start of negotiations, about the standard under which disciplinary actions would be reviewed. The Union sought a provision stating that challenged disciplinary actions would be upheld only if the Respondent showed “just cause,” whereas the Respondent sought language stating that its disciplinary actions would be upheld as long as they were not “arbitrary.”

¹⁸ This letter is erroneously dated 2008, but the record, including the text of the letter, make clear that the letter should have been dated 2009. See R. Exh. 63.

¹⁹ As discussed above, the October 16, 2008 letter setting forth the core issues actually identifies 11 such issues. The successorship clause is the 11th “core issue,” which the parties sometimes do not identify as such.

At the bargaining session on March 18, Wiese and Tate gave the Company's response to the proposals that the Union made on March 17. Wiese and Tate rejected all of the Union's proposals without making any counterproposals or new proposals. Wiese stated that the Respondent "couldn't live with" what the Union was proposing and that "it appears we have been at impasse for quite some time." After the Respondent rejected the Union's proposals on the core issues, Tate asked whether the union bargaining committee had any proposals on the noncore issues. Jeter answered that the Union did not because, at the Respondent's request, the union committee members had been working on preparing proposals on the core issues. Nevertheless, the union committee caucused to prepare proposals on noncore issues. The Union returned to the bargaining table and presented those proposals to the Respondent. The Respondent's committee reviewed this group of union proposals, and rejected them all as well—again without making any counterproposals or modifying any of its own proposals. Then the Respondent's committee asked the Union whether it had any other proposals to make. When the Union declined to make further proposals at that time, Wiese stated that the parties were at "impasse" on 31 items, and that they were further from an agreement than they had been in 2006.

At the close of the March 18 session, Wiese told the union committee to have a comprehensive proposal ready to present by 9 a.m. the next day. The union committee did not present a comprehensive proposal the next morning, but rather presented a proposal on successorship. The proposal required that the Respondent provide notice and a meeting, but did not require that purchasers agree to assume the collective-bargaining agreement. Earlier, the Union had conditioned its willingness to agree to this greatly weakened successorship provision on the Respondent's agreement to union proposals on dues checkoff and/or seniority. In the March 19 version, the Union makes no mention of the change being conditioned on a concession by the Respondent regarding union dues checkoff, seniority, or any other subject. (See GC Exh. 76(a) (attachment).) Jeter stated that the successorship proposal was the only proposal it was making at that time. He told the Respondent that "the company had all of our latest proposals" on the core issues and other unresolved subjects, "and that the ball was in the company's court to come back to us with something." The Respondent answered that the Union had its final offer and the company had no more movement to make.

At this point, the union committee stood to leave, telling the Respondent's committee to "Take a look at [the proposal], and we will come back and talk about it." Tate said he wanted to "talk about it right now." The union committee did not remain at the bargaining table at that time. The negotiations were being held in a motel where Jeter was staying, and Jeter stated that the union committee was leaving to go to his room and would return to the bargaining table when it was necessary. After about 5 minutes, Tate telephoned Jeter's room and asked the Union's negotiators to return to the bargaining table. Jeter asked Tate whether the Respondent had any counterproposals to what the Union had presented, and Tate refused to answer, instead stating that the Union should return to the bargaining table. Jeter and Tate repeated this exchange multiple times,

until Jeter ended the call by hanging up. Less than 10 minutes after the phonecall ended, the union committee left Jeter's room to return to the bargaining table. On the way, they encountered Tate, who had retrieved his luggage and was preparing to leave the bargaining location. Jeter said, "What are you doing? We're going back down to meet with you." Tate responded, that Jeter "had really done it this time, . . . screwed over and hurt a lot of people, . . . broke off negotiations and they were done." There has been no further bargaining.

4. *Respondent Unilaterally Implements Final Proposal on April 1, 2009:* In the days after the March 19 meeting, the parties traded letters accusing one another of bad-faith bargaining and of being responsible for the failure to reach an agreement. Then Wiese, in a letter dated March 27, 2009, told Jeter that: "We have declared Impasse. Because we are at impasse, the Company intends to implement certain parts of its final offer effective April 1, 2009." Wiese opined that "[o]ur differences on the important issues are simply too wide and too fundamental to ever bridge." Wiese stated that he was aware that the Respondent's merit wage proposal could not legally be implemented without the Union's consent, even after impasse. The Respondent stated that it would implement the merit wage proposal if the Union consented.

Jeter responded to Wiese's letter by email on March 27, 2009. Jeter stated, "I strongly urge you to abandon your intentions" to "implement certain provisions" of the Company's proposal. Jeter stated that the Respondent had "not bargained in good faith to a legal impasse" and therefore unilateral implementation would be an illegal act. Jeter stated that "[t]he Union is not at impasse and is not at its final position." Jeter also stated that the Union would not consent to the Respondent's implementation of any of its proposals, including the merit wage proposal.

On April 1, 2009, Tate and Wiese gathered bargaining unit employees for a meeting at the Iowa facility. There were 40 to 50 employees in attendance. Tate stated that the Respondent was implementing a contract. Wiese told the employees that that this was being done because the Respondent believed that it was at impasse with the Union. The Respondent provided the employees at the meeting with copies of its last best final offer, and also of a document setting forth the terms that it was implementing.²⁰ Among the changes in terms of employment that

²⁰ The contract provisions that the Respondent unilaterally implemented on April 1, 2009, included sections on: pledge of allegiance; mission statement; Whitesell corporate values; quality statement; recognition; management rights; shop committee; disciplinary action; probationary period of employment; seniority; rules and regulations; hours of work and overtime; holidays; vacation; bereavement pay; rest periods; benefits (health and dental plan); life and accidental death and disability insurance; jury duty; payroll transfers; safety and personal protective equipment; retirement plan; tuition reimbursement; vision care benefit; shop rules; attendance and downtime policy; drug testing; no solicitation; governmental compliance; and integration provision.

The Respondent also stated that it was excluding from implementation, the following provisions from the expired contract: union dues checkoff; scope of agreement; discrimination; no strike/no lockout; picket line recognition; leave of absences and sick leave; military leave; weekly accident and sickness benefit; pay rates; lead person duties;

Wiese discussed were: employees would no longer be paid for Good Friday; employees would no longer receive the overtime rate whenever they worked more than 8 hours on a particular day, but rather would have to work more than 40 hours during the week before qualifying for that rate; and, employees who had not worked long enough to qualify for fully paid medical insurance would have to pay increased premiums every year. Wiese also mentioned changes in vacation policy. Wiese stated that as a result of the changes, the employees would have the same vacation and medical benefits as all other Whitesell employees, including Wiese himself. Wiese told the employees that the Respondent could not give employees a raise because the Union would not consent to it. He asked Tate to read an excerpt from Jeter's March 27 email. Tate read an excerpt that included Jeter's statement: "In answer to your question, you do not have the Union's consent to implement your merit pay proposals or provisions."

D. Section 8(a)(1): Alleged Threats

The complaint in Case 18-CA-18540 includes two allegations that the Respondent violated Section 8(a)(1) of the Act by threatening that bargaining would be futile. The first allegation is that Tate threatened futility in about May or June 2007, by stating to employees during bargaining that the Respondent did not have to agree to anything and that labor costs and working conditions for unit employees at the Iowa facility had to be the same as those for employees at the Respondent's other, nonunion, facilities. (Complaint (I) pars. 6(a) and 45.) The second is that Wiese threatened futility by stating to employees during bargaining that the Respondent's final offer of June 2006 (which the Board has found the Respondent unlawfully implemented) was the best offer the Respondent would make to the Union and that each successive offer would be worse. (Id. pars. 6(b) and 45.)

Facts and Discussion

As discussed in above, Tate and Wiese made statements similar to those alleged.²¹ On June 26, 2007, Tate told the union bargaining committee that he knew the Respondent was required to "come to the table," but that "the law did not say that the company had to agree to anything." Throughout the negotiations, Respondent's bargaining team stated that the major terms and conditions of employment at the Iowa facility had to be consistent with those at the Company's other, nonunion, facilities. In addition, on October 3, 2007, Wiese told the union bargaining committee that it "should have taken what" was "offered in June of 2006" because the Company's "strategy" was "that every proposal they offered after that would become progressively worse for the employees," even if the parties bargained until the "cows c[a]me home."

Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In its brief, the General Coun-

sel argues that the statements made by Tate and Wiese are evidence of bad-faith bargaining in violation of Section 8(a)(5) and (1). The General Counsel does not, however, make any legal argument for the proposition that the statements also constitute independent violations of Section 8(a)(1) as alleged in complaint (I). It is not clear whether the General Counsel has abandoned the claim that these statements are independent violations of Section 8(a)(1). At any rate, the General Counsel does not cite any cases in which an employer has been found to violate Section 8(a)(1) when, during negotiating sessions, it makes statements regarding what the employer will or will not accept in the contract—even where those statements are calculated to pressure the union's negotiating committee to accept, or move towards, the employer's contract proposals. The Board has said that while an employer may not "with impunity" make statements "during a negotiating session" that "restrain, coerce, intimidate, or threaten members of the union's negotiating committee," when the statements are made in the context of negotiating sessions they should not be subject to "microscopic examination." *Frontier Homes Corp.*, 153 NLRB 1070, 1074 fn. 3 (1965). Thus, the Board has declined to find a violation of Section 8(a)(1) based on threatening statements made to a union negotiating committee during the course of negotiations, even under circumstances where it found that similar statements made to the general work force were a violation of Section 8(a)(1). See, e.g., *Mon River Towing, Inc.*, 173 NLRB 1452, 1457-1458 fn. 28 (1969).

Given the facts present here, I conclude that the General Counsel has not shown that the statements Tate and Wiese made were sufficiently coercive to constitute an independent violation of Section 8(a)(1) given that the statements were made to the union negotiating committee during bargaining sessions, not to employees in general. I note that to the extent that those statements were threatening, they concern what the Respondent intended to accept or propose during bargaining. The Respondent is not alleged to have threatened the employees of the bargaining committee with violence, discipline, discharge, or similar types of retaliation if the committee declined to accept the Employer's proposals. Nor is the Respondent alleged to have told employees who were not members of the bargaining committee that bargaining would be futile because the Respondent would refuse to reach a contract or would not alter its positions. Although, I find that the statements by Wiese and Tate do not constitute independent violations of Section 8(a)(1), I conclude that those statements are evidence that the Respondent violated Section 8(a)(5) and (1) by engaging in a course of bad-faith bargaining. See *Houston County Electric Cooperative*, 285 NLRB 1213, 1213, and 1216-1217 (1987) (behavior that is not an independent violation of the Act may nevertheless be "an indicum" of a course of bad-faith, surface, bargaining); see also *Regency Service Carts, Inc.*, 345 NLRB 671, 672 (2005) (statements that employer was "going to say no to everything," showed bad faith and an intention to negotiate with a closed mind); *Enertech Electrical, Inc.*, 309 NLRB 896, 899-900 (1992) (Board finds bad-faith bargaining in part by examining statements by employer, including one that the "law doesn't require me to agree to anything"); *NLRB v. Overnite Transportation Co.*, 938 F.2d 815, 822 (7th Cir.

contract term; and grievances. The Respondent stated that any portions of the expired agreement that were neither replaced, nor excluded from implementation, would remain in force.

²¹ See *supra*, sec. II.C.1. (Statements by Parties Regarding Their Bargaining Strategies).

1991) (statements that labor costs and working conditions at a union facility have to be the same as at nonunion facilities suggests a failure to bargain in good faith).

For the reasons stated above, I find that the General Counsel has not shown that the statements made by Tate and Wiese in 2007 constitute independent violations of Section 8(a)(1). Those claims should be dismissed.

E. Section 8(a)(5) and (1)

The General Counsel alleges that, during the time period covered by the consolidated complaints, the Respondent violated Section 8(a)(5) and (1) by failing to meet its obligation to bargain in good faith in a variety of ways.²² The General Counsel alleges essentially 10 types of employer conduct relevant to the 8(a)(5) and (1) claims: conduct intended to undermine the Union's status as collective-bargaining representative; regressive bargaining; making proposals to give the Company complete discretion over employee terms and conditions of employment; adhering to an illegal bargaining proposal; refusing the Union's valid information requests; making unilateral changes, refusing to bargain; making proposals to impede the bargaining process; engaging in a general course of surface bargaining; and unilaterally implementing a contract without bargaining in good faith to a bona fide impasse.

1. Course of conduct allegedly intended to undermine the Union's status as collective-bargaining representative

a. Respondent's resistance to recognition clause

The complaint in Case 18–CA–18540 alleges that from April 4, 2007, to June 2008, the Respondent attempted to undermine the Union's status as collective-bargaining representative by refusing to agree to include a recognition clause in the contract and that this constituted bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act, and was part of a course of bad-faith bargaining. (Complaint (I) pars. 14, 44, and 46.)

Facts

On May 22, 2007, the Union proposed the following, 3-paragraph, recognition clause:

The National Labor Relations Board has found and determined by Decision and Certification of Representation, dated April 11, 1967, that a unit appropriate for the purpose of collective bargaining consists of all production and maintenance employees of the Company at its plant in Washington, Iowa, excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act; and the National Labor Relations

Board has on said date certified the Union as being designated and selected by a majority of all the employees of the Employer in said unit as the representative for the purpose of collective bargaining with respect to rates of pay, hours of employment and all other conditions of employment; the Employer, in accordance with the terms of said Decision and Certification of Representation, recognizes the Union as the exclusive representative of its employees in said collective bargaining unit.

Employees outside of bargaining unit may do production work to instruct, to do experimental work, testing job runs on new processes and incidental work necessary to meet production schedules, provided, however, that such overall work performed shall not exceed twenty percent (20%) of the work week. Developmental work done by engineering personnel on products, processes and machines prior to their release to production is excluded from the above twenty percent (20%).

Bargaining unit employees, when promoted into a non-bargaining unit position, can return to the bargaining unit anytime up to six (6) months from the date he left said unit. Such employee shall return to the last job classifications which he had prior to leaving and shall bring his total accumulated seniority with him.

On June 5, the Union proposed all of this language again.

The Respondent, in a letter dated June 20, 2007, to Jeter, stated that "until such time of production of a certified copy" of the document certifying the Union as the bargaining representative of employees at the facility, "Whitesell must reject the union's proposal of June 5, . . . and associated Recognition article." The letter states that Whitesell had tried to locate a certification document but had been unable to do so. The letter stated that "Whitesell rejects that the certification exists and suggest[s] that this be deleted unless the GMP can provide a certified copy of the certification."

Subsequently, on June 26, 2007, the Respondent made a comprehensive contract proposal. In the "recognition" section of that proposal, the Respondent did not include any language recognizing that the Union was the collective-bargaining representative of unit employees, that the NLRB had certified the Union as the bargaining representative of unit employees, or describing the bargaining unit. Once again, the Respondent stated that it would not agree to any such language unless the Union provided a certified copy of the certification. The Respondent did propose language similar to the second two paragraphs of the union proposal outlined above. That language did not recognize the Union as the certified bargaining representative or incorporate a unit description. Rather, the Respondent's "recognition" clause was concerned primarily with the Respondent's rights to use nonbargaining unit employees to perform bargaining unit work in certain circumstances.

At some point, the Union provided the Respondent with a copy of the NLRB document certifying the Union. That document shows that the Union was certified as the bargaining representative at the Iowa facility on April 11, 1967, and sets forth the same unit description that appears in the Union's proposal and the most recent contract. The Respondent refused to accept

²² The three complaints that are consolidated in this proceeding all include allegations of 8(a)(5) and (1) violations. Complaint (I) includes allegations regarding conduct from April 4, 2007 (resumption of bargaining following 10(j) injunction), to June 2008 (petition for contempt). Complaint (II) includes allegations regarding conduct from approximately June 2008 (resumption of bargaining following agreement on contempt proceeding) to March 19, 2009 (Respondent's declaration of impasse). Complaint (III) includes allegations regarding conduct beginning on April 1, 2009 (Respondent's unilateral implementation of contract).

the certification, complaining that it did not have a seal and signature. When that union effort failed, the Union modified its recognition clause proposal in a way that addressed the Respondent's objection to language stating that the Union had been certified on April 11, 1967.

In its August 22, 2007 proposal, the Union deleted reference to the 1967 certification from the recognition clause. In its place, the Union proposed language which merely stated that the Respondent recognized the Union and set forth the description of the bargaining unit.²³ For reasons that the Respondent fails to explain, it did not agree to that language. The Union proposed the same type of language again on November 7, 2007, and again the Respondent did not agree.

It was not until August 14, 2008, that the Respondent agreed to language recognizing the Union as the bargaining representative and setting forth the unit description. This was over a year after the Union made its May 22, 2007 proposal, and close to a year after the Union modified its recognition proposal to delete reference to the 1967 certification.

The record shows that even while the Respondent was refusing to agree to a recognition clause, it did not have a good-faith doubt about the Union's representational status. Indeed, it had recognized the Union since acquiring the Iowa facility in January 2005. Moreover, in its pleadings in this proceeding and in the proceeding before Judge Rosenstein, the Respondent admitted to the Union's status as collective-bargaining representative and to the unit description set forth in the Union's proposed recognition clause.

The Respondent contends that it did not refuse to agree to a recognition clause, but rather always proposed a recognition clause, and only refused to include certain "historical language" in the recognition clause. In his testimony, Tate suggested that all the Respondent sought to omit was "historical language . . . that the GMP had been represented at that facility since . . . 1967" because that language stated something "we did not know at the time." The Respondent's characterization of what it was doing is inconsistent with the evidence of what it actually did do. The Respondent was not merely proposing to omit the language stating that the Union had been certified in 1967, but in every proposal on the subject that it made during the time period from April 4, 2007, to June 2008, the Respondent proposed to omit the language recognizing the Union as the collective-bargaining representative and describing the bargaining unit. Moreover, beginning in August 2007, the Union proposed a recognition clause that removed reference to the 1967 certification, and after that the Respondent persisted in its refusal to

²³ The Union's new recognition clause proposal substituted the following first paragraph for the one set forth above:

Whitesell recognizes The Glass, Molders, Pottery, Plastic and Allied Workers International Union AFL-CIO-CLC and The Glass, Molders, Pottery, Plastic and Allied workers International Union Local 359 as the exclusive collective bargaining representative of all its production and maintenance employees at the Washington Iowa facility with respect to rates of pay, hours of employment and all other terms and conditions of employment, however such recognition excludes office and clerical employees, salesmen, professional employees, guards supervisory and managerial employees as defined in the National Labor Relations Act.

agree to the recognition clause for almost a year. The Respondent fails to explain why for so long it refused to agree to that proposal if, as it now claims, its objection was only to contract language referencing the 1967 certification. The record shows that the Respondent insisted on a proposal that, although placed under the heading of "Recognition," did not, in fact, recognize the Union or the validity of the bargaining unit description. Rather, the Respondent's so-called recognition clause was essentially limited to granting the Respondent certain rights.

Discussion

In *Burrows Paper Corp.*, the Board affirmed an administrative law judge's finding of surface bargaining based, inter alia, on the respondent's failure to agree to a recognition clause regarding a union that had been certified by the Board as the bargaining representative. 332 NLRB 82, 82, and 93-94 (2000). In explaining why this failure was so significant, the administrative law judge stated that the fact that the respondent made the recognition clause a "bone of contention," suggested bad faith since "that is the one clause which should be easiest for the respondent to accept, because it costs the respondent nothing." As in *Burrows*, I conclude that the respondent's refusal, for over a year, to agree to a contract clause recognizing the unit's Board-certified bargaining representative is evidence of a course of bad-faith bargaining. In this case, the evidence of bad-faith bargaining is stronger than in *Burrows*, because it shows that the Respondent's explanation for refusing to agree to a recognition clause—i.e., objection to a supposedly unsubstantiated reference to the Union's 1967 certification—is pre-textual. Even once the Union removed that reference from its proposal, the Respondent continued to refuse to agree to a recognition clause for almost a year. The Respondent has not attempted to prove that it had a basis for doubting that a majority of unit employees still supported the Union. The Respondent's failure to agree to a provision recognizing the Board-certified bargaining representative of unit employees suggests that the Respondent was throwing up an unnecessary obstacle in order to undermine the Union, create an area of disagreement, and frustrate bargaining.

For the reasons stated above, I conclude that the Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) when it refused to agree to a recognition clause from April 4, 2007, through July 2008.

b. Language regarding at-will employment

The complaint in Case 18-CA-18540 includes an allegation that the Respondent attempted to undermine the Union's status as bargaining representative from about April 2007 to January 28, 2008, by proposing that new hires would be at-will employees with no union representation, and that this was part of a course of surface bargaining, and constituted bad-faith bargaining, in violation of Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 15, 44, and 46.)

Facts and Discussion

In the appendices to its comprehensive proposal of August 23, 2007, the Respondent included a page with the heading "Employment-At-Will." The page, which is formatted to be

signed by employees at the time of hiring, requires the signer to acknowledge that he or she is an at-will employee who can be terminated at any time without cause or notice. The page also states that other documents should not be construed as creating an express or implied contract restricting the Respondent's right to terminate the signer's employment at-will. During the trial, Tate credibly testified that the Respondent included this page in the appendices inadvertently. Tate testified, without contradiction, that when the union bargaining committee brought the at-will employment form to the Respondent's attention, Tate apologized, said the page was included in error, and immediately committed to removing it from the Respondent's proposal. Shortly thereafter, the Respondent removed the page from its proposal. Tate testified that it was never the Respondent's intention to impose "at-will" status on any of the unit employees. He explained that the Respondent had compiled a number of documents that were used at the Respondent's other facilities and which the Respondent wanted to insert in its proposal for the Iowa facility, and that the at-will employment form was mistakenly included among those. The circumstances presented here support Tate's testimony on this point.

Given the above, I conclude that the Respondent included the employment-at-will language in its proposal unintentionally and that the Respondent agreed to delete it as soon as the Union brought the language to attention of the Company's negotiating committee. For these reasons, the General Counsel has not shown that the Respondent proposed the employment-at-will document with the intent of undermining the Union's status as collective-bargaining representative.²⁴ The appearance of this document in the Respondent's proposal is not a violation of Section 8(a)(5) and (1). I conclude that this allegation should be dismissed.

c. Proposal regarding grievance procedure

The complaint in Case 18-CA-18540 includes an allegation that the Respondent attempted to undermine the Union's status as bargaining representative from about August 2007 by proposing a 7-step grievance procedure under which there would be no union involvement until step 4 and which required the employees themselves to sign and present the grievances. The complaint further alleges that the Respondent did this even though it was prepared in June 2006 to agree to a grievance procedure under which the Union would be involved as soon as the grievance was reduced to writing or within 5 days of its occurrence or knowledge thereof. The complaint alleges that this behavior violated Section 8(a)(5) and (1) and was part of a

²⁴ I do, however, note that the Respondent's post-April 4, 2007 proposals to the Union included documents used at the Respondent's non-union facilities, and that a number of those documents appear to have no application to the unit employees. The inapplicable documents included not only the at-will employment form, but also a noncompetition clause, and a document setting forth an emergency phone number to be used in Alabama. This suggests that the Respondent was dumping documents from nonunion facilities into its proposal to the Union and lends credence to the contention that the Respondent was intent on treating unit employees the same as employees at its nonunion facilities.

course of bad-faith bargaining. (Complaint (I) pars. 16, 44, and 46.)

Facts and Discussion

The record shows that the Respondent's proposals in August and September 2007 set forth a more limited role for the Union in grievance processing than had been the case under a tentative agreement reached by the parties in 2006. However, the General Counsel cites no authority for the proposition that an employer evidences surface bargaining or violates the Act by making a proposal to reduce the role of the bargaining representative in the grievance procedure. In the only case cited by the General Counsel on this subject, a violation of Section 8(a)(5) was found where the employer made a unilateral change that eliminated the union's role in the complaint procedure. Brief of General Counsel at page 17, citing *Arizona Portland Cement Co.*, 302 NLRB 36 (1991). However, the fact that making a change unilaterally is unlawful obviously does not mean that it is unlawful to *bargain* for such a change.

I am not persuaded by the General Counsel's argument that the Respondent's proposal, standing alone, is unlawful because it was less favorable to the Union than the grievance procedure the parties had tentatively agreed to in 2006. As discussed above, the Union stated at the start of the 2007 negotiations that it was withdrawing from all the previously reached tentative agreements. Thus, those tentative agreements, *by the Union's choice*, were no longer in effect for either party. The record shows that in the aftermath of the Union's announcement that it was withdrawing from all tentative agreements, both the Union and the Respondent made proposals that were less favorable to the other side than what they had tentatively agreed to in 2006. For example, the grievance procedure in the 2006 tentative agreement provided that the aggrieved employee would sign the grievance and be present at the first discussion with management. However, on April 4, 2007, the Union proposed language giving the Union authority to sign the grievance on behalf of the aggrieved employee, and allowing the Union's shop committee chairperson to decide whether the aggrieved individual would even attend the first discussion with management. Likewise, the Respondent made proposals that reduced the role of the Union in the grievance procedure. The grievance procedure that the parties tentatively agreed to in 2006 provided that a member of the union shop committee would serve as the aggrieved employee's representative during the first meeting with the employer. In August 2007, after the Union revoked the tentative agreement, the Respondent proposed language allowing the aggrieved individual to choose to be accompanied by someone who was not a member of the union shop committee at the first meeting with the employer. In September 2007, the Respondent made a proposal that further reduced the Union's role by increasing the number of steps in the grievance process from four to seven and giving the Union no role at all until the fourth step. I conclude that the Respondent did not violate the Act by proposing to reduce the Union's role any more than the Union violated the Act by proposing to increase its role.

For the reasons discussed above, I conclude that the Respondent's proposals to reduce the Union's role in the grievance process were not an attempt to undermine the Union's

status as bargaining representative in violation of the duty to bargain in good faith. This claim should be dismissed.

d. Use of suggestion box

The complaint in Case 18–CA–18540 includes an allegation that the Respondent attempted to undermine the Union’s status as bargaining representative on May 24, 2007, by placing an employee suggestion box in the Iowa plant and in about June 2007 by posting a summary of suggestions it said it received, including some that expressed dissatisfaction with the Union. The complaint alleges that this behavior violated Section 8(a)(5) and (1), and was part of a course of bad-faith bargaining. (Complaint (I) pars. 17, 44, and 46.)

Facts

There was an employee suggestion box present at the Washington, Iowa facility when the Respondent acquired the facility. The suggestion box remained at the facility until August or September 2006 when the Respondent moved the operation to another location in Washington, Iowa. The Respondent did not install the suggestion box at the new location until at least 8 months later—in May or June 2007. At about the same time that the Respondent installed the suggestion box, Wiese, Tate, and Milam held a meeting with employees. Tate testified that the Respondent held the meeting because of its frustration over how the Union was bargaining and to provide “education” to employees about “what was taking place at the bargaining table.” At the meeting, the Respondent told employees that “bargaining was not going very well” and that the Company was frustrated. Wiese invited the employees to submit suggestions for what management could do to “help that facility up there.”

On June 26, 2007, the Respondent posted a memorandum from Wiese and Tate that summarized the suggestions, but which also discussed complaints it purportedly received about the Union and explained the Respondent’s opposition to the Union’s presence at the facility. That memorandum stated in part:

YOUR FEEDBACK: Many Statements regarding dissatisfaction with union; feeling helpless; asking what can we do? Concern for your job and keeping your home. Will Whitesell stay in Iowa?

The Union has presented extra-ordinary demands far above what we feel we can afford in this facility and remain cost competitive. This is very unfortunate. This facility must be cost effective in order to remain competitive in the world wire form market. Fansteel was not competitive in the market place while under the agreement that they wrote with the Union. Whitesell does not believe it can be competitive under that old agreement either. Now is the time to make a change for the future. Whitesell’s intent is to keep the facility in Iowa. But that means changes have to be made.

Several of you have asked what can be done to get the union to listen to your expectations and to allow you the opportunity to vote on a new agreement. The Company is making every effort to prepare a new agreement which Whitesell feels will make this operation cost effective and an integral part of our total organization. Each of you cer-

tainly has the right to talk to the Union Committee representatives, whether you are in the union or not, and express your dissatisfactions with the process. That is your right! It is our understanding that the union represents all the employees in the bargaining unit. You can tell them that you expect them to listen to your desires. Fansteel had to get out of the wire form business. . . .

Whitesell does not believe that a union is necessary in the workplace. *We feel that we should be able to talk to you and directly listen to your concerns without a third party trying to talk for you.* Whitesell employees in our other locations are happy and productive because they know that the Company cares about them and wants to do right by them. There is no conflict, adversarial positions, or arguments on the floor as everyone is working and going in the same direction. This positive attitude in the workplace has to replace the negativity here in Iowa. At this facility, Whitesell recognizes that there is a union in place here and John and I want to come and be involved first hand to make our best effort to reach an agreement and make this work for the collective bargaining unit and the competitiveness of this operation as a whole.” [Emphasis in the original.]

The memorandum discusses the Respondent’s merit pay proposal and states that it was “instructed to roll back out of the Merit Pay for Performance process that recognizes and compensates for outstanding work.” The memorandum says that this was done at “the union’s request to the NLRB and direction of the Court.” The Respondent goes on to state that its “hands are tied” as a result of the action by the Union and the Court and that, as a result, “all wages are frozen.”

Among the specific employee complaints that the memorandum says the Respondent received are that lighting in some areas of the facility was inadequate, that production time was lost while employees waited for fork trucks, and that supervisors were engaging in favoritism. Regarding the complaint about lighting, the Respondent stated that it would look into the matter “and determine what cost effective improvements may be made.” With respect to the wait time for fork trucks, the Respondent stated that “[i]f we have to spend the money we will get more fork trucks,” but that “[i]f we can, we will find a better and least [sic] costly solution.” With respect to the complaint that supervisors were showing favoritism, the Respondent stated that it would “work with the supervisors and managers and look into this situation and further verify that this is not so here.”

The memorandum’s concluding section states: “Thanks for the suggestions and keep them coming. We wish we could meet with each and everyone [sic] of you individually and listen to what you have to say.”

Discussion

An employer violates Section 8(a)(5) and (1) when, during negotiations, it solicits employee grievances from employees and attempts to deal directly with employees regarding terms and conditions of employment. *Laidlaw Transit*, 318 NLRB 695, 701 (1995); see also *American Standard Cos.*, 352 NLRB 644, 655 (2008) (violation of Sec. 8(a)(5) where employer that

has obligation to bargain with the union solicits employee grievances, promises to remedy them, and thereby undermines the union). In this case, I conclude that the Respondent solicited employee grievances in the midst of negotiations when, during the meeting discussed above, Tate invited employees to submit suggestions about what management could do to “help that facility up there” and when, in the June 26 posting, Wiese and Tate urged employees to continue making suggestions and stated that they believed that management should be able to “directly listen to [employees’] concerns without a third party trying to talk for you.” In addition, as discussed above, the Respondent effectively promised to remedy complaints about poor lighting, the wait time for forklifts, and, to a lesser degree, about favoritism.

It is clear, moreover, that the Respondent actively sought to capitalize on the re-installation of the suggestion box to undermine the Union. The Respondent first solicited employee submissions to the suggestion box during a meeting that the Respondent held with employees for the purpose of expressing frustration with how the Union was bargaining. In the June 26 posting, the Respondent begins its discussion of the resulting employee suggestions by stating that there were “[m]any Statements regarding dissatisfaction with union.” Then the memorandum essentially threatens employees by referencing concerns about employees keeping their jobs and homes, and implying that the Iowa facility might, in fact, have to close unless employees demanded that the Union accept the types of contract changes sought by the Respondent. Lastly, the Respondent uses the memorandum to blame the Union for the fact that the Respondent had frozen wages. The Respondent’s statements regarding the frozen wages were misleading because, although the Union refused to consent to the Respondent’s implementation of a highly discretionary merit wage system, the Union consistently pressed for a general wage increase and never advocated for a wage freeze.

The Respondent’s use of a suggestion box, in the manner described above, attempted to bypass and otherwise undermine the Union and constituted bad-faith bargaining in violation of Section 8(a)(5) and (1), *American Standard*, supra; *Laidlaw*, supra.

e. Attempt to remove Jeter from role as union negotiator

The complaint in Case 18-CA-18540 alleges that, since June 26, 2007, the Respondent has attempted to remove Jeter from the Union’s bargaining team by filing and trying to pursue a grievance under the expired collective-bargaining agreement, to which Jeter is not subject. The complaint alleges that this behavior is intended to undermine the Union’s role as collective-bargaining representative in violation of Section 8(a)(5) and (1), and is part of a course of bad-faith bargaining. (Complaint (I) pars. 18, 44, and 46.)

Facts

There is no dispute that the bargaining sessions between the Union and the Respondent sometimes became heated. On several occasions, the union bargaining committee members Jeter, Thomas, and Baetsle used profanity. In one instance, Jeter became frustrated and said, “[F]uck this.” At other times he used the word “bullshit.” Jeter testified that he used “very little”

profanity, and Tate testified that Jeter would use profanity “once or twice conceivably” during meetings between the parties. The testimony does not establish that Jeter called any member of the Respondent’s bargaining team by a profane name.

Tate testified that profanity was something he “had not been exposed to in the past.” Moreover, although there was uncontradicted testimony that the use of similar profanity was commonplace in work areas of the facility, Tate claimed that he was concerned about exposing employees to it. On several occasions, Tate attempted to order Jeter to stop using profanity. In one such instance, Jeter responded that Tate was not his “father” or his “preacher.”

A bargaining session on June 26, 2007, was particularly tense. Tate began to pass proposals to Jeter in rapid succession. Jeter felt that Tate was not permitting him an opportunity to discuss the various proposals, and told Tate, “Take these goddamn proposals back” because “I wasn’t done talking about the first proposal yet.” Tate testified that he was so offended by Jeter’s use of “goddamn” that he said, “No more can I tolerate this.” Then, Tate took a document entitled “Memo of Disciplinary Action” out of his briefcase and presented it to Jeter. Tate had prepared the document in advance of the bargaining session, and before Jeter’s use of the word “goddamn.” The document was addressed to Jeter and stated that “[t]his is the fourth time we have stated that” your “persistent usage of foul and unprofessional language” is “unacceptable behavior.” The “Memo of Disciplinary Action” states that the Respondent expected Jeter to “cease and desist any and all such behavior,” and provide a “written apology” to the Respondent. The document stated that Jeter had to provide “written confirmation from your supervisor and or employer that they understand your unacceptable behavior and will ensure Whitesell and or the NLRB your poor behavior will not continue.” Jeter told Tate that he was not an employee and was not subject to discipline by the Respondent under the collective-bargaining agreement.

Subsequently, on June 28, 2007, the Respondent filed a grievance against Jeter. The grievance, which was signed by Tate and Wiese, claimed that Jeter had violated the collective-bargaining agreement by subjecting unit employees and company employees “to abusive, immoral, foul, derogatory language and cursing.” The grievance stated that “[t]his creates a hostile, harassing workplace environment.” The grievance sought either (1) Jeter’s removal from the union negotiating team, or (2) that Jeter be required to provide a written apology to the Respondent and attend anger management/negotiation training, and that Jeter’s supervisor provide “assurance of correction.”

The next day, June 29, 2007, Tate issued what he called a “Final Warning Suspension” to Jeter. In the document, Tate stated that “Whitesell has suspended you further access.” Then in a letter, dated July 3, 2007, the Respondent’s general counsel, David Tomlinson, informed Jeter that the Respondent would not resume negotiations unless Jeter apologized to the Respondent and the Union provided assurances that Jeter would stop using profanity. Tomlinson stated that if the apology and

assurances were not provided, the Respondent “expect[ed] to hear what the GMP plans to do for your replacement.”²⁵

The Union took the position that it would not process the Respondent’s grievance because Jeter, as a nonemployee of the Respondent, was not subject to discipline under the expired collective-bargaining agreement. Indeed, the “scope of agreement” provision in the applicable collective-bargaining agreement explicitly states: “This agreement shall be limited in its scope and application to only employees of the Employer in those job classifications . . . constituting the appropriate unit for the purpose of collective bargaining.”²⁶ By letter dated July 16, 2007, John Ryan, the international president of the Union, responded to Tomlinson’s letter. He stated that he had complete confidence in Jeter and indicated that Jeter would not be replaced. Ryan further stated:

Your comments seem inane and disingenuous to me. Profanity at the bargaining table is not something new. I would suggest that this is not the appropriate time or place to enter into a crusade to save the world from the use of colorful language. Let’s get down to the serious business of negotiating a labor agreement acceptable to both parties.

A separate letter, dated September 5, 2007, from the Union’s legal counsel, took the position that Jeter was not subject to the grievance procedure.

The Respondent has persisted in its efforts to remove Jeter from the union committee and/or discipline him. Tate requested that the Federal Mediation and Conciliation Service (FMCS) name a panel of arbitrators to consider the matter. In a letter dated April 4, 2008, the director of Arbitration Services at the FMCS rejected Tate’s request because the Respondent had failed to provide contract language showing that the matter was arbitratable. Then the Respondent indicated in a January 16, 2009, email communication to Jeter, that the Company would

²⁵ The July 3, 2007 letter from Tomlinson to Jeter reads in part:

Whitesell is ready to proceed with bargaining discussions, but not under these hostile conditions. Your persistent use of vulgarity, derogatory comments, and personal attacks has placed such a veil of hostility over the negotiations that further discussions cannot be productive under this environment. Whitesell expects you to provide a formal apology and assurance from the GMP that such behavior will not continue. It is essential that we receive this before we resume negotiations.

If the GMP will not provide an apology and adequate assurance against further hostile conditions, we fully expect to hear what the GMP plans to do for your replacement.

Tomlinson was not part of the Respondent’s negotiating team and had not attended the bargaining sessions.

²⁶ The Respondent does not attempt to square this language with the claim that it has the authority under the contract to discipline Jeter or to force the arbitration of a grievance seeking such discipline. Moreover, the grievance procedure in the expired contract only discusses grievances filed by “aggrieved employees,” and does not authorize management officials such as Tate and Wiese to file grievances against employees or union officials. The Respondent points to a provision which provides that neither the Employer nor the Union will discriminate against any employee. The expired contract does not provide for this obligation to be enforced through a grievance filed by management officials against a union official or through management-imposed discipline of union officials.

not schedule further bargaining sessions unless the Union agreed to arbitrate the grievance against Jeter. The Respondent raised the Jeter grievance as recently as March 2009, when the parties met for their last bargaining sessions.

The Respondent argues that while the Respondent’s reaction to Jeter’s use of profanity “might appear to some to be extreme, the fact remains that the Company’s negotiators were genuinely offended by Jeter’s conduct.” I agree that the Respondent’s reaction appears extreme, but reject the notion that the Respondent’s action was based on its negotiators being “genuinely offended.” I note, first, that the record shows that Jeter’s use of profanity was not pervasive. Jeter testified that he used the language “very little,” and even Tate testified that Jeter used the language only once or “conceivably” twice during “most” of the meetings. Indeed, although both Wiese and Milan were witnesses, neither testified that Jeter used language that offended them. I find Tate’s claim that he not previously been exposed to the types of profanity used by Jeter somewhat implausible on its face and, based on Tate’s demeanor and testimony, and the record as a whole, insincere. I note, in particular, that there was uncontradicted testimony that the use of such language was common at the Respondent’s facility. Even assuming that Tate was subjectively uncomfortable with Jeter’s language, I reject the contention that Jeter’s infrequent use of garden-variety profanity during bargaining was what motivated the Respondent’s unrelenting efforts to use the disciplinary process and grievance process to eliminate Jeter from the bargaining committee and his position as chief negotiator for the Union. Rather, under the circumstances present here, I infer that the purpose of that effort was to interfere with the Union’s effective representation of the bargaining unit.²⁷ The disciplinary memorandum was prepared *before* Jeter used the word “god-damn” on June 26, and it appears that Tate was simply waiting for an excuse to present the document to Jeter. Moreover, employees Thomas and Baetsle both used profanity during the bargaining sessions, but the Respondent did not make any effort to force them from the bargaining committee. The Respondent does not offer any explanation for its disparate treatment of Jeter.

Discussion

“[E]ach party to a collective bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party.” *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), *enfd.* sub nom. *Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982). A narrow exception to this rule is triggered when there is “persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible.” *KDEN Broadcasting Co.*, 225 NLRB

²⁷ Jeter is the only nonemployee on the Union’s bargaining committee and a very experienced negotiator—having successfully negotiated over 100 contracts. Moreover, Jeter had been the Union’s chief negotiator since the start of the negotiations with Whitesell in 2006, and was uniquely familiar with the course of these complex negotiations. As demonstrated by the finding of unlawful declaration of impasse in the prior case, Jeter had shown that he was unafraid to file unfair labor practice charges and challenge illegal action by the Respondent.

25, 35 (1976); see also *Pan American Grain Co.*, 343 NLRB 205, 206 (2004), and *Fitzsimmons*, supra.

In this case, the Respondent's lead negotiators sought to force Jeter from his role as the Union's lead negotiator by issuing purported discipline stating that Jeter was suspended from the negotiations, and attempting to enforce that exclusion by pursuing a grievance against Jeter. The Respondent also made statements to the Union in June and July 2007, and in January 2009, indicating that the Company would refuse to bargain with the Union for a new contract as long as Jeter remained the Union's representative and the Union declined to arbitrate the grievance against him. After making these statements, however, the Respondent met repeatedly with Jeter and the rest of the union bargaining committee.

The Respondent contends that its effort to force Jeter from his role on the Union's committee is justified by Jeter's continued use of profanity which "genuinely offended" the Company's negotiators. For the reasons discussed above, I do not credit the Respondent's claim that its actions were motivated by genuine discomfort over Jeter's language. At any rate, Jeter's behavior does not meet the test of persuasively showing that his presence would "make good-faith bargaining impossible." Jeter used relatively little profanity and the profanity he did use was not shown to be unusually graphic or to be directed at a particular individual. It was not accompanied by physical contact or threats. Moreover, the use of profanity was common at the facility where the employees worked. The Board has found conduct at least as severe as that Jeter was shown to have engaged in to be insufficient to justify an employer's refusal to meet with the union's chosen representative. In *Victoria Packing Corp.*, 332 NLRB 597 (2000), a union representative engaged in a shouting match with the company's president, then "got up very close to the [company president's] face, and while pointing his finger, yelled 'I'm going to get you and you[r] fucking company.'" *Id.* at 599. The administrative law judge, whose decision on this point was adopted unanimously by the Board, stated that the conduct was not "so egregious and beyond the pale as to make the bargaining process itself untenable" and therefore did not justify the employer's refusal to bargain with the union representative. *Id.* at 600. "For better or worse," the judge explained, "the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of . . . rude and unacceptable behavior." *Ibid.* Similarly, in *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989), the Board held that the employer was not justified in refusing to allow a union agent onto its premises even though that agent had hurled obscenities at managers on different occasions and pushed a manager in the presence of other employees. The Board agreed with the administrative law judge that the union agent's conduct, "although distasteful," "did not constitute persuasive evidence that [his] presence at the facility would create ill-will and make good-faith bargaining impossible." *Id.* at 72.

The Respondent's June 29 disciplinary notice, in which it purported to bar Jeter from further negotiations, is the functional equivalent of a statement refusing to negotiate with Jeter as

the Union's chosen bargaining representative.²⁸ This refusal was communicated again in the Respondent's July 3 letter asking who the Union planned to appoint as Jeter's replacement. I conclude that the Respondent's statements indicating a refusal to negotiate with Jeter are evidence of a course of bad-faith bargaining. However, since the Respondent continued, despite its statements to the contrary, to meet and bargain with Jeter, the Respondent's statements refusing to meet with Jeter do not rise to the level of an independent violation of Section 8(a)(5) and (1). Therefore, to the extent that the complaint alleges that the Respondent's effort to exclude Jeter from the negotiations constitutes an independent instance of bad-faith bargaining in violation of Section 8(a)(5) and (1), that claim should be dismissed.

f. Shop committee

The union shop committee is a group of employees who provide the first line of union representation at the Iowa facility. The complaint in Case 18-CA-18540 alleges that the Respondent attempted to undermine the Union from about June 2007 to January 28, 2008, by proposing that the number of members on the shop committee be reduced from six to three, that members of the shop committee only receive compensation for meetings that the Respondent calls, and that all investigation and processing of grievances occur during off-duty hours. (Complaint (I) par. 19(a).) The complaint further alleges that since January 28, 2008, the Respondent has proposed that the Union could determine the number of shop committee members, but that the Respondent would only compensate three of them, and only for meetings called by the Respondent. (Complaint (I) par. 19(b).) The complaint also alleges that the Respondent made these proposals even though in June 2006 it was prepared to agree to a proposal under which the Union could have six, compensated, committee members, without any limitation that compensation would be paid only for meetings called by the Respondent, and without a restriction that all investigation and processing of grievances occur during off-duty work. (Complaint (I) par. 19(c).) The complaint alleges that this behavior violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 19, 44, and 46.) In its brief, the General Counsel argues that the Respondent attempted to undermine the Union in its role as collective-bargaining representative by making regressive shop committee proposals. Brief of the General Counsel at pages 24-25.

Facts

In 2006, the Union and the Respondent and the Union reached tentative agreement on a shop committee provision, and the Respondent implemented that provision as part of the unlawful contract implementation on June 13, 2006. This shop committee provision stated, inter alia, that there would be "Not more than six (6) members . . . present at any meeting or negoti-

²⁸ Because Jeter was not an employee of the Respondent, and management lacked authority to take disciplinary action against him, I do not consider this letter to be discipline, regardless of how the Respondent characterized it. Therefore, I do not analyze the Respondent's action using the framework set forth in *Burnup & Sims*, 379 U.S. 21 (1964).

ations where the Company is paying the Shop Committee members['] wages.”

As discussed above, on April 4, 2007, when the parties resumed bargaining after issuance of the Section 10(j) injunction, the Union announced that it would no longer honor the tentative agreements reached in 2006. After this, both parties made shop committee proposals that differed from what had been tentatively agreed to. The 2006 provision to which parties had tentatively agreed, did not state what types of meetings the Respondent would be required to pay shop committee members for attending. The Union’s April 4, 2007 proposal added language stating that shop committee members would be paid for “meetings with the employer including, but not limited to, grievance meetings, labor management meetings, disciplinary meetings, arbitrations, and contract negotiations.” On August 22 and November 7, 2007, the Union made proposals which stated that shop committee members would be paid for the same types of meetings, with the exception that payment for contract negotiations would be “subject to mutual agreement.” In addition, the Union’s August 22 shop committee proposal diverged from both the 2006 tentative agreement and the Union’s April 4 proposal, by adding language stating that committee members who were off-duty “w[ould] not be denied access to the plant to conduct union business as long as advance notice [wa]s given as to the approximate time of arrival.”²⁹

The Respondent also made shop committee proposals that differed from the one the parties tentatively agreed to in 2006. In June 2007, the Respondent proposed that the size of the shop committee be reduced to three members. On August 23, 2007, the Respondent made a proposal which added that shop committee members would only receive their regular pay rate for meetings “called by and for the employer,” and that “[s]uch meetings do not include negotiations of the terms of this agreement, replacement agreements, grievance, arbitration or other issues without the prior written consent of the employer.” On January 29, 2008, the Respondent changed its proposal to eliminate the three-member limit for the shop committee. Although under this proposal there was no specific limit on the number of shop committee members, the Respondent would not pay more than three members for attending “any meetings or duties.” This proposal retained the language that limited the circumstances under which the Respondent would pay shop committee members.

The record shows that, during much of the period covered by this litigation, the Union did not find it necessary to have six members on the shop committee, even though it was contractually entitled to do so. Instead the shop committee had between two and four members. During the negotiations, the Respondent explained its proposal to reduce the shop committee to three members by stating that it did not see the need to allow for six

members when the shop committee had most recently been operating with only three members. Tate told the union committee that the Respondent did not want to bear the cost of paying for more than three committee members. The Respondent also expressed a desire to limit the number of its bargaining unit employees who would be absent from the production floor to engage in shop committee work at any one time. The Union did not explain why it thought it needed six members on the shop committee.

Discussion

The General Counsel argues that the “Respondent’s regressive proposals with regard to the shop committee, particularly in light of its failure to explain the basis for the changes, violate its duty to bargain in good faith.” Brief of the General Counsel at page 25, citing *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) (“Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining.”), *enfd.* 308 F.3d 859 (8th Cir. 2002). The Board has stated that “Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement.” *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), citing *McAllister Bros.*, 312 NLRB 1121 (1993); see also *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) (regressive bargaining tactics that are “designed to frustrate bargaining” are “an indicium of bad-faith bargaining”) In this instance, I conclude that the General Counsel has failed to show either that the Respondent made regressive shop committee proposals that were designed to frustrate bargaining, or that the Respondent’s negotiating team failed to explain the basis for its proposals.

I note first, that I agree with the Respondent’s argument that its shop committee proposals should not be evaluated against the tentative agreement from 2006 for purposes of determining whether those proposals are regressive. It was the Union that declared the 2006 tentative agreement void on April 4, 2007. After the Union voided the tentative agreement, it, like the Respondent, made shop committee proposals that were less favorable to the other side than what both parties had previously agreed to. The record also shows that while both sides added language to their shop committee proposals that in some cases moved the parties further from agreement than had been the case under the initial proposals after the 10(j) injunction, the Respondent also made movement towards the Union’s position. Specifically, on January 22, 2008, the Respondent eliminated one obstacle to agreement by abandoning its effort to limit the size of the shop committee to three members.

Moreover, the General Counsel has not shown that the Respondent failed to provide a plausible explanation for its shop committee proposals. During negotiations over the shop committee provision, the Respondent accurately noted that the Union had, most recently, been using only three of the six paid slots on the shop committee and stated that the Company did not want to agree to bear the cost of paying additional members to participate in meetings. The Respondent also expressed concern about the extent to which production would be affected if as many as six employees out of a bargaining unit of approxi-

²⁹ In its brief, the General Counsel contends that the Union’s August 22 proposal regarding the shop committee was “substantially identical to that contained in the Respondent’s illegally implemented offer of 2006.” The record includes copies of both proposals, see GC Exh. 8 and R Exh. 20, and the differences between those proposals are summarized above. Based on those differences, I reject the General Counsel’s contention that the proposals are “substantially identical.”

mately 105 could leave the production floor at a given time to engage in shop committee activities. These are not facially implausible explanations for the Respondent's proposals regarding the shop committee provision, and evidence regarding those explanations does not strengthen the General Counsel's argument that the Respondent was bargaining in bad faith.

For the reasons discussed above, I conclude that the General Counsel has not shown that the Respondent's shop committee proposals were intended to undermine the Union and are not evidence that the Respondent was engaged in a course of bad-faith bargaining. To the extent that the complaint claims the Respondent's shop committee proposals constitute an instance of bad-faith bargaining in violation of Section 8(a)(5) and (1), that claim should be dismissed.

g. Respondent's statements regarding union responsibility for lack of wage increase

The complaint in Case 18-CA-19008 alleges that on about April 1, 2009, the Respondent undermined the Union "by reading parts of an e-mail from Union Representative Dale Jeter, and by claiming that the Union was to blame for unit employees not getting a wage increase." The complaint further alleges that, by this conduct, the Respondent continued to engage in bad-faith bargaining in violation of Section 8(a)(5) and (1). (Complaint (III) pars. 12, 15, and 16.)

Facts and Discussion

In a March 27 email to Jeter, Wiese stated his understanding that, even at impasse, the Respondent could not legally implement its merit pay proposal without the Union's consent. Wiese urged the Union to consent to such implementation, and Jeter responded the same day with an email stating that the Union would not consent.

On April 1, 2009, Wiese and Tate met with employees to discuss the Respondent's decision to unilaterally implement terms and conditions of employment. During the course of that meeting Wiese told employees that the Respondent could not give a pay raise "because of the Union," and that "the Union had to agree to a raise." Then Tate read a portion of the March 27 e-mail from Jeter. The portion of Jeter's email that Tate read stated:

In answer to your question, you do not have the Union's consent to implement your merit pay proposal or provisions. Just so you are absolutely clear on the Union position. You do not have the Union's consent to implement any of your proposals or provisions, and you do not have the Union's consent to deviate from the status quo in any way, shape, or form.

The General Counsel does not claim that Tate misquoted Jeter's email, or that, assuming a valid impasse, the Respondent could lawfully implement its merit pay proposal without the Union's consent.

I conclude that the General Counsel has failed to show that the Respondent's statement and quotation from the Jeter email were a violation of the Act. As the Supreme Court has noted, the Board generally does not "police or censor propaganda" by the sides to a labor dispute, but "leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements. *Linn v.*

Plant Guard Workers Local 114, 383 U.S. 53 (1987). "[O]verenthusiastic use of rhetoric" is protected by the Act unless the statement is made "with knowledge that it was false or with reckless disregard of the truth." *Long Island College Hospital*, 327 NLRB 944, 947 (1999). It is obvious in this case that the Respondent was attempting to "spin" Jeter's email statement in hopes that employees would hold the Union, not management, responsible for the lack of a wage increase. However, the Respondent's statements on April 1, taken together, were not so misleading as to constitute a violation of the Act. Wiese's statement that the Respondent could not grant a wage increase because of the Union was misleading insofar as it ignores the fact that the Union, while withholding consent for implementation of the Respondent's merit pay proposal, had also consistently been seeking across-the-board wage increases that the Respondent staunchly refused to grant. Moreover, assuming that, as the Respondent was contending, the parties had reached a valid impasse, the Respondent was empowered to implement a general wage increase even if the Union refused to consent. On the other hand, the Respondent's statement is not absolutely false since at least some employees would likely have received wage increases if the Union had allowed the Respondent to implement its merit pay proposal. At any rate, the Respondent continued its discussion of this topic by quoting at length from a Jeter email, which clarified that the "raise" to which the Union had refused to agree was, in fact, the Respondent's merit pay proposal, not a straightforward wage increase for all employees. Explaining to employees why the Union did not view the Respondent's merit pay proposal as an acceptable means of obtaining wage increases was the Union's job, not the Respondent's, and employees' evaluation of which party was standing in the way of a pay raise is committed to the employees' own good sense. Under these circumstances, I conclude that the Respondent's April 1 statements regarding the wage increase did not unlawfully undermine the Union, and that this allegation should be dismissed.³⁰

³⁰ The General Counsel cites three cases in which violations were found based, at least in part, on employer statements that the union was preventing a wage increase and/or on employer statements conditioning a wage increase on the withdrawal of support for the union. See *Billion Oldsmobile-Toyota*, 260 NLRB 745 (1982) (violation where employer dealt directly with two individual employees about wage increases, and then made statements that if the union opposed the increase it would show that the union was indifferent to employee welfare), *enfd.* 700 F.2d 454 (8th Cir. 1983); *Lehigh Lumber Co.*, 230 NLRB 1122, 1127 (1977) (affirming Board's finding of violation where employer by-passed the union by offering individual employees wage increases on condition that they withdraw from the union); *NLRB v. Miller Waste Mills*, 315 F.3d 951 (8th Cir. 2003) (violation found where the employer had practice of granting annual wage increase and blamed the union for its failure to grant wage increase even though the union had explicitly consented to the annual increase). However, none of those cases involved instances, such as the one at issue here, where an employer made misleading, but not technically false, statements blaming the union for the lack of a wage increase.

2. Alleged regressive bargaining

a. Respondent's rejection of union proposals

The complaint in Case 18-CA-18540 alleges that the Respondent engaged in regressive bargaining since about April 4, 2007, by rejecting union proposals that were identical to proposals the Respondent included in its final offer of June 13, 2006, on nondiscrimination, no-strike/no-lockout, picket line recognition, probationary period, rest periods, grievances, safety glasses, joint safety committee, shop committee, and term of contract. The complaint further alleges that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 28, 44, and 46.)³¹

Facts and Discussion

The record indicates that each of the proposals referenced in this allegation had been tentatively agreed to by the parties in June 2006.³² As discussed above, when negotiations resumed in April 2007, the Union chose to invalidate all of the tentative agreements. The Union subsequently made proposals on most, if not all, of these subjects in which it sought better terms than those included in the compromises set forth in the tentative agreements. Once the Union withdrew from the tentative agreements in order to seek better terms, those tentative agreements ceased to be a valid point of comparison for determining the regressivity of the Respondent's proposals. It would be unfair, and would not forward the interests of collective bargaining, to permit the Union to use the compromises that its negotiators reached, and then invalidated, as a floor beneath which employees' terms could not sink, while the Union was free to seek to improve on those terms. Moreover, the record does not show that the Union ever offered to restore the entire collection of tentative agreements. It would also be unfair to

³¹ The complaint in Case 18-CA-08540, specifies subjects about which the Respondent allegedly engaged in regressive bargaining. The complaint in the second of the three cases consolidated in this litigation, Case 18-CA-18965, includes a general allegation that "[s]ince about August 1, 2008, Respondent has insisted upon inclusion of proposals that are regressive when compared to its earlier proposals, including in particular the offer Respondent unilaterally implemented in about June of 2006, and has not sought to explain or justify its insistence upon those standards." Complaint (II) par. 13. In the section of its brief addressing the allegations in Case 18-CA-018965, the General Counsel does not discuss the allegation of regressive bargaining or specify which, if any, of the Respondent's proposals the allegation relates to. To the extent that the allegation in Complaint (II) may have been meant to cover regressive bargaining over subjects other than those specified in Complaint (I), I conclude that that allegation has been abandoned by the General Counsel.

³² The Respondent's final offer of June 13, 2006, notes that the terms included there on the at-issue subjects (nondiscrimination, no-strike/no-lockout, picket line recognition, probationary period, rest periods, grievances, safety glasses, joint safety committee, shop committee, and term of contract) had all been tentatively agreed to by the parties earlier in June 2006. The General Counsel itself introduced the Respondent's final offer as an exhibit and has not disputed that the parties tentatively agreed to the at-issue provisions in June 2006. Under these circumstances, I conclude that the terms that the June 13 final offer identifies as the subjects of tentative agreements were, in fact, the subjects of such agreements.

permit the Union to "cherry pick" which of the former tentative agreements the parties would be held to.

I conclude that the General Counsel has not shown that the Respondent's rejection of union proposals that were the same as, or similar to, those in the 2006 tentative agreements (and included in the Respondent's June 2006 final proposal) constituted bad-faith bargaining within the meaning of Section 8(a)(5) and (1). That allegation should be dismissed.

b. Wages

The complaint in Case 18-CA-018540 alleges that the Respondent engaged in regressive bargaining: from about July 2007 to August 2007 by proposing to reduce the hourly wages of unit members by 75 cents for each year of a 3-year contract; from about August 2007 to November 7, 2007, by proposing to reduce the hourly wages of unit members by 50 cents for each year of a 3-year contract; and by failing to propose a wage increase apart from its merit pay proposal. The complaint also alleges that the Respondent did this even though the Respondent offered a 25-cent-per-hour wage increase during bargaining in 2006. *Id.* The complaint further alleges that this conduct was part of a course of surface bargaining and that by engaging in it the Respondent failed to bargain in good faith with the Union within the meaning of Section 8(a)(5) and (1). (Complaint (I) pars. 20, 44, and 46.)

Facts

The record shows that, during the period leading up to the Respondent's unlawful implementation of a contract on June 13, 2006, the parties failed to reach a tentative agreement regarding wages. The wage provision that the Respondent unilaterally implemented on June 13 provided for an immediate, across-the-board, increase of 25 cents per hour, but no further automatic wage increases during the term of the contract. The unlawfully implemented contract also provided that the Respondent's would not reduce employees wages during the term of the agreement and that individual employees would be eligible for annual wage increases based on the results of their performance evaluations. The amount of any such merit increases would be at the Respondent's discretion. When the district court issued the 10(j) injunction requiring the Respondent to reinstate the preexisting terms of employment, the employees retained the 25-cent-per-hour wage increase because the Union did not request that it be rescinded.

When the Respondent returned to the bargaining table pursuant to the district court's 10(j) injunction, the Union proposed an across-the-board wage increase of 75 cents per hour for each year of the contract, with the first year's increase retroactive to June 2007. In July 2007, the Respondent reacted by proposing a 75-cent an hour *reduction* in wages for each year of the contract. The Respondent's wage proposal made the reduction retroactive, meaning that it required employees to reimburse the Company for wages already paid. When the Union asked the Respondent to explain the amount of the proposed wage reduction, Wiese responded that "it's an exact mirror image of your proposal."

In August, the Union reduced the wage increase it was seeking to 50 cents per hour for each year of the contract, with the first year's increase still retroactive. The Respondent reacted

the same day by reducing the size of the wage decrease it was proposing to 50 cents per hour. On October 3, 2007, the Respondent proposed to abandon its proposal for a wage decrease entirely if the Union would agree to the Respondent's most recent comprehensive proposal. The Union did not agree to do so. Nevertheless, on November 7, 2007, the Respondent withdrew its proposal for any wage reduction. Although the Respondent never proposed a wage increase, it did propose to give itself the discretion to grant wage increases to individual employees based on the performance evaluations that those employees received.

The Respondent never attempted to justify its proposal for a wage decrease by pleading poverty or economic exigency. Indeed, the Respondent's officials told the union negotiating committee that the affordability of wages was not the issue at the Iowa facility and that there would be wage increases if the Union agreed to the Company's discretionary wage review proposal. At trial, Tate stated that the Respondent's purpose in making the wage reduction proposals was to "jolt" the Union into "some understanding" of how serious the Respondent was about reducing costs at the facility.

Discussion

The Respondent's proposals for wage decreases were regressive as compared to the wage provision that it unilaterally, and unlawfully, implemented in June 2006. That unilaterally implemented proposal specifically stated that employees would not have their hourly wage reduced during the term of the agreement. I note also that the Respondent's unilaterally implemented 2006 wage provision was the Respondent's own proposal—it was not one of those provisions based on a tentative agreement that the Union chose to invalidate in April 2007. Thus, the Respondent's unilaterally implemented wage provision is a legitimate point of comparison for determining whether the Respondent's subsequent proposals were regressive.

Although the Respondent's proposal for a wage decrease was regressive, the record here does not support a conclusion that the regressive proposal was designed to frustrate good-faith bargaining. See *U.S. Ecology Corp.*, supra; *McAllister Bros.*, supra, and *Houston County Electric Cooperative*, supra; see also *Hydro-Thermo, Inc.*, 302 NLRB 990, 993–994 (1991) (It is appropriate for the judge to examine the proposals "to determine whether, in combination and by the manner in which they are urged, they evince a mind set open to agreement or one that is opposed to true give-and-take."). I recognize that the Respondent's proposal for a wage decrease was not a "serious" proposal in the sense that the Respondent expected the Union to agree to a retroactive 75-cent an hour wage reduction for each year of the contract. However, given the record here, I credit Tate's testimony that the Respondent was using the proposals for a wage decrease in an effort to "jolt" the Union, which was proposing wage increases, to make movement towards the Respondent's position on wages. This is born out by the fact that as soon as the Union moved towards the Respondent's position by reducing the wage increase it was seeking to 50 cents per hour, the Respondent reciprocated by reducing the wage decrease it was seeking to 50 cents per hour. Then, the Respondent attempted to use the promise of withdrawing its proposal

for the 50-cent reduction to induce the Union to agree to other elements of the Company's comprehensive proposal. When the Respondent's proposal for a wage decrease ceased to generate further movement by the Union, the Respondent dropped that tactic entirely, withdrawing the proposal for a decrease. See *Formosa Plastics Corp., Louisiana*, 320 NLRB 631, 656 (1996) (no violation based on regressive proposal where the employer's "strategy was to obtain the contract it wanted by progressive concessions of its own after an initial tactic of shock bargaining"). Once again, this is not an instance where the Union attempted to agree to, or make movement towards, the Respondent's wage proposal only to have the Respondent withdraw its proposal in favor of a more regressive one. Rather, when the Union moved towards the Respondent's position, the Respondent reciprocated by moving towards the Union's position.

Based on my consideration of the entire record, I conclude that the Respondent did not bargain in bad faith in violation of Section 8(a)(5) and (1) by making the wage proposals discussed above.³³

c. Seniority and layoff/recall

The complaint in Case 18–CA–18540 alleges that the Respondent engaged in regressive bargaining: on October 3, 2007, when the Respondent proposed for the first time that employees' seniority dates would only run from January 3, 2005, the date when the Respondent assumed control of operations. The complaint also alleges that the Respondent engaged in this conduct even though during bargaining in 2006 it was prepared to recognize unit employees' seniority with the predecessor employer. In addition, the complaint alleges that the Respondent bargained regressively regarding a related layoff/recall provision. The complaint further alleges that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 21, 44, and 46.)

Facts

Prior to the Respondent's unlawful contract implementation in 2006, the parties failed to reach a tentative agreement regarding a seniority provision. The Respondent implemented its own proposal on seniority when it unilaterally imposed a contract on June 13, 2006. That provision states, inter alia, that seniority is a factor to be considered in layoff and recall situations, and that "[w]here all appropriate criteria are relatively equal, seniority . . . will prevail." On June 26, 2007, in its first proposal after the issuance of the 10(j) injunction, the Respondent proposed the same language again. Since this language does not grant the Respondent "sole discretion" to determine what criteria are appropriate or whether the employees are "relatively equal," the proposal apparently leaves employees with recourse to challenge layoff/recall decisions through the grievance procedure. However, in its July 17, 2007 proposal, the Respondent changed the seniority provision to state that the factors to be considered for layoff were "in the sole discretion

³³ At the same time, I do not consider the fact that the Respondent eventually dropped the idea of retroactive pay decreases to be evidence that the Respondent was negotiating with an open mind, since the wage decrease was not a serious proposal in the first place.

of supervision and management,” and that seniority would only be considered when the other criteria were “deemed by supervision and management to be relatively equal.” (Emphasis added.) The same or similar language committing the layoff decisions to the Respondent’s sole discretion was also included in the Company’s subsequent proposals of August 7, August 23, September 11, 2007, and January 29, and May 15, 2008. The Respondent modified the language on October 16, 2008—proposing at that time that the factors determining layoff decisions would be “reasonably judged by management” and that seniority would be a tie breaker “where factors [we]re reasonably deemed by supervision and management to be relatively equal.” (Emphasis added.)

The Respondent also made its proposal on seniority less favorable to employees by shortening the period during which laid-off employees would have recall rights and by changing the method for calculating seniority. More specifically, the seniority provision that the Respondent unlawfully implemented in June 2006, provided that employees on layoff would retain their seniority (and therefore their recall rights) for 12 months. This was based on the Respondent’s own proposal, not on a compromise about which the parties had previously reached a tentative agreement. After the issuance of the 10(j) injunction, all of the Respondent’s seniority proposals reduced the duration of recall rights to 6 months.

On October 3, 2007, the Respondent proposed that employees’ seniority would be measured from the date the Respondent acquired the facility—January 3, 2005. Previously, the Respondent had always recognized the seniority employees had accumulated prior to when it acquired the facility. Many of the employees’ most important benefits improved with seniority. The seniority-linked benefits included retirement payments, number of vacation days, layoff and recall preferences, ability to transfer within the plant, and job bidding. Since approximately 50 percent of the unit employees had worked at the facility for more than 10 years, requiring them to start over with regard to seniority was a very significant change.

Tate stated that the Respondent’s proposal to limit seniority to the post-January 3, 2005 period was eventually withdrawn, but he could not say precisely when.³⁴ At any rate, the Respondent never modified its written seniority proposal to explicitly state that the Company would recognize pre-January 3, 2005 service when calculating seniority. Beginning on January 28, 2008, and continuing through the unilateral implementation on April 1, 2009, the Respondent’s seniority proposals stated that the Company would use the “June 12, 2006 employment history at the Washington Iowa facility,” however, the Respondent’s proposals never set forth the “June 12, 2006 employment history,” stated how much seniority employees had under it, or described how it was calculated.

Tate testified that the Respondent made the October 3, 2007 proposal to limit employees’ seniority to the post-January 3, 2005 period, to “try to jolt the Union into some sincerity—in trying to get them to offer some serious proposals that would

help us be successful.” According to Tate, when the Respondent made the proposal to limit seniority to the period after January 3, 2005, the union committee “reacted with disgust and frustration.” Even when testifying about this episode, over 18 months after it occurred, Tate’s demeanor betrayed palpable glee at the discomfort this proposal caused the union negotiators. The record shows that on the same day that the Respondent made the proposal to honor only the employees’ post-January 3, 2005 seniority, Wiese told the union committee that the Respondent’s strategy would be to make every proposal it offered “progressively worse for the employees,” even if bargaining continued until the “cows c[a]me home.”

The Respondent’s January 28, 2008 proposal regarding seniority is also less favorable to employees than prior proposals in that it explicitly states that “[s]eniority will not apply to Pay Classifications, Layoffs, Bidding and Bumping.” At least with respect to layoffs, the prior proposals had made clear that seniority was to be considered if other factors were relatively equal. In subsequent proposals, the Respondent retained the language stating that seniority would not apply to pay classifications, but deleted the language stating that it would not apply to layoffs, bidding, and bumping.

Jeter offered credible, un rebutted, testimony that during the bargaining that took place after the issuance of the 10(j) injunction, the Union made multiple changes in its seniority proposal in response to concerns raised by the Respondent. For example, when the Respondent raised concern that the existing contract language allowed employees too much time to demonstrate that they were able to perform a new job, the Union proposed reducing the number of days for doing so from 30 or 40 days, to 10 days. When the Respondent complained that employees often used their seniority to bid on jobs in the plant only to reject the jobs once selected, the Union proposed that employees who did not accept offers of jobs that they had bid on would be prohibited from bidding on another job for 1 year. The Union also modified its seniority proposal to allow the Respondent to bypass seniority for “day-to-day” transfers if the person with the most seniority was unable to immediately perform the job.

Discussion

Under the circumstances discussed above, I conclude that the Respondent’s proposals regarding seniority and layoff/recall were not only regressive but that they frustrated bargaining. This is not an instance where the record indicates that the employer’s “strategy was to obtain the contract it wanted by progressive concessions of its own after an initial tactic of shock bargaining.” *Formosa Plastics Corp., Louisiana*, 320 NLRB at 656. Rather than making progressive concessions after the initiation “shock,” the Respondent made progressively worsening seniority proposals over an extended period time—starting after June 2006 and continuing at least through January 2008. Moreover, all of the Respondent’s subsequent proposals were worse than its June 2006 unilaterally implemented proposal.³⁵

³⁴ Tate testified that “it may have been withdrawn in the January ‘08 comprehensive proposal possibly,” or that the withdrawal “might have” come after 2 or 3 or 4 months. (Emphasis added.)

³⁵ As discussed above, the tentative agreements that the parties reached in 2006 are not a valid point of comparison for determining whether proposals are regressive since the Union chose to nullify those

even though the evidence shows that during that period the Union repeatedly modified its verbal proposals to address concerns that the Respondent raised about using seniority. The Respondent's behavior suggests that its regressive seniority and layoff/recall proposals were intended to frustrate the open-minded consideration of possible compromise.

For these reasons, I conclude that the Respondent's regressive bargaining regarding seniority and layoff/recall in 2007 and 2008 violated Section 8(a)(5) and (1) of the Act, and is evidence that the Respondent engaged in a course of bad-faith bargaining.

d. Vacation benefits

The complaint in Case 18-CA-018540 alleges that the Respondent engaged in regressive bargaining since about May 2007 by proposing that unit employees must work at least 2000 hours in a year, not counting compensated time off, in order to receive full vacation benefits. The complaint further states that the Respondent did this even though in 2006 it was willing to agree to a full vacation benefit without requiring that employees have worked a minimum number of hours. The complaint further alleges that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 22, 44, and 45.)

Facts

In 2006, prior to the Respondent's unlawful implementation of a contract on June 13, 2006, the parties reached a tentative agreement regarding vacation. That proposal provided that employees would receive between 5 days and 20 days of vacation per year depending on how many years of service they had. The proposal stated that the benefit was available to all regular, full-time, employees, but did not state that employees had to meet any threshold number of hours during the previous year to receive the full vacation benefit. This was among the tentative agreements that the Union withdrew from on April 4, 2007.

After the Union rescinded the tentative agreements, both the Respondent and the Union made vacation proposals that were in certain respects, less favorable to the other side than what the parties had tentatively agreed to in 2006. On June 26, 2007, the Respondent, in its initial postinjunction proposal, stated for the first time that employees would not be entitled to the full vacation benefit unless they worked a minimum of 2000 hours during the preceding 12-month period. Employees who had worked less than 2000 hours would receive a "pro rata" vacation benefit. This proposal for the 2000-hour minimum was included in all of the Respondent's proposals through at least May 15, 2008. The Respondent explained its proposal for the 2000-hour requirement by stating that management's biggest problem at the facility was the high employee absenteeism rate, and that it wanted to require employees to "be at work" in order to obtain "full-time benefits."

compromise agreements. However, provisions like the seniority and layoff/recall section, which the Respondent unlawfully implemented in 2006 without ever reaching a tentative agreement with the Union, are valid points of comparison since those were the Respondent's own proposals, not compromises later nullified by the Union.

During bargaining on September 4, 2008, the Union objected that if employees actually took their vacations, they would be unable to meet the annual 2000-hour threshold for full vacation benefits. The Respondent reacted to that objection in its October 16, 2008 proposal by stating that the Company would count all authorized paid time off—including vacations, holidays, bereavement, and jury duty—towards the 2000-hour minimum. The proposal that the Respondent unilaterally implemented on April 1, 2009, included the same language on this subject as the October 16, 2008, proposal.

As noted above, after the Union withdrew from the tentative agreements reached in 2006, it, like the Respondent, made a new vacation proposal that was less favorable to the other side than what had previously been agreed to. Shortly after issuance of the Section 10(j) injunction, the Union proposed to increase the maximum vacation benefit from 20 days to 25 days (5 weeks).³⁶ The Union continued to propose this increase throughout 2007 and 2008, but abandoned it on January 15, 2009, and agreed to the 20-day maximum that was in both the prior contract and the Respondent's proposals. On March 17 or 18, 2009, the Union agreed to set a minimum number of hours worked for receipt of full vacation benefits, but set that threshold at 1560 hours, rather than the 2000 hours sought by the Respondent.

Discussion

Under the circumstances presented here, I find that the General Counsel has not shown that the Respondent made regressive proposals regarding vacation benefits with the intent of frustrating good-faith bargaining. Although the Respondent's proposal was less favorable to the employees than what had been tentatively agreed to in 2006, that, as discussed above, is not a valid point of comparison for purposes of determining regressivity of the Respondent's proposals since the Union had chosen in April 2007 to invalidate all the prior tentative agreements. After the Union invalidated the tentative agreement regarding vacations, both the Respondent and the Union made proposals that were less favorable to the other side than what they had agreed to in 2006. Even assuming that the Respondent's proposal for a 2000-hours requirement amounted to a reduction in the vacation benefit, that is not materially different than the Union proposing to increase the maximum vacation benefit by 1 week. Moreover, after a bargaining session at which the Union pointed out that employees who took vacation would not be able to meet the 2000-hour threshold, the Respondent moved to address the Union's concern by modifying the proposal so that vacation and other company-approved time off would be counted towards the 2000 hours. Moreover, the General Counsel has not shown that after the Respondent added the 2000-hour minimum requirement, it made subsequent regressive changes to that proposal. At any rate, the absenteeism problem discussed by the Respondent is a facially plausible

³⁶ The proposal states that the maximum amount of vacation is "(5) weeks," but erroneously spells out the number as "four"—i.e., it reads "four (5) weeks." In context it is clear that 5 weeks was intended, since the provision sets forth increasing numbers of vacation days based on years of service, and the second highest increment provides "four (4) weeks" of vacation.

explanation for proposing a minimum annual-hours requirement, and no witness disputed that absenteeism was a serious problem at the facility.

For the reasons stated above, I conclude that the Respondent's proposals that employees be required to work a minimum of 2000 hours in order to qualify for full vacation benefits did not violate Section 8(a)(5) and (1). That alleged violation should be dismissed.

e. Attendance Policy

The complaint in Case 18–CA–18540 alleges that the Respondent engaged in regressive bargaining since about August 2007 by proposing an attendance policy based on a point system under which employees performing duties on behalf of the Union would be charged attendance points and subjected to discipline depending on how many points they accumulated. The complaint further alleges that the Respondent did this even though it did not include an attendance policy when bargaining with the Union in 2006. The complaint claims that this conduct was part of a course of surface bargaining and that by engaging in it the Respondent failed to bargain in good faith with the Union within the meaning of Section 8(a)(5) and (1). (Complaint (I) pars. 23, 44, and 46; and Complaint (II) par. 13.)

Facts

Neither the Fansteel contract, nor the contract that the Respondent unilaterally implemented in 2006, contained a policy on absenteeism. During postinjunction bargaining in early April 2007, the Respondent raised employee absenteeism as a concern. On June 5, 2007, the Union attempted to address those concerns by proposing an attendance policy under which employees would be charged "points" for unexcused absences and would receive varying degrees of discipline, including discharge, based on how many points they accumulated. The Respondent made its own attendance point-system proposal as part of the Company's comprehensive offer of August 23, 2007. The Respondent's attendance proposal was significantly less forgiving than the Union's in terms of the number of points that would result in various levels of discipline and the types of absences that would be excused. In particular, the Respondent's proposal, unlike the Union's, did not excuse an employee's absence to engage in union business. Under the Respondent's proposals during 2007 and most of 2008, employees would be charged with absenteeism points for absences incurred to engage in union business, including contract negotiations, except to the extent that they used vacation time for those absences.

Eventually, on October 16, 2008, the Respondent altered its attendance proposal to state that employees would not be charged a point for absences incurred to engage in "Union business related to the Company, including negotiations." However, under the Respondent's proposal, employees who were absent for union business unrelated to the Respondent—for example, because they were attending a union convention—would still be charged an attendance point for each day of absence unless they used vacation time.

Discussion

There is no dispute that during negotiations in 2006 the Respondent did not propose an attendance point system. However, the record indicates that it was the Union, not the Respondent, that first introduced a proposal to formalize attendance standards by using such a system. The Respondent cannot be seen as having bargained regressively when it reacted by introducing its own point system counterproposal. Therefore, the allegation that the Respondent made regressive proposals regarding attendance and that those regressive proposals constituted bad-faith bargaining in violation of Section 8(a)(5) and (1) should be dismissed.

Although the Respondent's point system proposal was not regressive, I do conclude that during much of the bargaining in 2007 and 2008, the Respondent's point system proposals were extreme and unreasonable in that those proposals did not exempt time spent by union officials to engage in contract negotiations and other company-related union business. Under such a system, employees on the union negotiating team would be subject to discipline for attending contract negotiations, even if they devoted all of their vacation time to attending those sessions.³⁷ See *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) (unreasonable bargaining demands are one of the seven traditional indicia of bad-faith bargaining); see also *Ceredian Corp. v. NLRB*, 435 F.3d 352 (D.C. Cir. 2006) (An employer's refusal to meet with the union bargaining committee during nonworking hours, while simultaneously refusing to grant employee members of committee unpaid leave to attend bargaining sessions during working hours, was unlawful interference with employees' selection of their bargaining representatives.). The Respondent could not have reasonably hoped that any union would agree to a proposal with those implications. Even though the Respondent relented, after 16 months, that is not inconsistent with finding that the Respondent's insistence on such a proposal for so long shows bad faith. In *Mid-Continent Concrete*, 336 NLRB 258, 260–261 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002). The Board found evidence of bad-faith bargaining where the employer's tactic "was to put forward a harsh bargaining proposal, stand by the proposal, then as the negotiations dragged on, concede no more than the status quo." The Board stated that "[u]nexplained concessions" can be "a tool to disguise and conceal a party's strategy of surface bargaining." *Id.* at 260, citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960). In the instant case, the record does not show that the Respondent's concession regarding absences for company-related union business was made in exchange for anything. Rather it appears that, similar to the situation in *Mid-Continent Concrete*, the Respondent made a harsh proposal, stood by that proposal for well over a year, then made an unexplained concession. I conclude that the Respondent's insistence, for over a year, on an unreasonable proposal to charge employees with attendance "points" for absences in-

³⁷ Consider, for example, that the parties met to bargain on 26 days between April and December 2007. Under the Respondent's vacation proposal, employees would have, at most, between 5 and 20 vacation days annually depending on their years of service, and less than that if they did not meet the 2000 hours worked threshold.

curred to engage in contract negotiations and other company-related union business was evidence of a course of bad-faith bargaining.

f. No-strike/no-lockout provision

The complaint in Case 18–CA–18540 alleges that the Respondent engaged in regressive bargaining from about July 2007 until January 28, 2008, by proposing that if any employee violated the contractual no-strike provision, the Respondent would have sole discretion to decide on discipline, up to and including discharge, and that the Union could not contest the discipline under the grievance/arbitration process. The complaint further alleges that the Respondent took this position even though during bargaining in 2006 its proposal allowed the Union to grieve discipline for alleged violations of the no-strike provision. The complaint claims that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 24, 44, and 46.)

Facts

Since at least June 13, 2002, the contract between Fansteel and the Union had banned both strikes and lockouts. During negotiations for a successor contract in 2006, the Respondent and the Union reached tentative agreement on a provision that prohibited the Union and its members from engaging in a strike or any other type of organized interference with the Respondent's business, and prohibited the Respondent from locking out employees. There was no mention of disciplining employees who violated the ban on strikes. After the issuance of the 10(j) injunction, in its June 26, 2007 comprehensive proposal, the Respondent proposed a no strike/lockout provision that included the following new language: "The Company may discipline any individual employee or group of employees who violate this provision. This discipline may amount to suspension or discharge." (Sec. 1.8 "No Strike-No Lockout.") The Respondent's comprehensive proposal of July 17, 2007, made no changes to that language. Then, in its August 7, 2007 proposal, the Respondent added language stating that the Respondent had "sole discretion" to suspend or discharge employees for violations of the no-strike provision and that employees subject to such discipline would not be able to challenge the discipline through the grievance procedure.³⁸ This language was also included in the Respondent's comprehensive proposals of August 23 and September 11, 2007. Next, in its January 28, 2008 comprehensive proposal, the Respondent removed the no-strike/no-lockout provision in its entirety. This would allow employees to strike, but also strip them of the protection against lockouts that they had enjoyed since at least 2002. Subsequently, while attorney Roberts was serving as lead negotiator in late 2008, the parties reached a tentative agreement on a no-strike/no-lockout provision. That agreed-upon provision made no reference to disciplining employees who violated the ban on strikes. However, after Wiese expelled Roberts from the bar-

gaining team, the Respondent again removed the no-strike/no-lockout provision to which the parties had recently agreed, and unilaterally implemented a contract on April 1, 2009, that contained no such provision.

Discussion

I conclude that the Respondent bargained regressively regarding the no-strike/no-lockout provision after issuance of the 10(j) injunction that forced it back to the bargaining table. I base this not on a comparison to the 2006 tentative agreement (which the Union rescinded), but based on a comparison of the Respondent's postinjunction proposals. As noted above, in its initial three comprehensive proposals after being ordered to resume bargaining, the Respondent included language stating that employees who violated the no-strike provision were subject to discipline, including suspension or discharge. Then in its August 7, 2007 proposal, the Respondent added regressive language stating that discipline for violations of the no-strike provision was within "management's sole discretion" and that employees so disciplined would have no recourse to the grievance procedure. The record does not show that, during bargaining, the Respondent explained why it made this regressive proposal, and the Respondent's brief offers no reason. Under the circumstances present here, the fact that this regressive proposal was made without explanation, and has still not been explained, suggests that its purpose was to frustrate the open-minded consideration of possible compromises. I am not dissuaded from this view by the evidence of the Respondent's actions after the July 2007, to January 28, 2008 time period covered by the allegation. The Respondent's proposal to delete the provision entirely meant that employees could not be disciplined for violating it, but also stripped employees of the protection against lockouts that they had enjoyed in the past. Moreover, although Roberts, acting on behalf of the Respondent, reached a tentative agreement in late 2008 that restored the no-strike/no-lockout provision, sans any discussion of discipline, the Respondent reneged on that tentative agreement once Wiese banished Roberts from the Respondent's bargaining team. The Respondent has not identified any changed circumstances that explain its decision to withdraw from the tentative agreement that Roberts had recently reached. *Regency Service Carts*, 345 NLRB 671, 722 (2005). (The Board considers "the withdrawal of agreements previously reached, without adequate explanation, or change in bargaining circumstances . . . to be evidence of bad faith.")

For these reasons, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by bargaining regressively and in bad-faith regarding the no-strike/no-lockout provision from July 2007 to January 28, 2008.

g. Drug testing

The complaint in Case 18–CA–18540 alleges that the Respondent engaged in regressive bargaining since about August 2007, by proposing random drug testing of union employees, even though its drug testing proposals in 2006 did not permit random drug testing. The complaint claims that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 26, 44, and 46.)

³⁸ The relevant portion of the modified provision stated: "The Company may discipline any individual employee or group of employees who violate this provision. Based on managements [sic] sole discretion, this discipline may amount to suspension or immediate discharge without grievance possibilities."

Facts

In the 2006 negotiations, the parties reached a tentative agreement regarding a drug testing provision. That provision, which was also among those unilaterally implemented by the Respondent in June 2006, stated: “During the term of the Agreement, the Company will maintain its 6/13/06 Drug Testing Policy to the extent it is consistent with federal and Iowa regulations. Random drug testing will not be a part of this Policy.” The record does not reveal the terms of the 6/13/06 Drug Testing Policy.³⁹ In April 2007, the Union stated that it was withdrawing from all the prior tentative agreements, including the one pertaining to drug testing. The Respondent’s comprehensive proposals of June 26, July 17, and August 17, 2007, included the same drug testing language that was in the 2006 unilaterally implemented contract and which is quoted above. The Union did not agree to that provision during this period of time.

Then, the Respondent, in its August 23, 2007 comprehensive proposal, used a printed line to strike out the language stating that random drug testing was not part of the drug testing policy. The Respondent’s comprehensive proposals of September 11, 2007, and January 29, 2008, did not include the language stating that random drug testing was not part of the Respondent’s drug policy. Then, in its May 15, 2008 proposal, the Respondent re-introduced language stating that the drug policy did not include random testing.

The Respondent does not attempt to provide a rationale for the August 23, 2007 change that deleted the language on random drug testing, or the May 15, 2008 change that restored that language. Tate testified that it was “just probably an error on my part” to delete the language in the first place. I do not credit Tate’s testimony that the language was stricken accidentally. First, I note that, on its face, Tate’s testimony on this subject was not confident and definitive. Rather he stated that the deletion was “just *probably*” inadvertent. Moreover, the way in which the change was made, belies the claim that its deletion was inadvertent. The language did not simply disappear, but rather was shown, and crossed-out, in the Respondent’s August 23 proposal. The language was then omitted entirely from the Respondent’s next two proposals. This all leads me to find that the Respondent made the change intentionally.

Discussion

I conclude that the drug testing proposal that the Respondent forwarded in its comprehensive proposals starting in August 23, 2007, and stood by until the beginning of May 2008, was regressive as compared to its earlier, postinjunction, proposals of June 26, July 17, and August 17, 2007. Moreover, the Respondent has not provided a credible explanation for making the regressive proposal. Under the circumstances present here, and Board precedent, see *Mid-Continent Concrete*, supra, *U.S.*

³⁹ The Respondent argues that when the parties resumed negotiations the Union made its own regressive drug testing proposal. Brief of Respondent at p. 82. However, since the evidence does not show what the terms of the 6/13/06 drug testing policy were, the Respondent has not established that the restrictions enumerated in the Union’s proposal went beyond any encompassed by the parties’ tentative agreement.

Ecology Corp., supra, *Houston County Electric Cooperative*, supra, I conclude that the Respondent made regressive bargaining proposals regarding drug testing for the purpose of frustrating the open-minded consideration of possible compromise, and that this conduct violated of Section 8(a)(5) and (1).

h. Choice of laws and venue

The complaint in Case 18–CA–18540 alleges that the Respondent engaged in regressive bargaining since about August 2007, by proposing that any contract negotiated by the parties be governed by Alabama State law and that employees employed in Iowa have no recourse, rights, or protection under Iowa State law. The complaint alleges that this was done even though the Respondent did not make a similar proposal in 2006. The complaint claims that this conduct was part of a course of surface bargaining and that by engaging in it the Respondent failed to bargain in good faith with the Union within the meaning of Section 8(a)(5) and (1). (Complaint (I) pars. 27, 44, and 46.)

Facts

The Respondent’s bargaining proposals prior to late August 2007 had never included a provision regarding choice of laws or venue. In its August 23, 2007 proposal the Respondent added the following section:

SECTION 1.10 Governing Law; Venue

1.10.1 This Agreement shall be governed in all respects, including validity, interpretation and effect, by and construed in accordance with the internal laws of the State of Alabama without regard to principles of conflicts of law. The parties expressly consent to exclusive personal jurisdiction and venue in the federal and state courts of the Northern District of Alabama.

Jeter testified that the Respondent stated that it wanted this provision so that its officials could resolve legal matters near their Alabama corporate offices, without the necessity of traveling to Iowa. A January 28, 2008 letter from Tate to Jeter describes the provision as “a housekeeping issue” and states that “Whitesell is an Alabama corporation with its principal Human Resources and Labor Relations managers located in Alabama,” and that “[a]ll of the common reasons for governing law and venue are the reasons for this modification.” Jeter rejected the Respondent’s proposal on the basis that the facility was in Iowa and all the unit employees worked in Iowa. On October 16, 2008, in a comprehensive proposal, the Respondent withdrew the provision regarding governing law and venue.

Discussion

I conclude that the Respondent’s proposal on choice of laws and venue was not regressive. This was not an instance in which the parties had been approaching an agreement on this subject, or on an overall contract, and then the Respondent backed away from its previous proposal. The proposal at issue here was the first, and apparently only, one on the subject of choice of laws and venue. The Respondent explained the reason for the proposal to the Union, and that explanation—that the Respondent’s officials did not want to travel from Alabama to Iowa for legal proceedings—was facially reasonable, as was

the Union's own reluctance to agree to travel from Iowa to Alabama. Indeed, the record shows that Wiese's and Tate's repeated trips to Iowa for negotiations were making them increasingly weary of the time and expense that the travel entailed. Moreover, the General Counsel did not attempt to show that, to the extent state law would control matters important to the Union and unit employees, the laws of Alabama were less favorable than those of Iowa.

Under the circumstances, the allegation that, by making a choice of laws proposal, the Respondent violated Section (a)(5) and (1) should be dismissed.

i. Shop committee involvement in discipline

The complaint in Case 18-CA-018540 alleges that the Respondent engaged in regressive bargaining since April 24, 2007, by insisting on a disciplinary proposal under which any shop committee member who represents an employee regarding discipline must maintain strict confidentiality of all information connected with the discipline. This requirement, the complaint alleges, was not contained in the Respondent's final offer of June 13, 2006. The complaint further alleges that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad faith bargaining. (Complaint (I) pars. 29(a), 44, and 46.)

Facts

In June 2006, the Union and the Respondent reached a tentative agreement on language regarding the participation of union committee members in disciplinary meetings between management and unit employees. The relevant language provided: "Before any employee is discharged or suspended, the employee will be permitted to have a Union Shop Committee person present if he so requests." This language was included in the contract that the Respondent unilaterally, and unlawfully, implemented on June 13, 2006.

In April 2007, after the Union invalidated all of the parties' tentative agreements, both parties made proposals that were less favorable to the other side than what was set forth in the tentative agreement regarding union involvement in disciplinary meetings. Whereas the June 2006 tentative agreement required the employee to actively request the presence of the union committee member, on April 4, 2007, the Union sought language mandating the presence of the union committee member unless the employee actively requested to exclude such individual. In addition, the tentative agreement only authorized the presence of the union committee member at meetings regarding employee suspension or discharge, but on April 4 the Union proposed to expand the authorization to all meetings for discipline "beyond a verbal warning." The Union retained these modifications in subsequent proposals.

For its part, the Respondent departed from the 2006 tentative agreement on the shop committee by adding language to its proposal stating that employees only had the right to have a shop committee member present if that member was "readily available," and that any committee member "involved in a disciplinary action w[ould] maintain strict confidentiality of the disciplinary matter." At the same time, the Respondent, made movement towards the Union's new position by accepting the language that permitted committee member involvement at all "disciplinary meetings beyond verbal warning." The Respond-

ent maintained this language in its proposals of June 26, July 17, August 7 and 21, September 11, 2007, January 29, and May 15, 2008.

Roberts credibly testified that at some point the Union expressed concern that the confidentiality language in the Respondent's proposal would prevent committee members from investigating a grievance. According to Roberts, he informed the Union that such a restriction was not the intent of the provision and then modified the proposal to address the Union's concern. The documentary evidence shows that, on August 15, 2008, the Respondent took the "strict confidentiality" language out of the proposal, and substituted language stating that the committee member would "respect the privacy of the employee receiving discipline insofar as reasonably possible and without compromising the Committee member's ability to carry out his/her duties." The Respondent's new proposal also addressed the Union's concerns by stating that the privacy language did "not purport to regulate the activities of the Committee member at any internal union meeting." The Union told Roberts that the new language was also unacceptable. The Respondent included the language from the August 15 proposal among the terms that it unilaterally implemented on April 1, 2009.

Discussion

I conclude that the General Counsel has not established that the Respondent made regressive proposals regarding the role of union committee members in disciplinary meetings between management and employees. Once again, the Respondent's argument is based on a comparison between the terms contained in a tentative agreement that the Union chose to invalidate, and the Respondent's subsequent proposals. For the reasons already discussed, since the Union invalidated that tentative agreement in order to seek better terms, the tentatively agreed to terms are not a valid point of comparison for determining whether the Respondent's subsequent proposals were regressive. During the period in question, the Respondent did not make progressively less favorable proposals regarding the role of committee members in discipline. Rather it held to its proposal on this subject until August 15, 2008, when it made modifications favorable to the Union.

The General Counsel also states that the confidentiality aspect of the Respondent's proposal sought to deny the Union access to information that was necessary for grievance handling and to which it was therefore entitled. According to the General Counsel, the restriction proposed by the Respondent would mean that "the Union committee member could not share relevant information with the Union as it attempted to represent the employee's interest." It is not clear that the "strict confidentiality" language would mean that a committee member would be unable to discuss a grievance with other union officials or with employees from whom relevant information was being gathered. At any rate, when the union negotiators raised such concerns, Roberts responded that it was not the Respondent's intent to impair the Union's ability to investigate grievances, and modified the proposal to make that clear.

I conclude that the General Counsel has not shown that the Respondent violated Section 8(a)(5) and (1) by bargaining reggressively regarding the involvement of union committee

members in disciplinary proceedings as part of a course bad-faith bargaining. This allegation should be dismissed.

j. Probationary period

The complaint in Case 18–CA–018540 alleges that the Respondent engaged in regressive bargaining since April 24, 2007, by insisting on a probationary period of 180 days—whereas the Respondent’s June 13, 2006 final offer set forth a probationary period of 90 days. The complaint further alleges that this conduct violated Section 8(a)(5) and (1), and was part of a course of bad-faith bargaining. (Complaint (I) pars. 29(b), 44, and 46.)

Facts

The record shows that in June 2006, the parties reached tentative agreement on a probationary period provision that set the length of that period at 90 days. This was included among the terms that the Respondent unilaterally, and unlawfully, implemented on June 13, 2006. When the parties resumed contract negotiations in April 2007, the Union withdrew from the tentative agreement on probationary period. Afterwards both parties submitted proposals for terms that were less favorable to the other side than the terms they had tentatively agreed to in 2006. The Union proposed a shorter probationary period of 60 days. On November 7, 2007, the Union modified that proposal to provide for a 90-day probationary period. The Respondent proposed increasing the probationary period to 180 days, citing a desire to have the freedom to use “seasonal” employees during busy times of year. In September 2008, the Respondent modified its probationary period proposal to agree to a 90-day probationary period.

Discussion

I find that the General Counsel has not shown that the Respondent bargained regressively regarding the probationary period. The Union chose to invalidate the tentative agreement and both parties subsequently made proposals that sought to improve on the terms they had previously agreed to. There is no evidence that the Respondent made progressively harsher proposals during the period after bargaining resumed. To the contrary, the evidence shows that the Respondent moved towards the Union’s position by reducing the length of the probationary period it was proposing. Moreover, the explanation that the Respondent offered the Union for seeking to lengthen the probationary period—i.e., to allow the Company to address the seasonal nature of its work with seasonal employees, rather than by recalling and laying off regular employees—is facially plausible and was not refuted by other evidence.

I conclude that the General Counsel has not shown that the Respondent bargained regressively regarding the probationary period as part of a course of surface bargaining or bad-faith bargaining within the meaning of Section 8(a)(5) and (1). This allegation should be dismissed.

k. Joint safety committee

The complaint in Case 18–CA–18540 alleges that the Respondent engaged in regressive bargaining since April 24, 2007, by insisting that it have the right to select both the three nonbargaining unit employees and the three bargaining unit

employees who would serve on the joint safety committee. This contrasted, the complaint states, with the Respondent’s June 13, 2006 final offer, which gave the Union the right to select the bargaining unit employees who would serve on the joint safety committee. The complaint also states that the Respondent’s proposals regarding the joint safety committee were increasingly regressive in 2007. The complaint further alleges that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 29(c), 44, and 46.)

Facts

During contract negotiations in June 2006, the parties reached tentative agreement on the following joint safety committee provision:

24.2 *Joint Safety Committee*—The Company shall select three non-bargaining unit persons and the Union shall select three bargaining unit employees to serve on a Joint Safety Committee. This Committee shall meet monthly for up to one hour without loss of pay (during work hours) to discuss safety and health matters. The Committee may make recommendations relative to resolving safety and health concerns. A mutually acceptable record of the meeting will be prepared and retained.

This provision was included in the contract that the Respondent unilaterally, and unlawfully, implemented on June 13, 2006.

When the parties resumed contract negotiations in 2007, the Union proposals re-introduced the same joint safety committee provision that was included in the tentative agreement and the final proposal that the Respondent unlawfully implemented in June 2006. The Respondent, in its June 26, 2007 proposal, modified the language to give it discretion to determine whether employees would be paid for participating in the monthly safety meetings. The Respondent’s modified proposal retained the first, third, and fourth sentences of the version previously agreed to, but substituted the following for the second sentence:

5.6.6.
* * *

As long as Whitesell believes this committee is productive and cost effective, this Committee shall meet monthly for up to one hour without loss of pay (during work hours) to discuss safety and health matters. The Company may change this at any time if it determines that the Committee is not fulfilling the expectations of the program.

The Respondent retained the same joint safety committee proposal in its July 17, 2007 comprehensive proposal.

On August 7, 2007, the Respondent modified its joint safety committee proposal to give itself the right to name both the nonbargaining unit employees *and* the bargaining unit employees who would serve on the committee. The Respondent included this proposal in all its comprehensive proposals from August 2007 through May 15, 2008, and did not modify it for over a year.

On August 14, 2008, Roberts became the Respondent’s lead negotiator, as required by the agreement to hold contempt proceedings in abeyance. Roberts testified that he proposed that the Respondent be permitted to select one, rather than all three,

of the bargaining unit employees who would serve on the safety committee. According to Roberts, he explained this proposal to the Union by stating that the Respondent was concerned that the Union would not select any nonunion members from the bargaining unit to serve on the safety committee.⁴⁰ That proposal is not reflected in the documentary evidence. On September 5, 2008, the Respondent submitted a written proposal that restored the Union's right to select all three bargaining unit employees who would serve on the committee. The proposal reduced the frequency of safety committee meetings from monthly to quarterly, but removed the language that permitted the Company to decline to pay employees for attending the meetings.

Discussion

I conclude that the Respondent bargained regressively regarding the joint safety committee. The Respondent's first two proposals in 2007 preserved the Union's right to select which three bargaining unit employees would serve on the safety committee. Then, on August 7, 2007, the Respondent made a regressive proposal to strip the Union of authority to select any of the safety committee members. The Respondent held to that proposal for over a year. The Respondent has not shown that it provided the Union with any explanation for this regressive change at the time it was made. In fact, the Respondent has not shown that it provided any explanation for the change for a period of over a year. It was not until Roberts became involved that any explanation was provided, and that explanation related to a different proposal under which the Union would select two of the three bargaining unit employees on the safety committee.

Given the lack of an explanation for the Respondent's proposal to shut the Union out of the process of selecting the unit employees on the safety committee, that proposal was facially unreasonable and appears calculated to frustrate, rather than further, open-minded consideration of possible compromise. Under these circumstances, I conclude that the Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) by making regressive proposals regarding the safety committee during the period beginning on August 7, 2007. See *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) ("Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining."), and *Houston County Electric Cooperative*, 285 NLRB at 1213-1214 (regressive proposals designed to frustrate bargaining and unreasonable bargaining demands are indicia of bad-faith bargaining).

3. Respondent proposals allegedly giving it unilateral control over terms and conditions of employment

The complaint in Case 18-CA-018540 alleges that the Respondent made three types of proposals that sought to give the company unilateral control over employee terms and conditions

⁴⁰ This is a plausible explanation for a proposal to allow the Respondent to name one of the three unit members on the safety committee. However, it would not explain why the Respondent's prior proposal (insisted upon for over a year), gave management the right to name *all* of the unit employees who would serve on the committee.

of employment. First, the complaint alleges that since about April 4, 2007, the Respondent has proposed a wage policy giving it sole discretion over whether to grant a wage increase to an employee, and over the amount of any increase. The complaint further alleges that under this proposal neither the Union nor the employee could grieve the Respondent's decisions. Second, that since about August 9, 2007, the Respondent maintained a proposal regarding "Policy, Work Rules & Procedures," that gave it unfettered ability to change, modify, create or eliminate policies, procedures and work rules during the term of the agreement, including policies related to disciplinary action, probationary period, rest periods, drug testing, attendance, holidays, hours of work, performance evaluations, vacations, and health and safety. Third, that since about April 4, 2007, the Respondent has proposed a management-rights clause that gave it unfettered ability to: determine the work performed, to remove unit work, and to control employees' terms and conditions of employment. The complaint states that the Respondent's "Policy, Work Rules & Procedures," and "Management Rights," proposals are both regressive as compared to terms it illegally implemented in June 2006. The complaint further alleges that the Respondent's conduct violated Section 8(a)(5) and (1), and was part of a course of bad-faith bargaining. (Complaint (I) pars. 30-32, 44, and 46.)

Facts

a. *Wages*: Ever since the parties resumed bargaining in 2007, the Respondent has declined to offer a set wage increase of any amount. The Respondent's first comprehensive proposal in 2007 (submitted June 26) contained a "merit pay evaluation" provision that gave the Respondent discretion to grant, or deny, wage increases to individual employees. That proposal stated:

4.1.1. Annual Evaluation:—On or about the anniversary date of the Agreement, each employee will receive a performance evaluation. Based on the results of the merit evaluation, the employee will be considered for an increase but there is no guarantee of an increase. Whitesell uses a Merit Pay Evaluation system which bases compensation on individual performance issues including but not limited to: production performance, employee efficiency, quality levels, scrap levels, attendance, and other rating characteristics. The amount of the increase, if any, will be at the discretion of the Company.

The proposal further states that promotion to higher pay grades "is solely at management discretion." The proposal does not set forth specific baselines which, if met, guarantee merit raises. The Respondent explained this proposal to the Union by stating that the same system was in place at the Respondent's other facilities, and that management wanted the flexibility to reward employees in accordance with their performance.

The Respondent's proposal also invalidated the existing job classification system, which set specific wage levels for employees based on their position and length of service. Examples of positions specified in the existing classification system are "part-time janitor," "truck driver," "tool & die maker A" "machine operator." The Respondent's proposal set forth general pay grades for unit employees, but those pay grades were not based on specific positions or length of service.

The Respondent's June 26, 2007 proposal included the following caveat, which provided, in essence, that management would have authority to decrease wage rates during the term of the contract.

[NOTE: WHITESELL CANNOT GUARANTEE WAGE RATES FOR THE 3 YEAR DURATION OF THE AGREEMENT AT THE SAME LEVEL. BUT WHITESELL CERTAINLY HOPES THAT IT WILL BE ABLE TO MAKE THE IOWA FACILITY MORE COST EFFECTIVE SO THAT RATES CAN ACTUALLY GO UP IN THE FUTURE.]

In its subsequent comprehensive proposal of August 23, 2007, the Respondent modified the merit pay proposal in three relevant respects. First it added a section stating that merit pay evaluations and recommendations were not grievable. That section read:

4.1.7 Merit Pay Not Grievable. Merit Pay Evaluations are critical tools to coordinate workers [sic] directions and needs of supervision and management. The Merit Pay evaluations and recommendations are not grievable. The amount of any change however can be requested by the employee to be reviewed again by the employees [sic] direct supervisor, management, and Human Resources. In the event an employee feels that the amount needs review an employee may prepare a detailed written explanation as to why they feel it should be reviewed and submit it to Human Resources for the evaluation process.

The August 23 proposal also added "supervision" to the list of those having discretion to determine the amount of the merit pay increase an employee received, and deleted the caveat stating that the company was not guaranteeing the wage rates for the term of the contract.

During negotiations, the union team objected to the Respondent's proposal precluding use of the grievance process to challenge merit pay actions. In its January 29, 2008 comprehensive proposal, the Respondent modified the section to state:

4.1.7 Merit Pay Evaluations are critical tools to coordinate workers [sic] directions and needs of supervision and management. The Merit Pay evaluations and recommendations can be grieved based on demonstrated performance, productivity, quality, and efficiency results. The amount of any change however can be requested by the employee to be reviewed again by the employees [sic] direct supervisor, management, and Human Resources. In the event an employee feels the amount needs review an employee may prepare a detailed written explanation as to why they feel it should be reviewed and submit it to Human Resources for the evaluation process.

The Respondent retained this provision essentially intact during the rest of negotiations.⁴¹ This, and subsequent, versions of the Respondent's wage proposal also retained language stating that

⁴¹ The Respondent's October 16, 2008 proposal added language stating that an employee could have the assistance of the Union when seeking review of the "pay change amount."

the amounts of merit pay increases were "at the discretion of supervision and management and the Company," and that the decision to move an employee to a higher wage category was "at management[']s discretion."⁴² During negotiations, the Respondent stated that supervisors would use a list of criteria to evaluate employees for the merit wage increases, but that there were no specific baselines that an employee could meet in order to ensure a raise.

The parties disagree about the meaning of language in the Respondent's January 29 proposal relating to grievances. The Respondent states that this section permits merit pay actions to be grieved. It relies on a written explanation of the Company's proposal of January 29, 2008, which was attached to a January 28, 2008 letter from Tate to Jeter. That document states: "Whitesell will agree to have merit pay grieved. Such a grievance shall be based on demonstrated productivity and performance improvements." Tate and Wiese both testified that the Respondent changed its position to permit employees to grieve the merit wage program. The General Counsel, on the other hand, contends that the modification does not permit the Union to grieve decisions about whether employees are granted merit wage increases, or the amounts of those increases, but rather only to challenge whether the Respondent used appropriate productivity and performance improvement standards. Jeter testified that the Respondent never changed its position that the grievance procedure could not be used to challenge merit pay decisions.

Based on my review of the Respondent's January 29, 2008 proposal, the relevant testimony, and the explanation that accompanied Tate's letter, I conclude that the Respondent's January 29 proposal, while unclear, is most reasonably read as permitting the use of the grievance procedure to challenge the Respondent's individual merit wage decisions on the grounds that those actions are inconsistent with the employee's "demonstrated performance, productivity, quality, and efficiency results." This, however, allows only a rather narrow opportunity for review under the grievance process—excluding, for example, direct consideration of whether the Respondent's actions were discriminatory. The opportunity for review is further minimized by the portions of the merit pay provision stating that the decision to raise the employee to a higher pay level and the amount of merit pay increases are within the Respondent's "discretion." This, arguably, only permits the Respondent's decision to be overturned if the decision is shown to be an abuse of discretion given the employee's "demonstrated performance, productivity, quality, and efficiency results."

b. *Applicability of Policies*: In its June 26, 2007 comprehensive proposal, the Respondent included a series of provisions under the heading "Article V: Policy, Work Rules & Procedures." The provisions of this article gave the Respondent authority to change, create, or eliminate a variety of policies and procedures. That provision was amended by the Respondent's August 23, 2007 proposal. The August 23 version states:

⁴² This language had been modified since the earlier proposals, which stated that moves to higher wage categories were "solely at management discretion."

Section 5.1 APPLICABILITY OF POLICIES

5.1.1 The parties acknowledge that the Company solely maintains and determines personnel policies, procedures and work rules. Such policies, procedures and work rules may change, be modified, created, or eliminated during the term of this Agreement. The Company will provide a copy of a new policy to the Union when such changes occur but reserves the unilateral right to modify, amend, add or delete any policy or procedure with respect to the employees covered by this Agreement to the extent that such modification, amendment, addition or deletion is not clearly and specifically prohibited by written provision in this Agreement. All employees shall comply with and adhere to any rule or regulation made by the Employer, whether now in force or hereafter adopted.

5.1.2 Whitesell's Disciplinary Rules and Guidelines as of the date of signing [sic] of this agreement are attached to this agreement as Continuous Improvement References "A" and every new employee will be given a copy of those Guidelines. Such Guidelines may be modified, changed, amended, added or deleted at management's discretion in order to maintain the success and productivity of the facility and the Company.

5.1.3 All other articles of this agreement are subject to this article and section 1.4 Management Rights and Whitesell's discretion to make decisions for the best overall benefit of the Company. In the event that other articles appear or subsequently believed [sic] to conflict with the rights of this Article or Article 1.4., these Articles shall supersede.

(see Continuous Improvement References "A" OF COMPANY POLICIES, PROCEDURES [sic], RULES DISCIPLINARY POLICIES AND GUIDELINES SEE also Section 1.4 Management Rights.)

Article V to this agreement is only a brief Synopsis and not the detailed Company Policies, Procedures, Disciplinary Policies and Guidelines and does not spell out the detailed rules and guidelines. For example, the detailed Drug Policy is only a summary, the Disciplinary Guidelines are not the detailed work rules on each issue, and the Safety Guidelines are only an overview synopsis. Continuous Improvement References "A" [is] a more detailed listing and accumulation maintained by the company which will govern the actual policies which may change on a regular basis and are not a fixed entitlement related to the term of this agreement. Polices Rules, Procedures or the like maybe [sic] added, changed, increased or decreased. Whitesell recognizes the responsibility to provide a secure environment for its employees and takes this responsibility very seriously. Whitesell will provide as much notice of changes taking place in its policies and procedures as reasonably possible and will endeavor to keep all employees fully informed and advised of any

changes. [GC Exh. 12 at pp. 28–29; GC Exh. 13 at pp. 15–16.]⁴³

The Respondent's August 23 proposal contains an attachment, entitled "'A' Continuous Improvement References," which identifies specific provisions that the Respondent is reserving the right to unilaterally change or eliminate. The list is extremely broad, and includes some fundamental contract provisions. The list includes, but is not limited to,⁴⁴ those on disciplinary policy and procedures, probationary periods, rest periods, drug testing, health and safety, joint safety committee, attendance, and holidays.

In its comprehensive proposal of January 29, 2008, the Respondent modified the version of section 5.1.1 set forth above to include the statement that "[t]he Company shall meet with the collective bargaining representatives prior to the initiation of any such changes, if feasible, review the suggested changes, discuss whether they are covered bargaining issues, solicit union input and advice, and work cooperatively to assure their effective implementation." The modification also deleted the word "unilateral" before the phrase "right to modify, amend, add or delete any policy or procedure."

On October 16, 2008, in the last comprehensive proposal that the Respondent presented to the Union, the Respondent replaced the section previously entitled "5.1 Applicability of Policies," with a new provision entitled "Article 36 (Shop Rules)." This section included much of the same language as the prior section 5.1.1, and read in relevant part:

36.1 The parties acknowledge that the Company solely maintains and determines personnel policies and procedures. The Company will provide a copy of a new policy to the Union when such changes occur but reserves the right to modify, amend, add or delete any policy or procedure with respect to the employees covered by this Agreement to the extent that

⁴³ In June 2006, the parties reached tentative agreement on a provision that was similar to the August 2007 proposal in some respects, but which did not provide that all other provisions in the contract would be superseded by the "applicability of policies" and "management's rights" provisions if there was a conflict. Moreover, the June 2006 version, unlike the 2007 proposal, only permitted the Respondent to modify, amend, add, or delete policies and procedures "to the same extent" the action was also taken with respect to all the Company's other personnel. GC Exh. 8 at pp. 6–7 (art. XI).

⁴⁴ The full list of subjects over which the Respondent retains unilateral control under this proposal reads as follows: "Disciplinary Action, Employment Conditions (Probation), Rest Periods, Drug Free Workplace, Health & Safety, Personal Protective Equipment, Eye Protection, Joint Safety Committee, Attendance & Downtime Policy, Holidays & Compliance, No Harassment Policy, Company Tools & Materials, Whitesell Clean Environment Policy, Personal Articles, Telephone Calls, Parking Lot, Workers Compensation Ins., Personal Appearance Policy, Report on Job Injury, EEO & Disability Rights, Education Assistance, Hourly Hours of Work, Maintain Work Areas, Quality, Prohibit Workplace Violence, Drug Testing Rational, FMLA, ADA, Payroll Procedure, Direct Deposit, Garnishment of Wages, Ear Plugs, Computer System Policy, Performance Evaluations, Advancement, Deduction Authorization, Mission Statement & Values, HIPPA, Agreement to Protect Confidentiality, Employee Data Record, Drug Policy, Disciplinary Guidelines." GC Exh. 12 (App. "A" Table of Contents); GC Exh. 13 at pp. A-1 to A-3.

such modification, amendment addition or deletion is not clearly and specifically prohibited by written provision in this Agreement. The Company shall meet with the collective bargaining representatives prior to the initiation of any such changes, if feasible, review the suggested changes, discuss whether they are covered bargaining issues, solicit union input and advice, and work cooperatively to assure their effective implementation.

This proposal does not include the “‘A’ Continuous Improvement References” appendix, or otherwise specify which personnel policies and procedures the Respondent is reserving the right to modify, amend, add, or delete.

c. *Management-Rights Provision*: The Respondent’s June 26, 2007, comprehensive proposal stated that it was within the Respondent’s “sole discretion” to determine what work was “in or out of the bargaining unit,” “the wages to perform such work,” and the “method, location and manner of performing necessary work.” This language remained in the Respondent’s proposals throughout 2007 and, with the exception of the reference to wages, throughout 2008. In addition, the Respondent’s 2007 and 2008 proposals have provided that “[t]he Company will have the right to decide whether to contract out any work,” and to use “working supervisors” to “perform bargaining unit work.”

During negotiations, the union bargaining team objected that the Respondent’s proposed management-rights provision was too broad. The union negotiators submitted counterproposals on the subject.

Discussion

The General Counsel argues that the Respondent’s insistence on “unilateral control” “over such a broad range of mandatory subjects of bargaining” “is itself further evidence of Respondent’s bad-faith (or surface) bargaining.” Brief of General Counsel at 39 ff. I agree. Through much of the negotiations the Respondent insisted on proposals that gave it unilateral control over a stunningly wide range of the most important terms and conditions of employment. These included: deciding what was bargaining unit work; deciding whether bargaining unit work would be performed by contractors or working supervisors rather than by unit employees; determining wage increases and decreases; setting disciplinary policy and procedures; determining probationary periods; and setting policies on attendance, holidays, rest periods, drug testing, health and safety rules, and the joint safety committee. Although in a number of later proposals the Respondent left the door open for employee or union challenges to specific decisions made pursuant to some of those policies, that did not restore the Union’s right to bargain over changes that the Respondent might make to the policies themselves. Since, without a contract, the Union would have the right to bargain over changes to terms and conditions of employment, union acceptance of the Respondent’s proposals reserving discretion to make changes on such a wide range of subjects would leave the Union and employees with significantly less protection than they would have without a contract.

In *Regency Service Carts, Inc.*, 345 NLRB 671 (2005), the Board held that it is suggestive of bad faith when an employer

makes proposals demanding discretion over such a broad range of unit employees’ working terms and conditions. The Board stated:

Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. An inference of bad-faith bargaining is appropriate when the employer’s proposals, taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract. “In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer’s bad faith.”

Id. at 675 (internal citations omitted); see also *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990) (“Board has found bad-faith bargaining on the basis of a management-rights proposal so comprehensive as to preempt the Union’s representative function and leave unit employees with less protection than they had prior to electing collective-bargaining representation”).

Similarly in *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), the Board, in reaching the conclusion that the employer had engaged in surface bargaining, “attach[ed] special significance,” Id. at 94, to the fact that the employer insisted on proposals under which it would retain control to alter or discontinue “a substantial number of significant mandatory subjects of bargaining,” Id. at 95. The Board explained that “[s]ince unions are statutorily guaranteed the right to bargain over any change in any term or condition of employment, the Union could do just as well with no contract at all.” Id.

The Respondent argues that it acted lawfully by making the proposals to retain such discretion, and relies on the Board’s decision in *Prentice-Hall, Inc.*, 306 NLRB 31 (1992). In *Prentice-Hall*, the employer had proposed that a merit salary system would be used to determine all pay increases, that such decisions would be based on the employee’s annual performance evaluation, that salary adjustments would be consistent with the system of rewarding performance and at the “sole discretion” of the employer, and that the increases and performance evaluations would not be not subject to contractual grievance procedures.⁴⁵ The administrative law judge’s decision, which was

⁴⁵ In *Prentice-Hall*, the administrative law judge also rejected the General Counsel’s contention that the employer was insisting, over the union’s objection, upon retaining unilateral rights to change a number of terms of employment other than wages. This conclusion was based, inter alia, on the fact that, in *Prentice-Hall*, the union had agreed to a number of those proposals and the employer had limited its own discretion by agreeing to make only those changes that it was making for all of its nonunit employees. *Prentice-Hall*, 306 NLRB at 37–38; cf. *Courier-Journal*, 342 NLRB 1093, 1094 (2004) (Board states that employer’s discretion to change health care benefit is adequately limited by the company’s established practice of only making changes for unit employees when it makes those changes for all of the company’s nonunit employees). The Respondent in the instant case did not limit

upheld by the Board, stated that the Respondent's merit salary proposal did not violate Section 8(a)(5). See also *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996) (stating that it is lawful for an employer to insist on the retention of discretion over certain mandatory subjects of bargaining). Consideration of the Board's decision in *Prentice-Hall*, does not alter my conclusion that the Respondent violated its obligation to bargain in good faith by insisting on proposals to retain unfettered control over a broad range of mandatory subjects of bargaining. I am not considering whether the Respondent insisted upon retaining too much discretion by evaluating its merit pay proposal in isolation. Rather, under the Board's decision in *Regency Service Carts*, I am considering whether "the employer's proposals, taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract." 345 NLRB at 675 (emphasis added). As discussed above, the Respondent insisted on proposals to retain discretion not only over changes to wages, but also over changes to an extremely wide array of other subjects of bargaining. These subjects included, among many others, the definition of bargaining unit work and policies on discipline, attendance, holidays, rest periods, health and safety, and drug testing.

Under the circumstances present here, I find that the Respondent, by insisting in its proposals upon retaining essentially unfettered control over a broad range of mandatory subjects of bargaining, violated Section 8(a)(5) and (1).

4. Respondent's alleged adherence to an illegal bargaining proposal from August 2007 to January 28, 2008

The complaint in Case 18-CA-018540 alleges that from about August 2007 until January 28, 2008, the Respondent proposed a contract that would be effective from the date "Respondent decided to sign it" until the following June 30, and that this violated Section 8(d) of the Act. The complaint states that this proposal was regressive as compared to the Respondent's June 13, 2006 final offer. The complaint further alleges that this conduct violated Section 8(a)(5) and (1) and was part of a course of bad-faith bargaining. (Complaint (I) pars. 33, 44, and 46.)

Facts

The Respondent's comprehensive proposals from June 26 to August 7, 2007, did not include a provision regarding the term of the contract. In its comprehensive proposals of August 23 and September 11, 2007, the Respondent added the following section on contract term:

Section 6.1 Contract Term

6.1.1 The terms of the Agreement shall be in force for one year. It will be in effect from July 1 to midnight June 30th and from year to year thereafter unless written notice of a desire to change or modify the Agreement is served by either party no less than sixty (60) days prior to any an-

the discretion retained in its proposals by stating that it would not make any changes for unit employees unless it made exactly the same changes, across-the-board, for its nonunit employees.

nual expiration date. The term of the first year shall be from date of signing by the company to June 30th.

In its January 29, 2008 proposal the Respondent altered this provision to provide for a minimum contract duration of 2 years from the date of signing.

Discussion

The General Counsel contends that the contract duration provision that the Respondent included in its August 23 and September 11 proposals violated Section 8(d) of the Act. According to the General Counsel, that provision is contrary to the Respondent's obligation, under Section 8(d), to execute "a written contract incorporating any agreement reached if requested by either party." I disagree. The Respondent's proposal on contract duration does not negate, or even seek to alter, the Company's obligation under Section 8(d) to promptly sign any agreement that is reached if asked to do so by the Union. The General Counsel does not point to any language in the Respondent's proposal creating discretion to refuse to sign, or unreasonably delay signing. The General Counsel also contends that the Respondent's proposal violates Section 8(a)(5) because it gives the Company discretion to determine the duration of the contract by deciding when to sign it. This argument, like the one based on Section 8(d), assumes that the Respondent's proposal gives it authority to unreasonably delay signing an agreement reached with the Union. The Respondent's proposal does not give the Company that authority, and therefore, does not give the Company discretion to determine the duration of the contract. Thus, this argument fails as well.⁴⁶

I also conclude that the Respondent's proposal is not evidence of a course bad-faith bargaining. On January 29, 2008—after the Union expressed concerns that the contract term sought by the Respondent was too short, and that the language the Respondent used was unclear—the Respondent modified its proposal to address those concerns. The General Counsel effectively concedes that these changes addressed any legal concerns because its brief, like the complaint, only alleges that the violation continued until January 28, 2008. There was no evidence that the Respondent adhered to its earlier proposal once the Union made its concerns known.

For the reasons discussed above, the allegation that the Respondent adhered to an illegal proposal regarding contract duration should be dismissed.

5. Respondent's alleged refusal to provide information

Each of the three complaints consolidated in this proceeding includes allegations that the Respondent refused to provide, or delayed providing, information requested by the Union that was relevant and necessary to the Union's performance as the col-

⁴⁶ I also reject the General Counsel's argument that the Respondent's proposals on contract duration were regressive. That argument is based on a comparison to the contract duration proposal that the parties tentatively agreed to in June 2006 and which the Respondent's included among the terms it illegally implemented later that month. When the Union chose to invalidate the tentative compromises from June 2006, those agreements ceased to be a valid point of comparison for determining whether the Respondent's subsequent proposals were regressive.

lective-bargaining representative of unit employees. The complaints further allege that this conduct violated Section 8(a)(5) and (1), and was part of a course of bad-faith bargaining. (Complaint (I) pars. 34 to 41, 44, and 46; Complaint (II) pars. 11, 15, and 16; Complaint (III) pars. 14 to 16.)⁴⁷

a. Employee suggestions

The complaint in Case 18–CA–018540 alleges that on June 26, 2007, the Union made a written request for copies of suggestions that unit employees had submitted to a suggestion box maintained by the Respondent, that on June 27, 2007, Jeter verbally repeated that request, and that by letter dated June 27, 2007, the Respondent refused to provide this information. (Complaint (I) par. 34.) The complaint in Case 18–CA–018965 alleges that, on about August 14, 2008, Jeter verbally requested the employee suggestions again, that on February 23, 2009, the Union made a written request for the suggestions, and that the Respondent delayed providing the information and did not do so until about March 2009. (Complaint (II) pars. 11(f), (g), (m), and (n).) The complaints allege that by this conduct the Respondent violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 44 and 46; Complaint (II) pars. 15 and 16.)

Facts

On June 26, 2007, the Respondent posted a memorandum that summarized suggestions the Respondent had received from employees. Among the employee suggestions it discussed in the memorandum, the Respondent included a number of purported employee comments criticizing the Union. In a written request, dated June 26, 2007, Jeter requested copies of the employee suggestions that the Respondent had referenced in the memorandum. Jeter also warned that the Respondent should not destroy the actual suggestions because they might be relevant to subsequent Board or court proceedings.

The Respondent refused to provide the information sought by the Union. Tate told the Union that the employees had been assured that their suggestions would be confidential and that the Respondent would not disclose the names of those who submitted suggestions. The Respondent also cited confidentiality concerns in a June 27, 2007 written communication in which it refused to provide the information. Although Tate stated that the Respondent was concerned that the Union would engage in retaliation against employees who submitted suggestions, he testified that at the time he denied the Union's request he was not aware of any instances of such conduct by the Union. (Tr. 574.) The Respondent did not offer to provide redacted versions of the suggestions or otherwise accommodate the Union's request. To the contrary, in the June 27 communication, the Respondent indicated that it was unwilling to provide name-redacted versions because "it would not be hard to determine who comments were from" based on the handwriting. At some point, the Union offered to accept copies of the suggestions

⁴⁷ At the start of the trial, I granted the General Counsel's motion to amend the complaint in Case 18–CA–018965 to delete par. 11(j), which concerned an allegation that the Respondent had failed to provide information regarding the assessment of attendance "points" to employees who attended funerals.

with the employees' names redacted, but the Respondent continued to refuse to provide the suggestions.

The Respondent did not provide the Union with any information regarding the employee suggestions until July 2, 2008—over a year after the Union requested them. At that time, the Respondent did not provide the Union with copies of the original suggestions, but rather with a typed document in which the Respondent purported to set forth the contents of the suggestions with identifying information deleted.⁴⁸ This information was sent under Roberts' signature, shortly after he became the Respondent's chief negotiator pursuant to the June 12 agreement to hold the contempt proceeding against the Respondent in abeyance.

The parties' next bargaining session was on August 14, 2008. At that session, Jeter stated that he needed the original, handwritten, suggestions in order to check the accuracy of the typed version prepared by the Respondent. Roberts agreed to bring the handwritten originals to negotiations and give Jeter the opportunity to compare them to the typed version. Subsequently, Tate began bringing the original suggestions to the bargaining sessions, but no one on the Respondent's negotiating team presented those documents to the union committee, or revealed that they were available. Jeter did not initially reiterate his request for those documents because he assumed that the Respondent's negotiators would tell him when the documents were available for him to review. Eventually, in a February 23, 2009 email correspondence, Jeter reiterated his request to see the original, handwritten, suggestions. The Respondent gave Jeter the opportunity to review those documents in March 2009.

Discussion

An employer's obligation to bargain in good faith under Section 8(a)(5) of the Act, includes the obligation to furnish the employees' bargaining representative upon request, with information relevant to and necessary for the performance of the Union's statutory duty as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The duty extends to the provision of information that is relevant to contract negotiations. *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997). When the "union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing or relevancy." *Quality Building Contractors*, 342 NLRB 429, 431 (2004), quoting *Commonwealth Communications, Inc.*, 335 NLRB 765, 768 (2001), *enfd. denied on other grounds* 312 F.3d 465 (D.C. Cir. 2002). The duty requires not only that the employer provide the information, but that it do so in a timely manner. An employer's "unreasonable delay in furnishing . . . information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001); see

⁴⁸ This document referenced 17 suggestions. With respect to 16 of the 17, there is no information identifying the employee who submitted the suggestion. In one, the employee refers to himself by name in the body of the suggestion and that name was not redacted. GC Exh. 56 (Letter of July 2, 2008, Attachment/Enclosure, Reference Number 17).

also *Britt Metal Processing*, 322 NLRB 421, 425 (1996), *affd.* mem. 134 F.3d 385 (11th Cir. 1997); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992).

The employee suggestions sought by the Union pertained to unit employees and were therefore presumptively relevant information. The Respondent has not rebutted that presumption. At any rate, the relevance of the information is clear. The suggestions included employees' calls for changes in working conditions at the facility. Information about such concerns was relevant not only to the Union's efforts to address employee's problems in a new contract, but to potential efforts to address those problems through grievances or other avenues. In addition, as discussed earlier, several of the "suggestions" that the Respondent purported to describe in the June 26 posting were essentially complaints about the Union. Information regarding unit employees' dissatisfaction with the representation being provided was relevant to the Union's duty to represent unit employees, including those who wanted the Union to alter its current course in some respects. Since the employees' suggestions were relevant to the Union's representation of the unit employees, the Respondent had an obligation to provide them. The information was also relevant to possible action by the Union to challenge what it saw as the Respondent's use of the suggestion box to undermine the Union.

There is no doubt that the Respondent unreasonably delayed providing the information. The Union initially requested the employee suggestions on June 26, 2007, and the Respondent did not provide any of the information sought until over a year later. Moreover, it was not until March 2009—approximately 20 months after the Union made the request—that the Respondent fully complied. The Board evaluates the reasonableness of an employer's delay in supplying information based on the complexity and extent of the information sought, its availability and the difficulty in retrieving the information. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), *enfd.* in part and *remanded* 394 F.3d 233 (4th Cir. 2005); *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). The employee suggestions were not complex or extensive, and the Respondent has not claimed that any part of the delay was occasioned by a difficulty gathering those suggestions.

The Respondent references confidentiality concerns as a basis for withholding the information. Such concerns must be "legitimate and substantial" in order to outweigh the Union's entitlement to the information. *International Protective Services*, 339 NLRB 701, 704 (2003); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991). The Respondent attempts to meet this standard by arguing that it had assured the employees that any suggestions they submitted would be confidential. The contention that the Respondent is entitled to employees' expressions of discontent with the workplace and the bargaining representative, but that the bargaining representative itself is not, is facially dubious. More importantly, the Respondent's argument fails under Board precedent holding that even when an employer promises employees that their information will remain confidential, the employees' bargaining representative is entitled to that information. *Mt. Clemens General Hospital*, 344 NLRB 450, 464 (2005), citing *New Jersey Bell Telephone Co.*, 289 NLRB 318, 319 (1988). Moreover, Tate conceded

that at the time he initially denied the information request he had no information indicating that the Union might be retaliating against, or intimidating, unit employees.

Even assuming that the Respondent had legitimate and substantial concerns about revealing the identities of the employees who submitted the suggestions, that would not explain why the Respondent continued to withhold the suggestions after the Union offered to accept copies with the employees' names redacted or why the Respondent waited for over a year before providing the Union with a typed and redacted version of the suggestions. If an employer has legitimate and substantial confidentiality reasons for refusing to provide relevant information it is required to come forward with an offer to accommodate both its concerns and the union's need for the information. See *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999). The Respondent did not attempt to do that for a period of over a year.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(5) and (1) by initially refusing to provide copies of the employee suggestions and unlawfully delaying the provision of that information.

b. Information about the Respondent's allegations of union retaliation against unit employers

The complaint in Case 18–CA–18540 alleges that the Union made verbal requests on June 26 and July 19, 2007, and a written request on July 15, 2007, for information regarding the Respondent's allegations of union retaliation against unit employees. The complaint further alleges that the Respondent failed and refused to provide that information,⁴⁹ and that by this refusal the Respondent violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 35, 41, 44, and 46.)

Facts

At a bargaining session on June 26, 2007, Tate made a comment indicating that the Union or its supporters had engaged in retaliation against unit employees. Jeter responded by verbally requesting that the Respondent provide any information it had about union retaliation. Jeter explained that he needed the information because it was the Union's responsibility to take steps to stop any such conduct. Tate responded that the information was confidential and that the Respondent would not provide it. Jeter offered to allow the Respondent to redact information that identified the unit employees involved. Tate still refused to provide the information, and offered no accommodation.

In a July 15, 2007 letter to Tomlinson (the Respondent's general counsel), Jeter requested information "[c]oncerning the Company claim that retaliation has occurred in the past." Jeter stated that "The Union has a legal responsibility to investigate any alleged violations of employee legal rights," and therefore needed "the names of the employee(s), names of any witnesses, and copies of any statements that gave rise to the Company allegation."

⁴⁹ At trial, the parties stipulated that the Union's information requests regarding alleged retaliation were fully satisfied as of July 2, 2008. Tr. 236–240.

The Respondent did not supply any responsive information until Roberts stepped in for Wiese and Tate as the leader of the Company's bargaining team. In a July 2, 2008 letter to Jeter, Roberts stated that the Respondent had information regarding a single incident of alleged union intimidation. (GC Exh. 56 at p. 7 (item 11).) Some information regarding that incident, which purportedly occurred in August or September 2006, was included among the attachments to the letter. Respondent's Exhibit (R Exh.) 44 (portion titled "Investigation of Union Intimidation' by R.R. Wiese"). The parties stipulate that the information in the letter and attachment satisfied the Union's request regarding alleged union retaliation.⁵⁰

Discussion

I conclude that the Respondent violated Section 8(a)(5) and (1) by initially refusing, and then unreasonably delaying, the provision of information regarding alleged union intimidation of a unit employee. The Respondent argues that it was justified in refusing to provide the information because the information was not relevant to the Union's representative responsibilities and because the Company had legitimate confidentiality concerns regarding its disclosure. Both arguments are without merit. The information was plainly relevant to the Union's responsibility as bargaining representative to take steps to stop intimidation of unit members by union members or officials. The Board has found that a union violated Section 8(b)(1)(a) when it was aware of misconduct by a nonagent union steward, but failed to take steps to stop such misconduct. *East Texas Motor Freight*, 262 NLRB 868, 871 fn. 14 (1982). Moreover, a union has been held to be liable for intimidation by agents, organizers, and business agents, as well as of others acting within the scope of union-delegated responsibility. *Teamsters Local 812 (Sound Distributing)*, 307 NLRB 1267, 1271-1272 (1992). The Respondent did not meet its burden of demonstrating that it had legitimate and substantial confidentiality concerns. *International Protective Services*, supra, *Pennsylvania Power Co.*, supra. It admits that it knew of only a single isolated incident involving one union bargaining committee member and one employee. The Respondent did not offer evidence showing the nature of the alleged intimidation, or otherwise demonstrate that the isolated incident raised serious enough concerns about union retaliation to outweigh the Union's need for the information. Moreover, the bargaining committee member (Baetsle) who allegedly engaged in the intimidation ceased to work for the Respondent in October 2007, and Wiese himself concluded that this mooted the matter. Nevertheless, the Respondent continued to refuse to give the Union any information about the alleged intimidation for 9 months. Even assuming that the Respondent had been able to raise legitimate and substantial confidentiality concerns, it has still violated

⁵⁰ The information provided does not state what form the alleged intimidation took or identify the employee against whom it was purportedly directed. It states that the incident took place during a union decertification effort that was underway at the Iowa facility from August to September 2006 and that the intimidating individual was David Baetsle, a former member of the union bargaining committee. In the report, Wiese stated that Baetsle no longer worked for the Company and that this rendered the issue "moot at this time."

Section 8(a)(5) because it did not meet its duty to come forward with an offer to accommodate both its concerns and the Union's need for the information, *Metropolitan Edison Co.*, supra.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(5) and (1) by initially refusing to provide, and unlawfully delaying, the provision of information regarding alleged union intimidation of a unit employee.

c. Respondent's merit wage proposal

The complaint in Case 18-CA-018540 alleges that on about April 7 and July 15, 2007, the Union made written requests to the Respondent for information regarding the Respondent's proposal for an evaluation and merit wage review system. The complaint further alleges that the Respondent has failed and refused to provide information and that by this conduct has violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 36, 41, 44, and 46.)

Facts

Jeter made multiple information requests in an April 7, 2007 letter sent to Tate's attention. One of those requests sought "the criteria and baselines for each of the categories and performance characteristics employees would be evaluated on relative to receiving a wage increase under the Company's proposed evaluation policy, and how wage increases were applicable to the summary score levels." The letter also attached, and renewed, an earlier, July 17, 2006 information request, which Jeter said had not been satisfied. The Union's July 17 request sought multiple, specific, types of information relating to the Respondent's merit wage review system. Most significantly, the Union stated that since the Respondent had been using the merit system proposals at facilities for a number of years, and since the Respondent had made representations about the size of resulting wage increases,⁵¹ the Union was requesting a copy of the merit wage evaluation for each employee at the Respondent's other facilities, and information regarding any resulting wage increase, for the last 3 years. (GC Exh. 30 at p. 5.)

Tate responded in an April 19, 2007 letter to Jeter. Tate stated that the Respondent had previously provided the Union with a copy of a blank evaluation form that was the only document the Company had "concerning the evaluation process." With the letter, Tate also provided "Wage Categories and Rate Incentives that were part of the company's proposal," and stated that "[h]opefully, this document with the Evaluation Form will give you the information needed." Tate did not supply completed evaluations from other facilities or information showing what, if any, wage increases had resulted from those evaluations. Nor did he offer an explanation for not providing that information.

In a letter dated July 15, 2007, to the Respondent's general counsel (Tomlinson), Jeter complained that the Respondent was continuing to refuse to provide the information sought by the Union on July 17, 2006. Jeter explained that the Union needed the wage reviews from other facilities where the program had

⁵¹ Jeter testified, without contradiction, that during negotiations the Respondent claimed that the merit wage review system had resulted in average wage increases of 3 percent per year at the other facilities.

been in effect “to be able to understand the Company proposal, system, and the affect it has had on employee wages in the Company locations where it has been in effect.” (GC Exh. 28 at p. 5.)

The Respondent did not provide the wage reviews and other merit wage review information sought by the Union until July 2, 2008.⁵² This was only after Robert’s stepped in for Wiese and Tate as lead negotiator and more than a year after the Union made its written request of April 7, 2007.

Discussion

On April 7, 2007, the Union requested copies of employee wage reviews and information regarding any resulting wage increases at other facilities. This information, which showed how the Respondent’s merit wage system had worked in practice, was clearly relevant to the Union’s consideration of the Respondent’s proposal to adopt the same system for unit employees at the Iowa facility. The Union’s need for the information was particularly substantial given that the proposed merit wage system gave the Respondent’s supervisors and managers discretion to grant or deny increases and that the Respondent was proposing to limit the ability of employees to challenge decisions under that system. Although, this request related to nonunit employees at other facilities, such information was relevant for the reason stated by the Board in *Whitesell I*. There the Board held that because “the Respondent consistently maintained that it intended to treat unit employees in the same manner as its nonunit employees at other facilities, the Union established that information regarding the administration of the merit pay plan to nonunit employees is relevant and necessary.” 352 NLRB at 1197 fn. 8. The information was also relevant because the Respondent made representations during negotiations about the size of the wage increases that the merit review system had produced at other facilities.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(5) and (1) by unlawfully delaying the provision of information relating to its merit wage system proposal.

d. Position requirements

The complaint in Case 18–CA–018540 alleges that at a bargaining session on about October 3, 2007, Jeter requested that the Respondent provide information regarding the position requirements for jobs held by unit employees. The complaint further alleges that the Respondent has failed and refused to provide this information and that by this refusal it has violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 37, 41, 44, and 46.)

Facts

During negotiations, the Respondent took the position that it intended to eliminate job classifications for unit employees so that it would have more flexibility in making use of employees. At a bargaining session on October 3, 2007, Jeter asked the Respondent’s negotiating team to provide the Union with a

description for what each job position held by a unit employee entailed. The Respondent answered that “the supervisors would know” what the various positions entailed. During subsequent discussions regarding the merit pay system proposal, the Respondent’s team stated that, under that proposal, the Respondent would not have specific classifications, position requirements, job duties, or job tasks. The Respondent explained that, under the proposal, if the company did not have work for a maintenance operator on a given day, an employee who had been performing those duties might be used to perform janitorial duties.

Jeter only recalls asking for the position requirements one time. Subsequently, on June 12, 2008, Roberts asked Jeter what the Union’s outstanding information requests were. Jeter did not mention that he was seeking information about position requirements. During a bargaining session in January 2009, Roberts again asked Jeter whether the Union had any outstanding requests. Jeter stated that he needed to check into the matter. In an email communication on February 23, Jeter reiterated several information requests, but did not mention a request for position requirements.

Discussion

I conclude that the evidence does not show that the Respondent failed or refused to provide information in its possession that was responsive to Jeter’s request regarding “position requirements.” I note at the outset that the subject of the request, as recounted by Jeter, is very vague. Jeter did not explain whether by “position requirements” he meant job duties, job responsibilities, job skills, necessary work experience, necessary abilities, job qualifications, or something else. He only made the request on one occasion, did so verbally, did not follow-up with a written request as he had in other instances, and never clarified what he was seeking. Moreover, even assuming it was clear what “position requirements” refers to, the Respondent stated that under its proposal there *were* no position requirements. The Respondent’s statement that the supervisors would know what the position requirements were does not, when viewed in context, indicate that such information existed for specific positions, but rather suggests that the decisions about position requirements would be made by supervisors on an ad hoc basis. Moreover, since the Respondent’s proposal to do away with the classifications had not been implemented during the relevant time period, the Respondent’s supervisors would not yet know what the result of such ad hoc decisions regarding the position requirements for particular unit employees would be. See *Detroit Typographical Union No. 15 v. NLRB*, 216 F.3d 109, 119 (D.C. Cir. 2000) (union may not insist upon greater specificity regarding a particular proposal than the employer’s proposal will permit). It was reasonable, under all the circumstances shown by the record, for the Respondent to assume that its representation that no position requirements existed had satisfied the Union’s curiosity on this subject.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide information that the Union requested about “position requirements” should be dismissed.

⁵² At trial, the parties stipulated that the Union’s information requests regarding the merit wage system were fully satisfied as of July 2, 2008. Tr. 236–240.

e. Medical insurance plan document

The complaint in Case 18–CA–018540 alleges that at a bargaining session on about August 8, 2007, Jeter requested that the Respondent provide the Union with a copy of the Respondent’s full medical insurance plan document. The complaint in Case 18–CA–18965 alleges that since about August 5, 2008, the Respondent maintained a verbal request, and on February 23, 2009, made a written request, for the full medical insurance plan document. The complaints further allege that the Respondent has failed and refused to provide, or delayed providing, this information and that by this refusal has violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 39, 41, 44, and 46; Complaint (II) pars. 11(a), (b), and (n), 15, and 16.)

Facts

During bargaining, the Respondent proposed to provide unit employees with health insurance through a plan with Blue Cross Blue Shield. In 2006, the Respondent supplied the Union with booklets regarding the Blue Cross Blue Shield medical and dental plans that the Company was proposing to use. These booklets were each between 15 and 20 pages, and were titled “summary plan descriptions.”

At a bargaining session on May 15, 2008, Jeter verbally requested that the Respondent provide a copy of the “full” medical plan documents. The Respondent answered that there were no other documents regarding the health insurance plan. In a written request sent to the Respondent on February 23, 2009, Jeter stated that the Union’s May 15 request for the full medical plan document had not been satisfied. He believed that such a document existed, he explained, because “The Company’s medical insurance proposal and summary plan documents appear to indicate that there is an additional full plan document(s) covering and controlling the Company’s medical plan.”⁵³

In response to the Union’s repeated requests for more extensive documents regarding the proposed medical plan, Tate made efforts to find anything else that existed. Tate asked the Respondent’s health insurance service provider whether there were any other documents and the service provider answered that the summary plan descriptions were “our agreement with the company,” and there were no other documents. Tate says that he asked the service provider “to go further” and “check with Blue Cross Blue Shield.” According to Tate, the service provider told him that he had checked with Blue Cross Blue Shield and that there were no other documents.

⁵³ While testifying regarding his reasons for suspecting that more detailed documents existed, Jeter added, “I believe Mr. Tate even stated that if there is a dispute relative to the summary plan description that the contract with Blue Cross Blue Shield would prevail.” Tr. 139. I do not believe the record establishes that Tate made this statement. Jeter’s testimony on the subject was uncertain on its face (i.e., I “believe Mr. Tate even stated”), and based on the testimony and Jeter’s demeanor I had the impression that it was more something that Jeter hoped he remembered than something he had an actual memory of. In the written requests for the information, Jeter never mentioned this supposed statement by Tate among the reasons why the Union believed that a more detailed plan document existed.

Discussion

There is no dispute that documents setting forth the terms of the Respondent’s health insurance proposal were relevant to bargaining. Moreover, I can understand why Jeter would suspect the existence of health plan documents more detailed than those the Respondent provided. The documents the Respondent had provided were titled “summary” plan descriptions and generally one would expect that a “summary” is a summary of something. However, Tate testified without contradiction that the Respondent did not possess more detailed health plan documents and that when he requested such documents from the service provider, he was informed that none existed. The General Counsel and the Union did not present testimony from any witness with actual knowledge of the existence of more detailed documents, or from any expert who could say that more detailed health insurance documents necessarily would exist. Under the circumstances, I conclude that the record, while providing a reasonable basis for Jeter’s suspicion that a more detailed plan document existed, failed to show by a preponderance of the evidence that such a document did, in fact, exist. Since it was not shown that the Respondent possessed such documents, or that Tate’s search efforts were inadequate, the General Counsel has not demonstrated that the Respondent unlawfully refused and failed to provide such information. *Day Automotive Group*, 348 NLRB 1257, 1263 (2006) (no violation where employer gave the union what information it had about health plan and “cannot be expected to provide information it does not have”).

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with a full medical plan insurance document should be dismissed.

f. Labor costs and product lines at the Respondent’s other facilities

The complaint in Case 18–CA–018540 alleges that the Respondent failed and refused to provide information that the Union requested about the Respondent’s other facilities. More specifically, the complaint alleges: that the Union made a verbal request on May 23, 2007, and a written request on July 15, 2007, asking the Respondent for information regarding the labor cost breakdown at the Respondent’s other facilities; and that on July 15, 2007, the Union made a written request for information about the Respondent’s product lines and employees at its other plant locations. The complaint further alleges that the Respondent has failed and refused to provide, or delayed providing, this information and that by this refusal has violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 40(a), (b), (c), and (e), 41, 44, and 46.)

Facts

Throughout bargaining, the Respondent made statements to the union negotiators that the terms and conditions of employment for the unit employees at the Washington, Iowa facility had to be consistent with those at the Respondent’s other facilities. In a July 15, 2007 correspondence to the Respondent’s general counsel, Jeter asked for information regarding, inter

alia, labor costs, products and employees at the Respondent's other facilities. That letter reads in relevant part:

Whitesell has stated that there has to be similar and consistent labor costs in Washington [Iowa] to the other Whitesell facilities and that was the basis for the Company proposals. . . . Whitesell has stated that wages in Washington were higher than in other Whitesell facilities, and during 2006 negotiations Wiese stated that employees at the other facilities were upset because Washington employees got more. . . . The Union has requested the labor cost breakdown, including wage and benefit breakdowns, at all the other Whitesell facilities. The Company has refused to provide the requested information. . . . In order to negotiate over subjects (wages and benefits) that have an associated cost it is necessary and relevant that the Union understand completely the labor costs of all the facilities Washington employees are competing with, both within and outside the Whitesell family of facilities. In order for the Union to negotiate with knowledge about such economic subjects the Union needs the following information.

+ The name and mailing address for each Whitesell facility in the USA that competes for the same business the Washington facility competes for.

. . . .

+ For each of the Whitesell facilities competing for the same business as the Washington facility, the plant-wide production and maintenance average hourly pay rate, the plant-wide production and maintenance median hourly pay rate, the plant production and maintenance average cost per hour for each non-wage economic benefit. In addition (using the Washington facility bargaining unit classification structure as a comparative base) the highest, the lowest, the average and the median hourly wage for each classification or group of employees performing similar or like jobs or duties in the Whitesell facilities that compete with the Washington facility for the same business.

The Respondent did not provide the information regarding its other facilities to the Union during bargaining in 2007. It appears that none of the information was provided until July 2, 2008—approximately a year after the Union requested it and only after Roberts replaced Wiese and Tate at the head of the Respondent's negotiating team. At that time, the Respondent satisfied the Union's information request, except to the extent that it was seeking comparative information regarding average hourly benefit costs. The Respondent stated it did not "capture" or "calculate" benefit costs, but it offered to "discuss how to accommodate the Union's needs with the information that is reasonably available to the Company."

Discussion

As held by the Board's decision in *Whitesell I*, supra, given the Respondent's bargaining position that it intended its treatment of the unit employees to be consistent with its treatment of employees at its nonunion facilities, information regarding those other facilities was relevant to the negotiations. The Respondent makes no argument in its brief in this case that the at-issue information regarding the Company's other facilities was

not relevant. The Respondent's only argument is that the portions of the Union's request that related to this information were fully satisfied on July 2, 2008. I agree that the Respondent satisfied the information request as of July 2, 2008,⁵⁴ however, it did so only after a delay of approximately 1 year. This delay, which the Respondent does not attempt to justify by reference to the complexity or volume of the information sought, was unreasonable and constitutes a violation of the Act. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001); *Britt Metal Processing*, 322 NLRB 421, 425 (1996); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992).

I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act, by unreasonably delaying the provision of information, requested by the Union, regarding labor costs, working conditions, and product lines at the Respondent's other facilities.

g. Competitors

The complaint in Case 18-CA-018540 alleges that on about July 15, 2007, the Union requested in writing that the Respondent state the names and mailing addresses of other companies that compete for the same business as the Respondent's Washington, Iowa facility.⁵⁵ The complaint further alleges that the Respondent has failed and refused to provide, or delayed providing, this information and that by this refusal has violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 40(d) and (f); 41, 44, and 46.)

Facts

During negotiations in 2007, the Respondent told the Union that the Company had to make dramatic changes at the Iowa facility in order to be competitive in the world market. (Tr. 679-680; GC Exh. 15.) In his July 15, 2007 correspondence to the Respondent's general counsel, Jeter asked for information regarding, inter alia, Whitesell's competitors. That letter states:

The Company has repeatedly stated that the Washington [Iowa] facility has to be competitive with the other Whitesell facilities and with Whitesells [sic] competitors. Whitesell has stated that if the Washington facility is not competitive, product may have to be moved to China,

⁵⁴ The General Counsel stipulated that as of July 2, 2008, the Respondent satisfied the Union's request for information about other facilities, with the exception of the information sought about benefits. In the July 2 letter, the Respondent stated that the information the Union was seeking about benefits did not exist, but that the Company was willing to work with the Union to provide other information that would meet the Union's needs. The record does not show that the information sought about benefits did exist, or that the Respondent failed to make good on its offer to work with the Union. Therefore, I conclude that the Respondent's July 2 representation that the information sought about benefits at other facilities did not exist, met its obligation to respond to that element of the information request.

⁵⁵ Originally, the complaint contained language alleging that the Union had requested "the standard industrial classification (SIC) number and north American industry classification (NAIC) number for each of" the competitor companies. After trial, by letter dated July 15, 2009, the General Counsel moved to amend Complaint (I) par. 40(d) to delete that allegation. The other parties have not opposed this motion. The General Counsel's motion is hereby granted.

Wisconsin, or Missouri. . . . In order for the Union to negotiate with knowledge about such economic subjects the Union needs the following information.

. . . .
 + The name and mailing address of Companies in the USA, outside the Whitesell family of facilities, that compete for the same business the Washington facility competes for.

. . . .
 + Copies of any industry wage and/or benefit surveys Whitesell relies on to determine labor cost competitiveness with non-Whitesell competitors.

+ Copies of any other data or materials Whitesell relies on or researches when comparing Whitesell's labor cost to the labor costs of other companies competing for the same business as the Washington facility.

The Respondent replied to these requests on August 7, 2007. Regarding the request for names and mailing addresses of competitors, the Respondent stated:

Wire Form companies throughout the world make wire forms. The Union can research wire form companies and locals as well as Whitesell can search and provide this information. We do not have the mailing addresses, but the names include: Clark Engineering, Northern Wire, Midwest Wire Products, Amanda Bent Bolt, Argo Products, Matrix Wire, Wire Maid, and many, many more. Whitesell has no specific information or research data on any of these other than what might be readily found on a Google search of the web.

In addition, the Respondent stated that it "ha[d] no wage or benefit surveys which it relies on," and "no labor cost on other companies 'competing' for the same business."

Roberts, in a letter dated July 2, 2008, provided the mailing addresses for eight of its "major competitors." Roberts also reiterated that the Respondent did not rely on wage surveys.

Discussion

In its brief, the General Counsel concedes that as of July 2, 2008, the Respondent complied with the request for information about competitors, but argues that the delay in providing that information was unlawful. (Br. GC at pp. 62–63.) A union is entitled to information in the employer's possession concerning competitors so that the union can evaluate and bargain over the employer's claim that employee concessions are necessary for the employer to remain competitive. *CalMat Co.*, 331 NLRB 1084, 1096 (2000).

The record does not show that the Respondent had information in its possession that it unreasonably delayed providing to the Union. On July 15, 2007, the Union requested information about major competitors of the Iowa facility. Approximately 3 weeks later, the Respondent reacted by identifying seven competitors. That is not a facially unreasonable delay. The Respondent also stated in writing that it did not have mailing addresses for these companies, research data regarding them, or any wage or benefit surveys that it relied on to assess labor cost competitiveness. The General Counsel has not shown that in August 2007 the Respondent possessed any of

the types of information it denied having. Nor has it shown that the Union had, or would have had, any difficulty using public sources to identify the addresses for the competitors named by the Respondent. When Roberts became lead negotiator, the Respondent did provide addresses for eight major competitors, but that does not, under the circumstances here, give rise to an inference that the Respondent had the addresses all along. On the record here, it is just as possible that Roberts gathered the addresses from sources outside the Company in an effort to satisfy the Union's request.

I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) when it refused to provide, or unreasonably delayed providing, information regarding the competitors of the Iowa facility, should be dismissed.

h. Definition of full-time employment for purposes of medical insurance

The complaint in Case 18–CA–018965 alleges that the Union made verbal requests on May 15 and September 11, 2008, and a written request on February 23, 2009, asking the Respondent to define what constitutes a full-time employee for purposes of the Respondent's medical insurance coverage. The complaint further alleges that the Respondent delayed providing this information and by such conduct has violated Section 8(a)(5) and (1) of the Act. (Complaint (II) pars. 11(c), (d), (e), (m), and (n), 15, and 16.)

Facts

Under proposals being discussed by the parties, an employee's entitlement to have his or her health insurance premium paid entirely by the Respondent was dependant on whether the employee was working full time and had more than 10 years of service with the Company. At a bargaining session on May 15, 2008, the union negotiators asked what constituted "full-time" employment for purposes of the health insurance benefit. In particular, Fort asked whether an employee would be considered full-time if he or she did not work the full year because of a layoff. At that time, Tate said that the Respondent would have to look into the matter. The parties discussed the subject again on September 11, 2008. Jeter testified that the Respondent gave different answers and the testimonies of Tate and Wiese support Jeter's recollection. Tate testified that the Respondent's position was that "we would expect the employee who has fewer hours, or less than full-time work, depending on whatever those hours we agreed to were, was that they would need to contribute or they should not be provided the full-time health care coverage." However, Wiese testified that an employee would be considered full time for purposes of the Respondent's health insurance proposal as long as they were "regularly scheduled people whether they're only scheduled to work 20 hours a week, or 40 hours a week, or whatever" and that "[t]here would be no allocation or pro-rata adjustment on health insurance." (Tr. 273 (Jeter), 640–641 (Tate), 723–724 (Wiese).) Jeter said that language defining what qualified as full-time employment for health insurance purposes should be put in the proposal so that it would be clear who was entitled to full-time health insurance benefits.

In a written request on February 23, 2009, Jeter again asked the Respondent to define "full-time" employment for purposes

of the health insurance benefit. In particular, he reiterated the question about whether an employee who had worked for the company for over 10 years, but was absent for part of the current or a recent year because of a layoff or other reasons would qualify for the full-time health insurance benefit during that year and the following year. Tate responded in writing on March 2, 2009. He stated:

This has been addressed over and over—and, the answer remains the same. We answered this in May 2008, September 2008, January 2009 and repeatedly to all of your questions. This benefit does not have the “hours allocations” we put into the agreement on some of the other benefits. When you asked that question at the table we told you No it would not have that allocation. We had drafted it in and then removed it and it would not apply to the Health/Dental benefit. Each time you asked we have answered the same way. In the correspondence from Chuck Roberts July 2, 2008 this was addressed.⁵⁶

In correspondence dated March 6, 2009, from Jeter to the Respondent, Jeter stated that the Union’s question on the subject of who would qualify for full-time health insurance benefits had not been answered. In particular, Jeter stated that the Union still did not know how the Respondent would treat an employee who had worked for the Company for over 10 years, but was recently absent for part of a year due to layoff or other reasons.

In correspondence, dated March 13, 2009, Tate informed the Union that the Respondent would continue to provide the full-time health benefit to an employee who had more than 10 years of service, but who did not work the full year because of layoff, medical absences, or other reasons. This would continue as long as the individual was actively employed, but “the company only pays for the employees [sic] coverage for a maximum period of 30 days after separation from active full time employment for whatever reason.” In the correspondence, Tate asserts that this information had previously been provided to the Union, but that unsworn assertion was not backed up by sworn testimony, and the information the Union requested on this point does not appear in any of the pre-March 2009 documents submitted at trial. I accept Jeter’s credible testimony that the Respondent did not provide the information prior to March 2009.

Discussion

The evidence shows that during a bargaining session on May 15, 2008, the Union asked whether, under the Respondent’s proposal, the Company would continue to pay 100 percent of the health insurance premium for an employee who had over 10 years of service, but had recently worked less than a full year due to layoff or other reasons. The Respondent did not provide that information until March 2009. The delay of over 9 months was not justified by the type of information sought, and the

⁵⁶ Roberts’ July 2, 2008 letter does not discuss the issue raised by Jeter. The letter does, however, state that the Respondent pays 100 percent of the cost of health insurance for individuals employed for more than 10 years, and 50 percent of the cost for employees employed for less than 10 years. GC Exh. 56; R. Exh. 44.

Respondent does not argue otherwise. Although the Respondent made responses to the Union’s information request about health insurance coverage prior to March 2009, those responses were contradictory and did not respond to the specific question that the Union had repeatedly posed since May 2008 regarding the treatment of persons who had worked less than a full year due to layoff or other reasons.⁵⁷

I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act, by unreasonably delaying the provision of information, requested by the Union, regarding the definition of full-time employment for purposes of health insurance coverage under the Respondent’s proposals.

i. Definition of safety sensitive positions

The complaint in Case 18–CA–018965 alleges that the Union made a verbal request on about September 10, 2008, and a written request on February 23, 2009, asking the Respondent to define what constitutes a safety sensitive position as the term applied to unit employees. The complaint further alleges that the Respondent delayed providing this information and by such conduct violated Section 8(a)(5) and (1) of the Act. (Complaint (II) pars. 11(h), (i), (m), and (n), 15, and 16.)

Facts

The Respondent’s comprehensive proposal of May 15, 2008, included a policy on drug testing which stated, *inter alia*, that the Respondent could test employees for drug use “[w]hen the employees are in safety and/or sensitive positions such as anyone driving a company vehicle . . . machine operators, forklift driver, etc.” At a bargaining session on September 10, 2008, Jeter asked the Respondent’s bargaining team to define what the Company considered “safety sensitive” positions for purposes of its proposal on drug testing. Tate responded that every position was safety sensitive. Jeter stated that that definition was not proper under Iowa State law which permitted random drug testing of employees in safety sensitive positions but which, in Jeter’s view, intended for the “safety sensitive” designation to reach a narrower group of employees.

In a written request made on February 23, 2009, Jeter asked the Respondent “for a list of jobs the Company considers to be ‘safety sensitive positions’ under the Company’s drug testing language.” On March 2, the Respondent provided a written answer in which it stated that the term “safety sensitive” positions in its drug testing proposal applied to drivers of company

⁵⁷ The Respondent notes that the request was “not in writing, as required by the June 12, 2008 agreement,” to hold contempt proceedings in abeyance. The Board has held that a request for information need not be in writing or expressed in any particular form to give rise to a duty to provide information. *A. W. Schlesinger Geriatric Center*, 304 NLRB 296, 297 fn. 7 (1991). The contempt proceeding agreement does not diminish the Respondent’s duty under the Act to provide relevant information requested verbally. The language in the contempt proceeding agreement regarding information requests only affects the question of whether that agreement has been complied with, not the question of whether Sec. 8(5) has been violated. At any rate, the Union initially made the request before the 2008 agreement, and by the time of that agreement the Respondent had already delayed providing that information for 4 weeks. That itself was an unreasonable delay given the nature of the information sought.

vehicles, machine operators, forklift drivers, or any employees that enter into the marked off production areas around any of the equipment.” In a March 6 response, Jeter opined that the Respondent’s definition of safety sensitive positions “does not comply with Iowa’s Law” since it would make “every person, employee or not, hourly and salary” subject to the drug testing policy. On March 13, Tate responded, “We disagree with the Union position; our position is valid under Iowa law.”

At some later date, the Respondent withdrew the “safety sensitive” language from its drug testing proposal. Jeter testified that once the Respondent did that, the information request for the definition of safety sensitive was no longer an issue.

Discussion

The Respondent clearly communicated to the Union that, under the Company’s drug testing proposal, the “safety sensitive” designation applied to all of the unit employees. Even before the Union request was made, the Respondent stated in its May 15 proposal that the category included “positions such as anyone driving a company vehicle . . . machine operators, forklift driver, etc.” When the Union made its verbal request on September 10, Tate immediately answered that the Respondent considered all positions with the Company safety sensitive. Tate’s written response of March 2, although cast in more specific terms, also included every unit position within the definition of safety sensitive. The Respondent clearly answered the information request for a definition of what the Company considered “safety sensitive” under its drug testing proposal. The parties disagreed about whether that definition was consistent with Iowa State law on drug testing. However, even assuming that the Union was correct in its understanding of Iowa law, that would only mean that the Respondent’s proposal was contrary to State law, not that the Respondent had failed to meet its obligation under Section 8(a)(5) of the Act to supply information regarding what it meant by its proposal. The General Counsel argues that the Respondent violated the duty to bargain in good faith by supplying “false and misleading information.” (Br. GC at p. 95, citing *Assn. of D.C. Liquor Wholesalers*, 300 NLRB 224, 231 (1990).) However, the General Counsel did not show that the Respondent’s answer was false or misleading as to the nature of the company proposal. The General Counsel does not even make an argument that the Respondent’s definition was contrary to Iowa law, but simply references Jeter’s opinion that it was. Thus, the General Counsel’s argument that the Respondent’s answer was “false and misleading” fails.

I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by delaying the provision of information regarding the definition of what constitutes a safety sensitive position as the term applied to unit employees should be dismissed.

j. Cost of sickness and accident benefit

The complaint in Case 18–CA–018965 alleges that the Union made a verbal request on about January 16, 2009, regarding the average hourly cost of the sickness and accident benefit for unit employees. The complaint further alleges that the Respondent delayed providing this information and by such conduct has violated Section 8(a)(5) and (1) of the Act. (Complaint (II) pars. 11(k), (m), and (n), 15, and 16.)

Facts

During negotiations, the Respondent proposed to eliminate an existing benefit under which employees unable to work due to sickness or accident received short-term disability payments. The Union proposed to continue that benefit, and increase the amount of the payments under it. Wiese asked the union negotiators what they would be willing to give up in order to retain the sickness and accident benefit. At a bargaining session on January 16, 2009, Jeter verbally requested that the Respondent provide information regarding the average hourly per-employee cost for the sickness and accident benefit so that the Union “could take that into consideration relative to our proposal.” The Respondent answered that it did not calculate the cost of the sickness and accident benefit on a per-hour basis, but did supply the Union with information identifying the three or four employees who had drawn sickness and accident pay, and stating the total that each had received.

On February 23, 2009, Jeter requested information regarding the average hourly cost of the benefit again, this time in writing. In a response dated March 1, 2009, Tate stated, “[Y]our question regarding this calculation is not relevant to these proceedings because the company is Not offering a Sickness & Accident Insurance proposal.” (Capitalization in Original.) Nevertheless, Tate supplied information showing the total premium it paid, per month, to the provider of the sickness and accident coverage. Tate opined that the Union could calculate the hourly cost by multiplying this monthly figure by 12 months, and then dividing by the total number of hours employees worked that year. On March 6, 2009, Jeter responded that his request had not been satisfied, and explained how he thought the Respondent could go about calculating the average hourly cost of the sickness and accident benefit. On March 13, 2009, Tate provided the Union with additional information. He stated that the monthly, per employee, premium for the sickness and accident benefit was \$16.64. He reiterated that the Respondent did not calculate the average hourly cost of the benefit and stated that such a calculation “seem[ed] meaningless” because different employees worked different numbers of hours.

At trial Jeter expressed skepticism regarding the Respondent’s claim that it did not have the information he was seeking and stated that this was “the first company he’s heard of that knows what their average hourly pay rate is but not what their benefit package costs.”

Discussion

I conclude that the General Counsel has not shown that the Respondent unreasonably delayed providing the Union with information regarding the average hourly cost of the sickness and accident benefit. When this question was posed on January 16, the Respondent denied that it had the information. No evidence was produced at trial showing that the Respondent actually had the information it denied having. Although the Respondent’s denial is perhaps somewhat surprising, it is not so implausible as to justify a finding that the Respondent possessed the information that it denied having. Moreover, the Respondent attempted to accommodate the Union’s request by providing other information regarding the cost of the sickness and accident benefit. When Jeter stated, in his February 23

written request, that the information verbally sought on January 16 had not been provided, the Respondent replied on March 2 with information showing the monthly amount that the Respondent paid to the entity that provided the sickness and accident coverage. After Jeter stated, on March 6, that this information was still insufficient, the Respondent answered on March 13 by providing a statement of the monthly premium it paid per employee for the sickness and accident benefit. The General Counsel has not shown that these responses were unreasonable given the unavailability of average hourly cost information.

I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by delaying the provision of information regarding the average hourly cost of the sickness and accident benefit should be dismissed.

k. Impact of unilateral implementation on unit employees

The complaint in Case 18-CA-019008 alleges that the Union made a written request on about April 9, 2009, asking the Respondent to provide information on the impact that the offer the Respondent unilaterally implemented on April 1, 2009, had on employee’s terms and conditions of employment, including: the recall rights and seniority of then-laid-off employees; the Good Friday holiday; the benefits of employees currently off work with sickness and accident insurance benefits; whether the Respondent intended to match employee contributions to the implemented retirement plan; whether the Respondent intended to continue the terms and conditions of the expired contract to the extent the terms and conditions had not been identified to be changed or eliminated; and, if the Respondent did not intend to continue all of the other terms and conditions, which terms and conditions it did, and did not, intend to continue. The complaint further alleges that the Respondent had failed and refused to provide this information, and that by such conduct had violated Section 8(a)(5) and (1) of the Act. (Complaint (III) pars. 14 to 16.)

Facts

On April 1, 2009, the Respondent unilaterally implemented provisions of its contract proposal after declaring that the parties were at impasse.⁵⁸ Previously, on March 27, 2009, the Union received a letter from the Respondent expressing management’s intent to do this. That same day Jeter made the following information request:

For each bargaining unit employee . . . please give an exact, complete, and detailed explanation of the impact each implemented proposal will have on the employee. Also describe in complete detail how the implementation of each of your proposals will impact the status quo of each bargaining unit employee.

. . . .

⁵⁸ This was the second time during the course of the negotiations that the Respondent had declared impasse and unilaterally implemented a contract. As discussed above, the Board has previously ruled that the first unilateral implementation, which took place in June 2006, was unlawful.

I expect this information prior to April 1st in order for the Union employees to be able to understand and consider the impact of your intentions both individually and collectively prior to implementing your proposals.

In a letter dated April 7, 2009, Tate responded to Jeter’s March 27 information request. Tate began by stating that each employee was provided with a copy of the implemented proposals and had been given the opportunity to ask questions about how he or she might be affected. The response went on to provide what Tate characterized as “additional answers” about how the Company understood the impact of the contract implementation on the bargaining unit employees.⁵⁹

⁵⁹ Those answers were as follows:

Management Rights—the company must take the measures that it has proposed to operate the facility productively.

Disciplinary Action and related Attendance Policy—this is active and the related attendance policy will be under review for supervisors to better understand, develop forms and practice the process that will ultimately be executed May 1, 2009. The Disciplinary Action article has been executed.

Probationary Period—Article 12 has been executed and the 90 day calendar period will affect any new employees.

Seniority—the Company’s article 13 has been executed as previously provided to the union committee months ago during contract negotiations.

Hours of Work and Overtime—employees will only be compensated for overtime in excess of 40 hours per week.

Holidays—employees will be given nine (9) Holidays according to article 16.

Vacation—the company will make the appropriate vacation payout to those affected employees, will process the proper paperwork and will then execute this article on July 1, 2009.

Health and Dental Benefits—an enrollment period will be initiated and the new premium rates which were embodied in the Company’s Best and Final Offer will become active May 1, 2009. Employees will be able to share cost of this benefit following an [sic] qualified absence stated in this proposal for 30 days—and, after this time, they will be able to qualify for COBRA benefits.

Bereavement—will include the new schedule as detailed in the Company’s Best and Final Offer.

Life and AD&D Insurance—will be implemented immediately and will be equal to two times the employees prior 52 weeks base earnings. And, employees will be able to purchase other supplemental coverage.

HM Advantage—employee paid disability insurance will end. However, employees will be able to purchase the same or similar supplemental insurance through AFLAC, if applicable.

Sickness and Accident Benefits—employees were told that this benefit will end and that they will need to find some other coverage at their own cost. The company will allow this provision through the end of April, 2009.

MEDCO—Mail in prescription program will end April 30, 2009. However, employees will be able to take advantage of the BCBS prescription drug plan beginning May 1, 2009.

Wages—unable to immediately implement the Company’s Merit Pay program due to the Union rejecting the proposal.

Safety & Personal Protective Equipment—will be implemented as scheduled in the Company’s Best and Final Offer in order to provide these items to our employees.

.84 cents defined contribution plan—will terminate at the end of workweek, April 4, 2009.

Jeter, in an April 9, 2009 email communication, asked the Respondent for additional information regarding the impact of the unilateral implementation. Jeter asked: whether employees who were already on layoff status at the time of the unilateral implementation would still have the recall and medical insurance continuation entitlements provided for under the contract in effect at the time of their layoff, or whether they would have the reduced entitlement provided for under the Respondent's implemented seniority provision; whether Good Friday would be considered a paid holiday in 2009; whether the Respondent's discontinuation of the sickness and accident benefit would mean cancellation of those benefits for any employees who were already off work and eligible for the benefit at the time of unilateral implementation; whether the Respondent would match unit employees' contributions to the retirement plan as it proposed, or would the Respondent suspend those matching contributions as it had done for nonunit employees; whether the Respondent intended to continue all terms and conditions under the "status quo" to the extent that those were not changed by implementing the final offer, and, if not, which ones it did, or did not, intend to continue.

The Respondent made no answer to Jeter's April 9 email communication seeking additional information.

Discussion

In its brief, the Respondent argues that its April 7, 2009 communication fully answered the Union's March 27, 2009 information request. (Br. of R. at pp. 131–132.) I tend to agree that that response was reasonable given the amorphous and extremely broad nature of the Union's March 27 request. However, whether the response to the March 27 request was adequate is beside the point since the complaint allegation concerns the Union's *April 9* request. The Respondent does not claim that it supplied the information sought on April 9, or give any explanation for its failure to do so. The information the Union sought on April 9 concerned unit employees and was therefore presumptively relevant to the Union's representational duties. *Quality Building Contractors*, 342 NLRB at 431. Therefore, the Respondent has, by failing to provide that information, violated its duty under Section 8(a)(5) to supply the Union with requested information that is relevant to and necessary for the performance of the Union's statutory duty as the employee's bargaining representative. *NLRB v. Acme Industri-*

al Co., 385 U.S. at 435–436. The fact that the Respondent had declared impasse, even assuming that that declaration was valid, would not diminish the duty to provide relevant information. *Watkins Contracting, Inc.*, 335 NLRB 222, 225 (2001).

I conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to supply the Union with the information requested on April 9, 2009, regarding the impact of the Respondent's April 1, 2009 unilaterally implemented changes on: whether employees who were already on layoff status at the time of the unilateral implementation would still have the recall and medical insurance continuation entitlements provided for under the contract in effect at the time of their layoff, or whether they would have the reduced entitlement provided for by the Respondent's implemented seniority provision; whether Good Friday would be considered a paid holiday in 2009; whether the Respondent's discontinuation of the sickness and accident benefit would mean cancellation of those benefits for any employees who were already off work and eligible for the benefit at the time of unilateral implementation; whether the Respondent would match unit employees' contributions to the retirement plan; whether the Respondent intended to continue all terms and conditions under the "status quo" to the extent that those were not changed by implementing the final offer, and, if not, which terms and conditions it did, or did not, intend to continue.

6. Alleged unilateral changes prior to declaration of impasse⁶⁰

a. Plant suggestion box

The complaint in Case 18–CA–018540 alleges that on about May 24, 2007, the Respondent implemented a plant suggestion box, soliciting employee suggestions for, among other things, changes in unit employees' terms and conditions of employment. The complaint further alleges that the Respondent made this change to a mandatory subject of bargaining without prior notice to the Union and without providing the Union an opportunity to bargain, and that such conduct violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 42(a), (d), and (e), and 45 and 46.)

Facts

As discussed above, when the Respondent purchased the Iowa operation in January 2005, an employee suggestion box was present at the facility. The suggestion box remained in-place until August or September 2006 when the Respondent relocated the Iowa operation to a nearby site. For the first 8 or more months at the new location, the Respondent did not install a suggestion box.

In May or June 2007, Wiese, Tate, and Milam held a meeting with employees. Tate testified that the Respondent held the

401K—Retirement program and Company matching plan will begin April 6, 2009

Tuition Reimbursement—will allow qualified employees to this benefit April 1, 2009 after the proper prequalification is approved.

Vision Care Benefit—will be available through Spectera.

Shop Rules—are now implemented and will be executed on May 1, 2009, following further coaching with supervision and forms development for corrective action needs.

Drug Testing—in accordance to the implemented process and compliance with Iowa law.

No Solicitation and No Distribution—will be prohibited as described in the Company's Best and Final Offer.

Governmental Compliance—as described in Article 43 will be followed by all parties which include the Company, the Union, and uncovered employees.

⁶⁰ In addition to the alleged unilateral changes discussed below, one of the complaints originally alleged that the Respondent unlawfully announced changes to employees' health insurance plan without providing the Union with notice and an opportunity to bargain. Complaint (III) par. 13. Subsequent to the trial, by letter dated July 15, 2009, the General Counsel moved to amend Complaint (III) to delete that allegation. The other parties have not opposed that motion, and it is hereby granted.

meeting because of frustration over how the Union was bargaining and to provide “education” to employees about what was taking place at the bargaining table. At the meeting, Wiese encouraged the employees to submit suggestions about what management could do to “help that facility up there.” At about the same time, the Respondent, for the first time, installed a suggestion box at the new facility.

On June 26, 2007, the Respondent posted a memorandum from Wiese and Tate that summarized employee suggestions,⁶¹ but which also discussed the Company’s opposition to the Union, and summarized complaints the Company said it had received about the Union. The Respondent did not provide the Union with notice or an opportunity to bargain before installing the suggestion box at the new facility, soliciting employee submissions, and posting the June 26 memorandum.

Discussion

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873–874 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1164–1165 (1990). This is a requirement even if at the time of the change the collective-bargaining agreement between management and the union has expired and a new agreement has not been completed. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

The Respondent argues that the installation of the suggestion box was not an unlawful unilateral change both because it was not a mandatory subject of bargaining, and because, in this case, the suggestion box was not new. Neither of these arguments is persuasive. First, the Board has found that an employer violates Section 8(5) and (1) by unilaterally installing an employee suggestion box in the workplace. *Chatham Mfg. Co.*, 172 NLRB 1948, 1977, and 1978 (1968). The Respondent’s argument that the use of a suggestion box is not a mandatory subject of bargaining is based on a decision—*E. I. du Pont Co.*, 311 NLRB 893 (1993)—that deals with a different issue entirely. In *E. I. du Pont*, the Board stated, in dicta, that an employer’s use of an employee suggestion box would not constitute an employer-dominated labor organization within the meaning of Section 2(5) and Section 8(a)(2) of the Act since the employees made their submissions individually and not as a group. *Id.* at 894. That analysis does not address the question of whether an employer would be required to give the employees’ recognized bargaining representative notice and an opportunity to bargain before installing an employee suggestion box, and does not discuss, or overrule, *Chatham Mfg.*, *supra*.

I also conclude that the Respondent’s installation of the employee suggestion box and its call for employees to submit suggestions, represented a change from the status quo at the new facility. A suggestion box was not present at the new fa-

cility for its first 8 months of operation. Indeed, the Respondent did not act to install a suggestion box at the new facility until after Judge Rosenstein issued his decision in *Whitesell I* and the district court enjoined the Respondent from changing the status quo during bargaining. Under these circumstances, I conclude that the absence of a suggestion box was the status quo at the new facility and the installation of a suggestion box in May or June 2007 was a change. Moreover, even at the old facility, the Respondent had not solicited employee submissions to the suggestion box. At the new facility the Respondent departed from that practice by actively soliciting employee suggestions. Thus, the Respondent’s active use of the suggestion box at the new facility constituted a departure not only from the status quo at that facility, but also from the status quo that had existed at the old facility.

I conclude that the Respondent made an unlawful unilateral change in violation of Section 8(a)(5) and (1) of the Act in May and/or June 2007, when it installed an employee suggestion box at the Iowa facility and solicited employee suggestions for, inter alia, changes to terms and conditions of employment.

b. Plant safety committee

The complaint in Case 18–CA–018540 alleges that on about June 12, 2007, the Respondent announced the creation of a plant safety committee to be composed of unit employees. The complaint further alleges that the Respondent made this change to a mandatory subject of bargaining without prior notice to the Union and without providing the Union an opportunity to bargain, and that such conduct violated Section 8(a)(5) and (1) of the Act. (Complaint (I) pars. 42(b), (d), and (e), and 45 and 46.)

Facts

The Respondent posted a notice, dated June 12, 2007, announcing that the Company was “now ready to form our new plant safety committee.” The posting also included a signup sheet, on which employees were invited to write their names if they were interested in becoming members of the safety committee. Prior to posting this notice, the Respondent did not give the Union notice or an opportunity to bargain. The record does not clearly show whether a safety committee program was in place at the facility when the Respondent posted this signup sheet. Jeter stated that he believed such a committee already existed, but that he was not sure how active it was. Jeter was the only witness who testified about how safety committee members had been selected in the past and his testimony on the subject was uncertain and self-contradictory. Compare Transcript 141–142 (Jeter testifies that three safety committee members were selected by the employer, and three were selected by the Union. Tr. 291–292) (Jeter testifies that he was not sure who selected the safety committee members). The General Counsel does not point to any language in the Fansteel contract (which was in effect at the time pursuant to the 10(j) injunction) concerning a safety committee. On this record, I

⁶¹ These included complaints about supervisor favoritism, poor lighting on the production floor, and wait times for equipment.

am unable to reach a finding about how safety committee members had been selected in the past.⁶²

When Jeter found out about the June 12 posting, he asked the Respondent to provide a copy of it. After reviewing the posting, Jeter informed the Respondent's negotiators that they had to bargain over the safety committee and requested that the company rescind the posting and cancel its intention to establish a safety committee. The Respondent reacted by rescinding the posting and stating that it would not implement a safety committee. The Respondent never actually named a safety committee, or conducted any safety committee meetings, pursuant to the posting.

Discussion

I conclude that the General Counsel has failed to demonstrate that the Respondent's posting of a notice seeking volunteers to serve on a safety committee constituted an unlawful unilateral change. First, the record does not demonstrate that the posting of such a notice was a departure from an established past practice since the record does not show what the past practice was. Even if, under the past practice, the Respondent selected three of the six members of the safety committee, the evidence still does not show that the use of a posting was a departure from an established practice for identifying interested employees. Furthermore, assuming that some other method had been used to select safety committee members in the past, the evidence shows that the Respondent did not use the June 12 posting to select safety committee members. When Jeter told the company negotiators that he believed the matter had to be bargained over, the Respondent rescinded the posting. Safety committee members were never named using the June 12 posting.

I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally announcing the creation of a safety committee should be dismissed.

c. Union assistance with employee insurance problems

The complaint in Case 18-CA-018540 alleges that on about April 5, 2007, the Respondent instructed Union President Georgia Fort that she could no longer assist unit employees with insurance questions or problems and that unit employees would have to handle their own insurance problems during off hours. The complaint further alleges that the Respondent made this change to a mandatory subject of bargaining without prior notice to the Union and without providing the Union an opportunity to bargain, and that such conduct violated Section 8(a)(5) and (1) of the Act. (Complaint (1) pars. 42(c), (d), and (e), and 45 and 46.)

⁶² The contract that the Respondent unilaterally, and unlawfully, implemented on June 13, 2006, provided for a joint safety committee with three employer-selected members who were not bargaining unit employees, and three union-selected members who were bargaining unit employees. However, the 10(j) injunction had required the Respondent to rescind that contract in March 2007.

Facts

Fort, in addition to being a member of the union bargaining committee, has been the president of the Union local for 12 years and chairperson of the shop committee for approximately 25 years. For a period of approximately 20 years, Fort provided assistance to unit employees who had problems or questions regarding their health insurance. She was knowledgeable about the terms of the health plan due to her involvement in the negotiations for that benefit. If Fort was sure of the answer, she would provide that answer to the employee. In other instances, Fort would refer the employee to the appropriate official of the Respondent. Many employees were uncomfortable speaking directly to company officials about these matters and, so, Fort frequently accompanied the employees when they had meetings with management. During such meetings, Fort would sometimes present the insurance question on the employee's behalf.

When the Respondent purchased the facility in 2005, Fort continued to assist employees with their health insurance problems and questions. At that time there were a particularly large number of questions because the Respondent's Alabama-based Blue Cross Blue Shield (BCBS) insurance plan was treating some types of claims differently than the Iowa-based BCBS plan which had provided the coverage previously. In mid-2005, the Respondent and the Union resolved a grievance regarding this disparity and, as part of that resolution, the Respondent provided Fort with the name and phone number of the contact person at the insurance company so that Fort could speak directly to that individual about health insurance questions. Subsequently, Fort communicated with the insurance company contact person on multiple occasions.

Then, at a bargaining session on April 5, 2007, the Respondent directed Fort to stop assisting employees with their insurance problems. The Respondent cited concerns with: employee privacy; liability if Fort made a mistake or gave out incorrect information; and the possibility that management would not find out about problems with insurance. In addition, Tate told Fort that she was prohibited from contacting the Respondent's insurance carrier or insurance agent. He said that employees who had problems or questions regarding their insurance could submit forms to Milam (human resources director), or contact the insurance company on their own. Before the Respondent announced these changes, it did not afford the Union notice or an opportunity to bargain.⁶³

On June 12, 2008, over a year after the Respondent announced the change to Fort's role regarding employee health insurance, Jeter and Roberts discussed the issue. However, they did not try to resolve it at that time because Roberts said he lacked knowledge regarding the issue.

Discussion

An employer's established past practices, even if not embodied in a collective bargaining agreement, become terms and conditions of employment which cannot be altered without offering the representative of unit employees notice and an

⁶³ The credible evidence does not substantiate the complaint allegation that the Respondent told unit employees they could only address their health insurance problems during off hours.

opportunity to bargain over the proposed change. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). In this case, there was a well-established and longstanding past practice under which the Union assisted employees with their health insurance claims. The Respondent ended that practice without giving the Union notice or an opportunity to bargain over the change.

The Respondent argues that this change was not unlawful because it was not material. A unilateral change does not violate the Act unless that change is material, substantial, and significant, and has a real impact on, or causes a significant detriment to, the employees or their working conditions. *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001); *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993). However, the unilateral change here was plainly significant enough to constitute a violation. Employer-provided health insurance is one of the most important terms of employment for many employees. The union president had been helping employees obtain the health insurance benefits to which they were entitled by counseling them, accompanying them to meetings with the Respondent, presenting their questions to company officials, and, in some instances, directly contacting the insurance carrier. The employer's action ending that type of active union assistance with such an important employee benefit was a material change that had a real impact on unit employees, especially since many of the employees were not comfortable advocating for themselves.

I conclude that the Respondent violated Section 8(a)(5) and (1) on April 5, 2007, by prohibiting Fort from continuing to assist unit employees with their health insurance questions and problems without offering the Union notice and an opportunity to bargain over the change.

7. Respondent's alleged refusal to meet and bargain with the Union from fall 2007 through June 2008

The complaint in Case 18-CA-018540 includes an unnumbered heading asserting that from about the fall of 2007 through June 2008 the Respondent refused to meet and bargain with the Union.⁶⁴ The numbered allegations in the complaint state that: on about October 11, 2007, the Respondent notified the Union by letter that it did not intend to meet to discuss the Union's "ongoing concessionary demands"; on about November 8, 2007, the Respondent told the Union's negotiating team that the Respondent was at or near its final offer; on about November 14, 2007, the Respondent notified the Union by letter that it was at or near its final offer and was unwilling to schedule further negotiations until the Union offered "significant proposals"; on about January 13, 2008, the Respondent notified the Union in an e-mail correspondence that the Respondent refused to meet unless the Union provided "proof of its intent to come to an agreement"; and, on about February 14, 2008, the Respondent notified the Union by letter of its refusal to meet until the Union delivered substantive proposals to the Respondent. The complaint alleges that by this conduct the Respondent

⁶⁴ The complaint originally stated that this period continued until August 2008. At the start of the hearing, I granted the General Counsel's unopposed motion to amend the complaint to state that the failure to meet continued only until June 2008. Tr. 11-12, 13, 15; GC Exh. 84.

has been failing and refusing to meet and bargain with the Union in violation of Section 8(a)(5) and (1) and that this was part of a course of bad-faith bargaining. (Complaint (I) pars. 43, 44, and 46.)

Facts

Throughout bargaining, the Respondent's negotiators have pressed Jeter to submit the Union's proposals by letter or e-mail correspondence and have complained to the Union about the time and expense that travel from Muscle Shoals, Alabama, to Washington, Iowa, for face-to-face negotiations has entailed for the Respondent. During bargaining sessions in 2007 and 2008, the Respondent stated that it would not return to the bargaining table until the Union made "substantive" proposals. Jeter responded that "[t]he Union has made what we believe are substantive proposals," and asked what the Respondent "consider[ed] to be substantive proposals?" Tate answered that he did not know.

The Union and the Respondent met to negotiate on October 2 and 3, 2007. In an October 11 letter to the Union, Tate stated that the Respondent was "explicitly clear during our last bargaining session of . . . our inability to continue to waste time on the do-nothing-bargaining approach you use." Tate also stated: "The Company has clearly communicated that there is no need to reconvene for scheduled negotiations until the Union presents proposals that were substantive—and, that reflected meaningful improvements. We no longer wish to discuss your ongoing concessionary demands." In the concluding paragraph of the letter, Tate stated that "Whitesell is eager to return to the bargaining table if and when the Union offers new, meaningful and substantive proposals." Tate's October 11 letter led to an email exchange between the parties, during which Jeter asked whether the Respondent would be present for the negotiations scheduled on November 6, 7, and 8, 2007. As part of the exchange, Tate sought to persuade Jeter to provide the Union's proposals to the Respondent in advance of those sessions, but Jeter declined to do so. Nevertheless, at the conclusion of the email exchange, Tate informed Jeter that the Respondent would attend the scheduled bargaining.

The Respondent and the Union met to bargain from November 6 to 8, 2007. At the session on November 8, Tate stated that Whitesell was very close to making its best and final offer. In a letter dated November 14, 2007, Tate reiterated that statement, and expressed the view that "there was little need to reconvene unless the Union was positioned to make substantive and meaningful movement to 'bridge-the-gap' between" the parties' positions.

In a December 12, 2007 letter to Jeter, the Respondent offered to meet with the Union on December 18, 19, and 20, 2007, and January 15, 16, 17, 29, 30, and 31, 2008. The Respondent and the Union met to bargain on December 18, 2007. Afterwards, in a January 10, 2008 letter to Jeter, Tate complained that the December session had not been productive, and blamed the Union for this. In the concluding paragraph of this letter, Tate stated:

[W]e see no value or reason to come back to Iowa since the Union has proven that it has reached a point where it is not making any new proposals. However, Whitesell has presently

scheduled and planned the time to return to Iowa on January 29, 30, 31 in order to further negotiations and have the Agreement signed.

The Respondent and the Union met to negotiate on January 29 and 30, 2008. At the close of the January sessions, Wiese sent Jeter an email correspondence, stating:

Whitesell is not interested in expending more time and money for non-productive bargaining sessions. Whitesell will come back to the bargaining table if and when the Union provides us proof in advance of a meeting. Upon review, Whitesell will then schedule with the Union any necessary followup bargaining sessions.

In a February 14, 2008 letter to Jeter, Tate repeated many of the sentiments of Wiese's January 30 email. The letter stated, *inter alia*: "The company will return to the Bargaining Table when we have received substantive proposals. . . . And, it should be clear to you what Substantive and Meaningful means."

After January 2008, the parties did not meet again until May 15, 2008. The record does not establish that the Union attempted to schedule additional bargaining dates between January 30 and May 15. Tate testified that during much of that period the parties were busy preparing for the contempt hearing scheduled to take place on June 12, 2008.

Discussion

Section 8(d) of the Act provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." I conclude that the record in this case fails to substantiate the General Counsel's allegation that the Respondent violated that obligation from the fall of 2007 until June 2008. To the contrary, the record shows that the Respondent repeatedly met with the Union for negotiating sessions during that period. The parties had negotiating sessions on October 2 and 3, November 6, 7, and 8, 2007, December 18, 2007, January 29 and 30, and May 15 and 16, 2008. As noted above, the evidence does not show that the Respondent refused attempts by the Union to schedule bargaining for other specific dates. Neither Jeter nor Fort testified that they believed it would have been futile for the Union to request additional bargaining dates given the Respondent's statements.

Under Board law it would have been unlawful for the Respondent to insist that the Union submit its proposals in advance, by mail, as a precondition to further face-to-face bargaining. See *Metta Electric*, 349 NLRB 1088, 1093 (2007), citing *Beverly Farm Foundation*, 323 NLRB 787 (1997); *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952 (6th Cir. 2006). Unless a union agrees otherwise, "the employer must make his representatives available for conferences at the plant where the controversy is in progress, and at reasonable times and places, so that personal negotiations are practicable." *NLRB v. P. Lorillard Co.*, 117 F.2d 921, 924 (6th Cir. 1941), *revd. on other grounds* 314 U.S. 512 (1942). In the instant case, it is clear that the Respondent was attempting to pressure the Union to move towards the company's proposals in advance

of face-to-face negotiations by stating that the Respondent's negotiators were not disposed to come to Iowa for further meetings until the Union submitted correspondence that included what the Respondent deemed to be substantive proposals. Although, in some of its statements, the Respondent walked right up to the line of unlawfully insisting that the parties bargain by mail, it never stepped over that line in this case. Even assuming that the Respondent is seen as having stated that it would refuse to meet unless the parties first negotiated by mail, the record does not show that the Respondent ever carried through on such statements. Rather the Respondent repeatedly met for face-to-face negotiations when asked to do so by the Union, even when the Union declined to submit proposals by mail. The General Counsel does not cite any authority for the proposition that, under circumstances such as those present here, a party's statements threatening not to meet are violations of Section 8(a)(5) and (1) when that party, in fact, continued to meet when asked to do so.

Since the Respondent, in fact, engaged in numerous bargaining sessions with the Union from the fall of 2007 to June 2008, and was not shown to have rejected requests by the Union to schedule bargaining for specific additional dates, I conclude that the allegation that the Respondent refused to meet and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act should be dismissed.

8. Respondent alters bargaining procedure

The complaint in Case 18-CA-018965 alleges that, in about mid-October 2008, the Respondent altered the parties' prior bargaining procedure by insisting: that the parties stop considering proposals one article at a time and begin considering only the Respondent's comprehensive proposals; and that the Union agree to the Respondent's "core" proposals as a condition of further bargaining. The complaint further alleges that the Respondent did this in order to impede the process of reaching an overall collective-bargaining agreement, and that by such conduct the Respondent violated Section 8(a)(5) and (1). (Complaint (II) paras. 14 and 16.)

Facts

In August 2008—the parties began a series of bargaining sessions pursuant to their agreement to hold contempt proceedings in abeyance. Under that agreement, Wiese and Tate were required to step aside as the Respondent's chief negotiators and allow attorney Roberts to assume that role for the 8 to 10 sessions mandated by the agreement. When Roberts took over as chief negotiator he returned to the approach of negotiating article-by-article, rather than on the basis of comprehensive proposals. Roberts testified that his intention was to reach agreement "in small bites," and to begin with issues that were "less significant . . . , but still important." This approach worked, and the parties quickly made progress narrowing the issues that divided them. Over a period of about 1 month—from August 14 to September 12, 2008—the parties reached tentative agreement on subjects including the scope of the agreement, nondiscrimination, picket line recognition, no strike or lockout, rest periods, vision care, no-solicitation policy, and a provision regarding "rules and regulations." Even according to Roberts'

testimony, the parties “made considerable progress” using the article-by-article approach.

Even though the article-by-article approach had resulted in exactly the sort of the progress Roberts said he was hoping for (agreement “in small bites,” beginning with less significant, but still important, items), the Respondent, in a letter dated October 16, 2008, changed course and told the Union that the time had come to stop presenting individual proposals and return to bargaining on the basis of comprehensive proposals. According to the letter, “the last eight sessions” at which the article-by-article approach was used “ha[d] not lived up to the Company’s expectations.” In the letter, the Respondent also identified 11 “core issues” separating the parties⁶⁵ and said that the Union should “send any proposals as soon as possible” or else provide “a statement to the fact” that it was “not going to make any movement on the above core issues or other issues.” The Respondent warned that unless the Union made “substantial movement, particularly on the core issues . . . , the Company reserve[d] the right” to follow up with a “Final Comprehensive Proposal” that was worse for the Union than the Respondent’s current proposal, and that the Company was “very near, if not at, the end of its rope.”

On January 14, 15, and 16, 2009, the parties met for bargaining sessions. Although these were the first sessions following the Respondent’s letter identifying the core issues, Roberts foreclosed the possibility of negotiating compromises regarding those issues by stating that the Company’s positions on the core issues were “hard and fast” and “would not change today, next week, or next year.” The Respondent said that it had “some flexibility” on the noncore issues, but took the position that it would only negotiate over possible changes to its positions on the noncore issues *after* the Union agreed to all of the Company’s proposals on the core issues. Roberts stated that the negotiations had been going on too long and had to “come to an end.” He discussed the Respondent’s “last comprehensive proposal” and said that the Union had to respond to it on a comprehensive basis, not article-by-article.

During the January sessions, Jeter stated that he wanted to continue negotiating article-by-article because the parties had been making progress using that approach. He opined that the Respondent was changing its approach in order to undermine successful bargaining. After Jeter made this accusation, Roberts said that the Union could bargain any way it wanted, including by making article-by-article proposals on noncore issues. However, when the union negotiators subsequently made proposals attempting to find agreement on individual and/or noncore issues, the Respondent rejected those proposals out-of-hand. Based on the evidence regarding the Respondent’s statements and actions after the October 16, 2008 letter, I find that the Respondent was, in fact refusing to consider proposals made by the Union on an article-by-article basis, and refusing to negotiate over the “noncore” issues unless the Union first agreed to all the Company’s proposals on the core issues.

⁶⁵ These were: successorship, management rights, disciplinary action, seniority, hours and overtime, vacation, medical benefits, sickness and accident benefits, retirement plan, wages, and attendance policy.

Although the Union made article-by-article proposals, the record does not show, or suggest, that the Union ever insisted that such proposals had to be considered in isolation or in a specific order. To the contrary, the Union demonstrated an openness to “horse trading.” For example, the Union offered to surrender its proposal that purchasers be bound by the collective-bargaining agreement in exchange for the Respondent agreeing to automatic deduction of union dues from employee pay.

Discussion

Section 8(a)(5) of the Act establishes a duty to negotiate “with an open and fair mind, and a sincere purpose to find a basis of agreement.” *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). Based on the record here, I find that the Respondent violated that obligation by altering the bargaining procedure in an effort to clear the way for a second declaration of impasse. The evidence regarding the Respondent’s bargaining from October 16 forward shows that it did not approach negotiations with a mindset that was open to the possibility of making meaningful changes to its position or committed to the process that might have resulted in an agreement. Moreover, the Respondent’s statements to union negotiators that the Company’s postinjunction proposals would all be worse than the contract it unlawfully implemented in 2006, as well as the Respondent’s overall bargaining, lead me to conclude that the Respondent was determined to bring unit employees to heel by punishing them for prevailing in the prior litigation and for continuing to insist on good-faith bargaining instead of quickly capitulation.

When the district court ordered the Respondent back to the bargaining table, it was certainly obvious to the Company’s negotiators that they would have to engage in a more lengthy bargaining process than they had previously been willing to bear, but the record shows that the Company’s underlying inflexibility and impatience did not change. To cite one telling indicator of this mindset, the Respondent told the Union that it would not continue the existing sickness and accident benefit because it did not have the benefit at its other, nonunion, facilities. When the Union requested cost information about the sickness and accident benefit in the hopes of negotiating a deal under which the Union would give up something in exchange for the Respondent continuing that benefit, Tate responded on March 1, 2009, that the information was “not relevant to these proceedings because the company is Not offering a Sickness & Accident Insurance proposal.” In a subsequent, March 13 email, Tate chastised Jeter for seeking to find a way of working out the parties’ differences on this issue, stating: “The Company has never proposed in three years to extend this benefit. The Company does not understand why the union persistently asks questions that are not germane to contract negotiations.” Tate went on to assert: “We have told you repeatedly, the Company is unwilling to continue this benefit. This is the foundation and essence of the definition of Impasse.” Tate’s response demonstrates not only a misunderstanding of the meaning of “impasse,” but also an unwillingness to engage in the type of give and take under which the Company would at least consider

agreeing to continue the sickness and accident benefit if the Union offered sufficiently attractive concessions on other issues in return.

The Respondent also demonstrated its inflexibility by refusing to bargain further on the noncore issues until the Union agreed to the Company's demands regarding the core issues. The Board has held that insistence on this type of "piecemeal or fragmented" bargaining contravenes a party's duty to bargain in good faith because it excludes the opportunity for the "horse trading" that characterizes good-faith bargaining. *Bridon Cordage, Inc.*, 329 NLRB 258, 265 (1999); *E. I. du Pont & Co.*, 304 NLRB 792, 792 fn. 1 (1991); see also *Asociacion Hospital Del Maestro*, 317 NLRB 485, 519 (1995) ("The Board has held that when an employer had taken an unyielding position that certain subjects be settled before discussing other areas, it evidenced its bad faith."). Moreover, in this instance the Respondent not only refused to bargain on noncore issues until after agreement was reached on the core issues, but made its stance even more inflexible by declaring in January 2009 that it would not consider changing any of its positions on the core issues.

In addition, the Respondent remained too impatient to endure the time-consuming process that reaching an agreement was bound to entail even if the Union eventually capitulated to the Respondent's demands for concessions. When Roberts took over as chief negotiator, the parties began to make progress towards an agreement using Roberts "small bites" approach. However, that process would take time, and shortly before banishing Roberts from the bargaining team, the Respondent cancelled the "small bites" approach and insisted upon a return to "one big bite" bargaining based on its comprehensive proposal. Wiese, in a March 2009 letter, complained that the bargaining process was moving at a "snail's pace." (R. Exh. 63 at p. 3; see also Tr. 721) (Wiese testifies that he pointed out to Jeter that negotiations were "moving at a snail's pace"). In its brief, the Respondent cites *Matanuska Electric Assn.*, 337 NLRB 680, 682 (2002), for the proposition that "moving to package proposals in the latter stages of negotiations is reasonable and not indicative of bad faith." (R. Br. at pp. 120–121.) However, in *Matanuska Electric*, the employer suggested a change to package bargaining and thereafter "both parties sought to deal in package proposals." *Matanuska Electric*, supra. The fact that the employer's suggestion in *Matanuska* was not found to be in bad faith, is not instructive in the instant case where the Respondent insisted upon changing to a comprehensive proposal approach, and the Union expressly opposed that change. Moreover, in the instant case the parties were not in the later stages of negotiations with respect to the core issues. They had been working to resolve less important issues, and had not yet focused on the core issues.

For the reasons discussed above, I find that starting on October 16, 2008, the Respondent violated Section 8(a)(5) and (1) by altering the parties' prior bargaining procedure with the intent of impeding further good-faith bargaining and speeding the parties towards a deadlock.

9. Overall course of bad-faith bargaining

The complaint in Case 18–CA–18540 alleges that by the Respondent's overall conduct it has engaged in surface bargaining and failed and refused to bargain collectively and in good faith within the meaning of Section 8(a)(5) and (1). (Complaint (I) pars. 44 and 46.) The complaint in Case 18–CA–018965 alleges that the Respondent, by its overall conduct, has engaged in surface bargaining, and continued a course of bad-faith bargaining. (Complaint (II) par. 15.)

General Legal Standard

The Act requires "the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment," but does not "compel either party to agree to a proposal or require the making of a concession." (Sec. 8(d).) Nevertheless, as discussed above, the Act establishes a duty to negotiate "'with an open and fair mind, and a sincere purpose to find a basis of agreement.'" *Houston County Electric Cooperative*, above at 1213. The "essential element" of good-faith bargaining is "the serious intent to adjust differences and to reach an acceptable common ground." *White Cap, Inc.*, 325 NLRB 1166, 1169–1170 (1998); see also *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965) ("[T]he parties must have a sincere desire to enter into 'good faith negotiation with an intent to settle differences and arrive at an agreement.'"). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, supra; see also *NLRB v. Insurance Agents Union*, 361 U.S. 477, 485 (1960) (the obligation to bargain in good faith is not satisfied when a party "maintains an attitude of 'take it or leave it'"; good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.") Rather, the employer is obliged to make "some reasonable effort in some direction to compose his differences with the union if Section 8(a)(5) is to be read as imposing any substantial obligation at all." *U.S. Ecology Corp.*, 331 NLRB at 224–225. In evaluating the sufficiency of a respondent's bargaining efforts, the Board has also considered whether the other party's bad-faith bargaining has created a situation in which the respondent's good faith could not be tested and, therefore, could not be found lacking. *Chicago Tribune Co.*, 304 NLRB 259, 260 (1991); *Continental Nut Co.*, 195 NLRB 841, 858 (1972).

"[A]lthough the Board is not privileged to second guess a party's bargaining proposals, . . . a large number of unreasonable positions raises questions about that party's willingness to reach agreement." *Houston County Electric Cooperative*, above at 1215. Thus, the Board can, and does, take cognizance of the reasonableness of the positions taken by the employer so as "not to be blinded by empty talk and by the mere surface motions of collective bargaining." *Charlie's Oil Co.*, 267 NLRB 764, 769 (1983), quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

Facts

Much of the evidence relevant to a determination of whether or not the Respondent engaged in a course of bad-faith bargaining has already been discussed. As found above, the record establishes numerous instances during the relevant time period when the Respondent violated its duty to bargain in good faith. Moreover, the Respondent's officials made statements indicating that they were bargaining with a closed mind and were determined to make sure that the Union's success in the prior litigation would result in contract terms that were worse for unit employees than those that the Respondent had unlawfully implemented and been forced to rescind.

At trial, the Respondent presented other evidence that it argues provides necessary context for the Respondent's actions during negotiations. Some of that evidence purportedly shows that the Respondent was taking good-faith steps to reach an agreement with the Union, and some that the Union itself engaged in bad-faith bargaining that precluded the Respondent's good faith from being tested. Regarding the first category, I agree that at the first eight sessions held pursuant to the contempt agreement the Respondent gave the impression of negotiating with an open mind and sincere desire to find a basis of agreement. During that period, Roberts replaced Wiese and Tate at the head of the Respondent's negotiating team pursuant to the contempt agreement. With Roberts as lead negotiator, the Respondent made multiple proposals that sought common ground and helped resolve issues dividing the parties.⁶⁶ However, when the contempt agreement expired, Wiese abruptly ejected Roberts from the Respondent's bargaining team and, in the presence of the union bargaining team and Roberts himself, disparaged Roberts' bargaining efforts as a "game" and a "party." With Wiese and Tate back at the helm of the bargaining committee, the Respondent continued its course of bad-faith bargaining. The Respondent repeatedly asserted that the parties were already at impasse while summarily rejecting movement that the Union made to address the Respondent's stated concerns. They also reneged on a tentative agreement that Roberts had reached with the Union regarding a no-strike/no-lockout provision. Based on the evidence, I conclude that the Respondent had no intention of allowing Roberts' bargaining approach to run its course, unless, perhaps, that strategy quickly resulted in the Union's complete capitulation to the Respondent's take-it-or-leave-it proposals and to contract terms that satisfied the company officials' desire to punish unit employees for forcing

⁶⁶ For example, when the Union objected to the Respondent's proposal that employees be required to work for a minimum of 2000 hours annually in order to qualify for full vacation benefits (on the grounds that no employee who actually took vacation could meet that threshold), Roberts modified the Respondent's proposal in October 2008 to provide that the Company would count vacation hours and all other paid time off towards the employee's 2000-hour minimum. Similarly, in a September 11 proposal, Roberts responded to the Union's concerns about a company proposal that permitted union committee members to make off-hours visits to the facility only if management "invited" them, by offering a new proposal under which the Respondent agreed to permit such off-hours access if the Union provided advance notice and a valid reason for the visit.

the Company to revoke the unlawfully implemented contract terms.

As found above, when Wiese and Tate were leading the Respondent's negotiating team they repeatedly violated the duty to bargain in good faith and made statements evidencing an unwillingness to do so. The record is not completely devoid of proposals by Wiese and Tate that addressed union concerns, but those instances were few and far between, and generally of little significance in the context of the overall negotiations.⁶⁷ The Respondent made very little, if any, movement towards common ground on the "core" issues between the time of its unlawful unilateral implementation in 2006 and the time it unilaterally implemented terms again in April 2009. (See Tr. 495.) (Wiese concedes that the Respondent's proposals on the core issues were "very, very similar" in June 2006 and March 2009.)

The Respondent attempts to turn the tables by accusing the Union of "ha[ving] no desire to make progress," but only the desire "to have 'non-bargaining' continue indefinitely" so that it could retain the terms of the expired contract. (R. Br. at 48 and 56.) The Respondent provides no direct evidence of such motivation, but rather contends that I should infer it based on: the Union's withdrawal from the tentative agreements reached before the Company unlawfully declared impasse and implemented terms in 2006; the Union's purported refusal to "confer"; and the Union's insistence on submitting all proposals during face-to-face negotiations rather than by mail or email.

Regarding the Union's withdrawal from tentative agreements, it is undisputed that in April 2007, shortly after the district court ordered the Respondent to rescind the unlawfully implemented contract, the Union notified the Respondent that it would not honor the tentative agreements that the parties had reached prior to the unlawful implementation. The record is also clear that both the Union and the Respondent subsequently made a number of proposals that were less favorable to the other side than what the parties had agreed to in 2006. However, while the Union's rescission of the tentative agreements was likely to prolong negotiations, the evidence does not show that the action impeded efforts by the Respondent at good-faith bargaining. To the contrary, the Respondent saw the Union's decision to begin bargaining afresh as a positive development in negotiations. The Respondent's bargaining team did not object to the Union's action, but rather told the union team that the Company welcomed it. Far from being frustrated by the Union's decision to begin bargaining afresh, Tate testified that the Respondent was pleased.

⁶⁷ At one point, Wiese and Tate made a proposal to deny the Union any right to grieve the Respondent's decisions regarding either merit pay or the discharge of employees under the no-strike clause, but during the January 2008 bargaining sessions the Respondent altered those proposals to allow the Union to grieve such actions in a limited way. During sessions in May 2008, Wiese and Tate agreed to: the Union's choice of color for the cover of the agreement; the Union's request that the Respondent organize its proposed contract so as to track the titles and structure from prior contracts; and, the Union's request that the Respondent move a number of its proposals out of the contract's appendices and into the body of the contract.

Under the circumstances present here, I find, moreover, that the Union's decision to rescind the tentative agreements was not motivated by a desire to avoid progress towards a new contract. Jeter repeatedly testified that he was trying to reach an agreement with Whitesell. (See, e.g., Tr. 67–68, 411, 427.) Roberts confirmed that the Union “put honest effort into the negotiations,” resulting in “considerable progress.” (Tr. 804–805, 806.) Rather than showing that the Union withdrew from the 2006 tentative agreements to avoid a contract, I credit Jeter's testimony that the Union took that action because, during the lead up to the Respondent's unlawful declaration of impasse/unilateral implementation in 2006, the Union had “went way beyond” what it would normally concede to reach agreement, but that, in the Union's view, “things had changed radically” as a result of Judge Rosenstein's decision and the district court injunction requiring the Respondent to reinstate the terms of the expired contract and return to the bargaining table. I understand this to mean that the Union made what it considered unusual concessions in an effort to reach common ground before the Respondent went ahead with the unlawful declaration of impasse and unilateral imposition of terms in 2006.⁶⁸ The subsequent administrative law judge decision and district court injunction meant that the Union should have been able to resume bargaining without fear that the Respondent would unilaterally impose terms without reaching a genuine impasse. Thus, the Union withdrew the unusual concessions that it made under threat of the Respondent's unlawful actions.

Regarding the Respondent's vague accusation that the Union would not “confer” or engage in meaningful discussion. (R. Br., at 16–17, 47), that accusation is contradicted not only by Jeter, but also by the Respondent's own negotiators. Jeter testified that when the Respondent presented proposals, the union's negotiators would first caucus to review those proposals, and then would return to the bargaining table to discuss the Union's reaction to the proposals with the Respondent's negotiators. (Tr. 375–376.) According to Jeter, the parties would “sit and talk about the other's counter proposal and try to make, you know, a few changes in hopes of getting closer.” (Tr. 377.) Jeter's description is supported by evidence showing numerous instances in which the Union adjusted its proposals based on concerns raised by the Respondent during the parties' discussions. For example, when the Respondent complained that the existing contract language gave employees too many days to demonstrate the ability to do a new job, the Union proposed reducing the number of days from 30 or 40 days to 10 days. In response to the Respondent's stated concern that employees bid on jobs only to reject the jobs once selected, the Union pro-

posed that employees who did that would be prohibited from bidding for 1 year. When the Respondent expressed concern about seniority rules interfering with day-to-day transfers, the Union modified its seniority proposal to allow the Respondent to bypass seniority for such transfers if the person with the most seniority was unable to immediately perform the job. Jeter discussed provisions that the Respondent had included in an appendix to its contract proposal, and told the Company that the Union would consider accepting, or in some cases would accept, those provisions if the Respondent moved them to the body of the contract.

Jeter's recollection that the Union discussed proposals is echoed, rather than contradicted, by much of the testimony of attorney Roberts. He testified that the parties “exhaustively discussed” issues. (Tr. 804–805.) The proposals he discussed with the Union included those on: the standards for review of disciplinary action; seniority; the payment of shop committee members; attendance and downtime policy; the merit wage program/guaranteed wage increases; the vacation benefit; and the successorship provision. (Tr. 767 ff., Tr. 784 ff., 812–813.) Roberts testified that he and Jeter had “pretty good dialogue” about the suggestion box, and that Jeter offered a compromise under which the Union would not object to the suggestion box as long as the Respondent did not use it to undermine the Union. (Tr. 752–753.) In its brief, the Respondent argues that “the Company repeatedly modified its proposals to meet Union objections.” (R. Br. at 49), an assertion that undercuts its claim that the Union refused to discuss what its objections were.

Similarly, Tate, another of the Respondent's chief negotiators, testified about discussions with the union negotiators regarding, inter alia: the grievance procedure; the successorship provision; the implications of a provision regarding the cost of printing work; language in the no-strike/lockout provision that the Tate considered extraneous; language in the vacation proposal that Tate considered “arduous”; seniority; and, the definition of full-time employee. (Tr. 517–521, 527–528, 543–544, 552–554, 556–557, 640–641.) Regarding the final stages of bargaining, Tate conceded that “[t]he Union . . . did come up with some proposals, some ten issues that encapsulated the objectives that we had.” (Tr. 631.) Given this evidence, I find that the Respondent's assertion that the union negotiators refused to confer with the management team is not factually supported.

The Respondent also states that the Union demonstrated bad faith by refusing to supply its bargaining proposals by mail or e-mail in advance of face-to-face meetings. The record is clear that the Union declined to submit proposals by mail or e-mail, and that, throughout negotiations, the Respondent complained bitterly about this. In one letter, Wiese stated that Jeter was insisting on using “a union bargaining process that is extinct,” and “dead.” (GC Exh. 66.)

Discussion

To determine whether an employer has engaged in a course of bad-faith bargaining, the Board examines the “totality of the Respondent's conduct,” both at and away from the bargaining table.” *Mid-Continent Concrete*, 336 NLRB at 259. The conduct the Board examines includes statements made by the par-

⁶⁸ At one point the Respondent made a proposal to deny the Union any right to grieve the Respondent's decisions regarding either merit pay or the discharge of employees under the no-strike clause, but during the January 2008 bargaining sessions the Respondent altered those proposals to allow the Union to grieve such actions in a limited way. During sessions in May 2008, the Respondent agreed to: the Union's choice of color for the cover of the agreement; the Union's request that the Respondent organize its proposed contract so as to track the titles and structure from prior contracts; and, the Union's request that the Respondent move a number of its proposals out of the contract's appendices and into the body of the contract.

ty's representatives. See, e.g., *Regency Service Carts, Inc.*, 345 NLRB at 672 (in analyzing whether a party has engaged in surface bargaining, the Board considers statements made by the party's representatives); *Enertech Electrical, Inc.*, 309 NLRB at 899–900 (same). During a bargaining session in October 2007, Wiese told the Union that the Respondent's bargaining strategy was to make each successive, postinjunction, proposal worse for employees than the one before. He stated, further, that the Union should have taken the contract that the Respondent offered in June 2006 because it was the "best" the employees "would ever get" and that all subsequent proposals would be worse for employees. Not only do these statements indicate that the Respondent lacked "an open and fair mind, and a sincere purpose to find a basis of agreement," *Houston County Electric Cooperative*, supra, but also indicate, under all the circumstances present here, that the Respondent was committed to forcing employees to accept worse contract terms in retaliation for the Union's success in forcing the Company to rescind the unlawfully imposed contract and resume bargaining. Such retaliation for protected activities is evidence of bad-faith bargaining. See, e.g., *Regency Service Carts*, 345 NLRB 671, 721 (2005).

Moreover, the record shows that the Respondent generally bargained in a manner consistent with the bad-faith strategy it announced. As discussed above, the Respondent made unlawfully regressive, worsening, proposals on numerous subjects. In addition, after being ordered to return to the bargaining table, the Respondent pressed unreasonable bargaining proposals that were not part of its preinjunction position. *Hydro-Thermo, Inc.*, 302 NLRB at 993–994. (It is appropriate to examine the proposals if the examination is "not intended to measure the intrinsic worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mind set open to agreement or one that is opposed to true give-and-take.") For example, the Respondent made a proposal under which union negotiators would be subject to attendance-based discipline for attending bargaining sessions. In other proposals it sought to retain sole discretion over a broad range of employees' most important terms and conditions of employment. These are types of conduct that the Board has seen as indicating that an employer is engaged in a course of bad-faith bargaining, and which I find, given all the circumstances present here, shows that the Respondent engaged in a course of bad-faith bargaining in this case. See *Regency Service Carts*, above at 724 (seeking to retain sole discretion over important terms and conditions of employment); *Teamsters Local 122*, 334 NLRB 1190, 1254 (2001) (making regressive proposals to frustrate bargaining); *Radisson Plaza Minneapolis*, 307 NLRB at 95 (seeking to retain sole discretion over important terms and conditions of employment); *Houston County Electric Cooperative*, 285 NLRB at 1213 (making unreasonable bargaining demands); *Charlie's Oil Co.*, 267 NLRB at 769 (making proposals that lack "the slightest chance of acceptance by a self-respecting union"); see also *Summa Health System*, 330 NLRB 1379, 1393 (2000) (an employer's adamancy regarding proposals that relate to "the very essence and viability of the Union's representational status" may be considered in evaluating the employer bargaining efforts).

The Respondent also evidenced a lack of the requisite open mind by repeatedly stating that the terms and conditions of employment for unit employees had to be consistent with those for nonunion employees at the Company's other facilities. See *NLRB v. Overnite Transportation Co.*, 938 F.2d at 822 (statements that labor costs and working conditions at a union facility have to be the same as at nonunion facilities suggests a failure to bargain in good faith.). Moreover, the Respondent took actions that demonstrated the lack of an open mind in this regard. For example, it repeatedly refused to even consider providing a sickness and accident benefit simply because that benefit was not provided at its nonunion facilities.

During the latter stages of negotiations, the Respondent dropped all pretense of bargaining with the requisite open-minded "intent to adjust differences and reach an acceptable common ground." *Houston County Electric*, supra; *White Cap, Inc.*, supra. At the first negotiating sessions after it identified the "core" issues, the Respondent announced that its proposals on all those issues were already "hard and fast" and "would not change today, next week, or next year." That is tantamount to a declaration by the Respondent that its mind was closed and the Union could "take it or leave it." As the Supreme Court has observed, a party does not meet the obligation to bargain in good faith when it maintains a "take it or leave it" attitude. *NLRB v. Insurance Agents' Union*, 361 U.S. at 485. The Respondent's actions show that its mind was indeed closed. The Respondent's positions on the core issues were essentially the same in January 2009 when it declared that those positions were "hard and fast," as they had been in June 2006 when it unlawfully imposed a contract. Moreover, after the January declaration, the Respondent made no changes at all to its positions on the core issues. Cf. *Mid-Continent Concrete*, 336 NLRB at 260 (refusal to budge from an initial bargaining position can constitute evidence of bad-faith bargaining). This contrasts with the actions of the Union, which made movement, and in some instances repeated movement, towards common ground on most of the issues that the Respondent had identified as "core."⁶⁹ Moreover, the Respondent refused to consider the Union's offers of compromise on the noncore issues unless and until the Union agreed to all the Respondent's positions on the core issues. Insistence on this type of "piecemeal" bargaining, in which a party demands that certain issues be resolved before any others may be considered, is indicative of bad-faith bargaining. *Frontier Hotel & Casino*, 323 NLRB 815, 818–821 (1997); *Pillowtex Corp.*, 241 NLRB 40, 49 (1979), enfd. 615 F.2d 917 (5th Cir. 1980).

These were not the only examples of bad-faith bargaining by the Respondent during the relevant time period. As found above, the Respondent also bargained in bad faith by: refusing

⁶⁹ As discussed above, even the Respondent's witnesses conceded that the Union continued to make movement on the core issues. See Tr. 631 (Tate testifies that "[t]he Union . . . did come up with some proposals, some ten issues that encapsulated the objectives that we had, which were the ten core components and the framework of what we feel would make us successful."); Tr. 691 (Wiese testifies that the Union made proposals on all of the core issues, and made what Wiese considered "actual changes" on most of them).

to agree to a provision that recognized that the Union was the Board-certified bargaining representative and which set forth the bargaining unit definition; bypassing and undermining the Union through the use of an employee suggestion box; making unilateral changes regarding the use of an employee suggestion box and the Union's role in assisting employees with health insurance questions; and refusing to promptly provide information in response to numerous valid information requests by the Union. This is all behavior that the Board views as evidence of a course of bad-faith bargaining. See *Regency Service Carts*, supra at 718 (failure to provide, or delay in providing information); *Burrow's Paper Corp.*, 332 NLRB at 82 and 93–94 (refusing to agree to a provision that recognizes that the union is the Board-certified bargaining representative and which sets forth the unit description); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (refusal to promptly provide information requested by the Union and necessary to bargaining). *Houston County Electric Cooperative*, 285 NLRB at 1213 (“unilateral changes in mandatory subjects of bargaining, efforts to bypass the union”); *Milgo Industrial, Inc.*, 229 NLRB 25, 26, and 30 (1977) (refusal to provide, or to promptly provide, information).

The Respondent also showed bad faith by persistently attempting to force Jeter off the Union's bargaining committee. It seems that the Respondent not only wanted to dictate contract terms to the Union, but also wanted to decide who could serve on the Union's negotiating committee. As discussed above, I conclude that the effort to remove Jeter was motivated by a desire to interfere with the Union's effective representation of unit employees. Jeter was the only member of the union bargaining committee who was not an employee of the Respondent, but rather a highly experienced negotiator. Moreover, Jeter had led the Union's committee since the start of bargaining, and was therefore uniquely familiar with the complex contract negotiations involved here.

Lastly, I note that throughout negotiations, Wiese and Tate expressed their irritation at being forced to come to Iowa for what Wiese described as “a union bargaining process” that was “dead” and “extinct.” These comments sharpen the picture of bad faith that is drawn by the Respondent's other statements regarding bargaining and its numerous violations of the Act. I conclude that the Respondent's actions and statements during bargaining show that company negotiators approached their obligation to bargain as an inconvenient and time-consuming obstacle to changes that the Company was determined to make anyway, and certainly not as an opportunity to use “open and fair mind[ed]” negotiations to “adjust differences and . . . reach an acceptable common ground.” *White Cap, Inc.*, supra, and *Houston County Electric Cooperative*, supra. The Respondent did not meet its bargaining obligation by grudgingly holding a facially sufficient number of negotiating sessions, while maintaining a take-it-or-leave-it attitude about the most important issues dividing the parties, demanding that the Union capitulate quickly (rather than at a “snail's pace”), and insisting that any contract punish employees for overturning the Company's prior

unlawful implementation and otherwise exercising their right to bargain.⁷⁰

The evidence that the Respondent proffers to provide “context” for its bargaining efforts does not change my view of those efforts. The Respondent points to various moves that it made towards common ground with the Union. I find that the record does not show that the Respondent engaged in open-minded, good-faith, negotiations during the period when Wiese and Tate were lead negotiators. To the extent that Wiese and Tate made proposals that moved towards common ground, that evidence was more than out balanced by the evidence of their bad-faith bargaining tactics and statements demonstrating a closed-minded attitude. I agree that, during much of the period when Wiese and Tate were required to step aside and allow attorney Roberts to serve as the Respondent's chief negotiator, the Respondent's actions had the appearance of good-faith negotiations. However, the evidence leads me to conclude that whatever Roberts' intentions, his client refused to permit Robert's bargaining approach to run its course to either agreement or impasse. As discussed above, after the expiration of the contempt agreement requiring that Roberts serve as chief negotiator, Wiese ejected Roberts from the negotiations and disparaged his bargaining efforts as a “game” and a “party.”

The Respondent argues that the Union bargained in bad faith by withdrawing from the tentative agreements reached before the Respondent's unlawful unilateral implementation of terms, and that by such action the Union prevented the Respondent's good faith from being tested or found lacking. The Board has “considered the withdrawal of agreements previously reached, without adequate explanation, or change in bargaining circumstances . . . to be evidence of bad faith,” *Regency Service Carts*, 345 NLRB at 722; see also *White Cap*, 325 NLRB at 1169–1170 (“It is settled that the withdrawal of previous proposals does not per se establish the absence of good faith, but rather represents one factor in the totality of circumstances test.”). However, in this case there is both an “adequate explanation” and a “change in bargaining circumstances.” Bargaining circumstances were changed by Judge Rosenstein's decision condemning the Respondent's 2006 unilateral implementation of terms, and by the district court injunction requiring the Respondent to rescind the unilaterally imposed terms and return to the bargaining table. Once the district court issued its order, the Union was bargaining in “changed circumstances” because it was no longer under immediate threat that the Respondent would unlawfully declare impasse and unilaterally implement terms. Moreover, although the Respondent now argues that the Union's decision to begin negotiations afresh thwarted negotiations, the Respondent did not, at the time, object to the Union's action, but rather welcomed that action as a positive development for negotiations. Thus even if one assumes, contrary to my finding, that the Union's decision to begin negotiations

⁷⁰ The Respondent argues that the decisions finding its June 2006 declaration of impasse and unilateral implementation unlawful did not mean that the Company had to improve on its offer of June 2006. That is true, but the prior rulings (and the Act itself) did require the Respondent to negotiate with an open mind in an effort to adjust differences and reach common ground.

afresh was an instance of bad-faith bargaining, the record still does not show that the action impeded the Respondent's purported efforts at good-faith bargaining from being tested or found lacking.

The Respondent also alleges that the Union is responsible for the failure of bargaining because it refused to confer with the Respondent and refused to submit its proposals by email or mail. Regarding the purported refusal to confer, as discussed above the evidence does not support the Respondent's factual allegation. Rather the evidence establishes that the union negotiators engaged in discussions of proposals, made significant changes in their own proposals based on concerns raised by the Respondent, and discussed the Union's concerns about the Company's proposals with the Respondent's negotiators. Regarding the assertion that the Union bargained in bad faith by refusing to exchange proposals by mail or email, the Board has held that the Act entitles a party to refuse to bargain by mail and insist that bargaining take place in person. *Metta*, 349 NLRB at 1093. Therefore, by insisting that bargaining take place in person, the Union was not bargaining in bad faith, but, rather, exercising a right to good-faith bargaining that is guaranteed by the Act.⁷¹

Based on Jeter's demeanor and testimony, and the record as a whole, I credit his statements that he was trying to reach an agreement with the Respondent. Any suggestion that the Union was intentionally trying to avoid reaching a contract is rebutted in my view by the abundant evidence that the Union repeatedly made substantial movement designed to address the Respondent's concerns on a wide range of subjects and did so even when the Respondent failed to make responsive movement or otherwise demonstrate any receptivity to the prospect of "settling differences and arriving at an agreement." *Mid-*

⁷¹ The Respondent also asserts that Jeter demonstrated bad faith by failing to discuss the Respondent's October 16, 2008 letter with the full bargaining committee in advance of the January 14 to 16 bargaining session. That letter identified core issues, transmitted what the Respondent called its "Last Comprehensive Proposal," warned that the company was "very near, if not at, the end of its rope," and threatened to follow up the Last Comprehensive Proposal with one that was worse for employees. The record shows that, during the interim between October 16 and January 14, Jeter and the Respondent engaged in correspondence discussing the October 16 letter, but that Jeter did not meet with the unit employees on the bargaining committee or discuss the Respondent's letter with them. On January 14, the Respondent criticized Jeter for not reviewing the October 16 correspondence with the union committee prior to that day. Jeter explained that the press of his responsibilities at 18 other facilities had prevented him from meeting sooner with the union committee to go over the October 16 correspondence. The record shows that, during the January 14 to 16 negotiations, the Union made movement towards the Respondent's positions on a range of issues, including most of the "core" issues, but that the Respondent did not agree to, or even make a counterproposal regarding, any of those union proposals. The record does not demonstrate that Jeter's explanation for the delay in discussing the October 16 correspondence with the employee-members of the committee was untrue, or that this was a case of bad faith or intentional delay. To the contrary, given the proposals the Union made during the January 14 to 16 meetings, I find that the Union's handling of the October 16 letter had neither the intent, nor the effect, of impeding bargaining and did not prevent the Respondent's purported good faith from being tested.

Continent Concrete, 336 NLRB at 259. Among the subjects about which the Union made movement, and in some instances repeated movement, towards common ground were: wages, successorship, vacation benefits, sickness and accident benefits, short-term disability benefits, sick pay, bereavement policy, drug testing, safety equipment, lead persons, contract dates, seniority, overtime, retirement benefits, and healthcare benefits. During negotiations the Respondent also raised an idea for finding common ground on merit pay—i.e., combining efficiency or profit-based compensation with some minimum guaranteed pay increase. The evidence shows that the Union desired, and was attempting to find a way to reach, a new collective-bargaining agreement with the Respondent. I note in this regard that Roberts the brief writer finds himself at odds with Roberts the witness and former lead negotiator. Contrary to the accusation in the Respondent's brief, Roberts' testimony was that the Union "put honest effort into the negotiations," and had "made considerable progress," (Tr. 804–805, 806.) Moreover, Wiese, in a letter sent to the Union in March 2009, complained that the negotiations were proceeding at "a snail's pace"—on its face, a complaint not that no progress was being made, but that the Respondent considered the pace of that progress to be unacceptably slow. Lastly, the motivation that the Respondent's brief ascribes to the Union is somewhat implausible since, if successful, such a strategy would mean that unit employees would be forever denied even cost-of-living increases to wages—hardly an appealing outcome for the Union, especially given that the Respondent was no longer proposing wage cuts.

For the reasons discussed above, I find that from April 2007 onward, the Respondent engaged in an overall course of bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act.

10. Declaration of impasse and unilateral implementation

The complaint in Case 18–CA–19008 alleges that on about April 1, 2009, the Respondent violated Section 8(a)(5) and (1) by declaring impasse and unilaterally changing employees' terms and conditions of employment (including those regarding disciplinary action, probationary period and employment, seniority, health and pension benefits, vacations, holidays, hours of work and overtime, drug testing, life and disability insurance, rest periods, and sickness and accident pay) without having reached a bona fide impasse in negotiations, and after failing to bargain in good faith with the Union. (Complaint (III) pars. 10, 11, 15, and 16.)

Facts⁷² and Discussion

The Board has held that when, as here, "parties are engaged in negotiations for a collective-bargaining agreement," the employer's obligation to refrain from unilateral changes regarding mandatory subjects "extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *Register-Guard*, 339 NLRB 353, 354

⁷² Most of the facts relevant to a discussion of the 2009 declaration of impasse have already been discussed above. In particular, see, supra, sec. II,C,3 and 4 and E, 8, and 9.

(2003), quoting *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). The employer's obligation to refrain from such changes survives the expiration of the contract, and failure to meet that obligation is a violation of Section 8(a)(5) and (1) of the Act. *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005); *Made 4 Film, Inc.*, 337 NLRB 1152 (2002).

As found by Judge Rosenstein and the Board, the Respondent unlawfully declared impasse and unilaterally implemented terms in June 2006. It rescinded the unilaterally implemented terms and returned to bargaining in April 2007 only after being ordered to do so by the district court. Approximately 2 years later, the Respondent declared impasse for a second time and, on April 1, 2009, it once again unilaterally implemented terms of employment. The terms that the Respondent unilaterally implemented on April 1 included many that are mandatory subjects for purposes of collective bargaining—including those relating to disciplinary action, probationary periods, seniority, health and pension benefits, vacations, holidays, hours of work and overtime, drug testing, life and disability insurance, rest periods, and sickness and accident benefits. As it did with respect to the unilateral implementation in 2006, the Respondent now contends that the 2009 unilateral implementation is lawful because the parties had reached a good-faith impasse in negotiations.⁷³ As the party asserting impasse, the Respondent has the burden of establishing that impasse existed. *Coastal Cargo Co.*, 348 NLRB 664, 668 (2006); *L.W.D., Inc.*, 342 NLRB 965 (2004); *Outboard Marine Corp.*, 307 NLRB at 1363. For the reasons discussed below, the Respondent has not satisfied its burden of establishing impasse, and I conclude that it violated the Act by declaring impasse in 2009, and unilaterally implemented conditions on April 1, 2009.

A valid impasse may be arrived at only when the parties have reached deadlock *after bargaining in good faith*. *Don Lee Distributor*, 322 NLRB 470, 492 (1996). Thus, no valid impasse can exist in the presence of bad-faith bargaining. *United Contractors Inc.*, 244 NLRB 72, 73 (1979), enfd. mem. 539 F.2d 713 (7th Cir. 1976), cert. denied 429 U.S. 1061 (1977); see also *Quality House of Graphics*, 336 NLRB 497, 510 (2001); *PRC Recording Co.*, 280 NLRB 615, 634 (1986); *Pease Co.*, 251 NLRB 540, 546 (1980); *Kellwood Co. v. NLRB*, 434 F.2d 1069, 1074 fn. 6 (8th Cir. 1970), cert. denied 401 U.S. 1009 (1971). Even assuming that negotiations in this case had reached a deadlock, that would not constitute a bona fide impasse since the Respondent engaged in an unlawful course of bad-faith bargaining and that unlawful conduct was a cause of

any arguable deadlock. The Respondent not only engaged in a general course of bad-faith bargaining, but also in multiple individual instances of bad-faith bargaining. Those individual instances included its action, in October 2008, to alter the parties' bargaining procedure in an effort to impede further progress and manufacture a deadlock.

Putting the Respondent's bad-faith bargaining aside, the impasse defense still fails because the Respondent has not shown that the parties had reached a deadlock. The Board defines bargaining impasse as the "situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement.'" *Royal Motor Sales*, 329 NLRB 760, 761 (1999), enfd. sub nom. *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001), quoting *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). It is "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. . . . 'Both parties must believe that they are at the end of their rope.'" *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), quoting *PRC Recording Co.*, 280 NLRB at 635; *Patrick & Co.*, 248 NLRB 390, 393 (1980), enfd. mem. 644 F.2d 889 (9th Cir. 1981). The employer's "duty to bargain . . . is not negated by the possibility or even the substantial probability that the Union would not agree to the [employer's] proposed economic concessions." *Stephenson-Yost Steel*, 294 NLRB 395, 396 fn. 5 (1989), quoting *NLRB v. Eltec Corp.*, 870 F.2d 1112 (6th Cir. 1989). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant considerations are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, above at 478. In this case, the Respondent has failed to show that the Union was at the end of its bargaining rope when company officials declared impasse and implemented terms on April 1. See *AMF Bowling Co.*, supra. To the contrary, the evidence shows that the Union continued to make substantive movement towards common ground on key issues, even while the Respondent insisted that the parties were at impasse. During the bargaining sessions from January 14 through 16, 2009, the Union moved towards the Respondent's positions on issues including successorship, vacation benefits, sickness and accident benefits, drug testing, lead person policy, short term disability, seniority, and health insurance premiums. The Union also withdrew its proposal on pay rates, and suggested a compromise under which it would forgo the larger wage increase it had been seeking in exchange for a smaller, but immediate, wage increase. The Union also suggested a compromise regarding merit wages, under which it would agree to an efficiency or profit-based compensation plan, if that was coupled with some minimum guaranteed pay raise. Nevertheless, at the end of that session the Respondent stated that the parties were at impasse, and in a letter dated March 14, Wiese ignored the Union's movement and asserted that the January "session was a complete deadlock and waste of time = IMPASSE." When Jeter asked to continue bargaining, Wiese claimed that Jeter's

⁷³ The Respondent argues, in the alternative, that even if an impasse did not exist the Union's purported bad-faith bargaining "constitutes a valid defense to allegations of bad faith on the part of the employer, as well as an independent ground for the employer to implement its final offer." R. Br. at 52-53. As discussed above, the Respondent has failed to show that the Union was bargaining in bad faith, or that the Union's actions during bargaining precluded a test of the Respondent's good faith. To the contrary, the evidence showed that the Union wanted to reach a new agreement, and bargained in good faith to find common ground.

request “confirm[ed] . . . we are at Impasse.” It is telling evidence of the Respondent’s close-minded attitude towards negotiations that it would attempt to recast a request for further bargaining as confirmation of impasse.

The parties met for the next—and it turns out final—series of bargaining sessions on March 17, 18, and 19. During these last meetings significant differences remained between the parties, but the Union made movement towards common ground on many of those issues, including successorship, vacation benefits, overtime pay, seniority, sickness and accident benefits, retirement benefits, and healthcare benefits. Even Wiese testified that during these final sessions the Union made “actual changes” on 6 of the 10 core issues, and Tate conceded that the Union “did come up with some proposals, some ten issues that encapsulated the objectives that we had.” Nevertheless on March 18, Wiese asserted that “it appears we have been at impasse for quite some time.” After negotiations broke off on March 19, the Wiese sent the Union a letter, dated March 27, in which he formally declared impasse and stated that the Respondent planned to implement certain parts of its final offer effective April 1, 2009.

The changes that the Union made during the March bargaining sessions demonstrated a willingness on its part to remain flexible in order to reach a new agreement. See *Royal Motor Sales*, 329 NLRB at 762 (no valid impasse when the union had made a dead-lock breaking proposal only 2 days earlier), *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981) (employer’s declaration of impasse invalid where the union had significantly reduced its wage demand only 2 weeks earlier and the union never stated it was unwilling to make further concessions).⁷⁴ Given the Union’s demonstrated willingness to make further compromises on major issues, the Respondent was “required to recognize that negotiating sessions might produce other or more extended concessions.” *Royal Motor Sales*, 329 NLRB at 772, quoting *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966), enfg. 152 NLRB 1526 (1965). “Rather than explore the possibilities raised” by the Union’s offers of compromise during the January and March sessions, the Respondent “rushed to declare impasse and implement” its own proposals. *Royal Motor Sales*, 329 NLRB at 763. This action “precluded further exploration of possible tradeoffs and foreclosed any finding that good-faith bargaining exhausted the prospects of reaching an agreement.” *Id.* “[H]aving never fully tested the finality of the Union’s bargaining position, Respondent is in a poor position to argue that further negotiations would have been futile.” *Towne Plaza Hotel*, 258 NLRB at 78.

In communications leading up to the April 1 unilateral implementation, the Union informed the Respondent that the Union was not at its final position. Jeter did this repeatedly, including at the conclusion of the January 2009 sessions, and in a March 27 email following the close of the March 2009 ses-

sions. Moreover, Jeter backed up his statements by making offers of compromise on major issues during the final days of bargaining. Under the circumstances present here, Jeter’s “protestations that negotiations have not reached impasse provide substantial evidence to support . . . [a] finding of no impasse.” *Royal Motor Sales*, 329 NLRB at 773, citing *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, 924 F.2d 1078 (D.C. Cir 1991). This is true even though Jeter and the Union had not yet offered specific additional compromises, but only declared the willingness to make further compromises and continue bargaining. *Grinnell Fire Protection System*, 328 NLRB 585, 585–586 (1999) (no impasse where employer expressed unwillingness to move from its position and the union had not yet offered specific concessions, but the union had declared its intention to be flexible, sought another bargaining session, and indicated a willingness to involve a Federal mediator), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001).

In reaching my conclusion, I considered the fact that, on March 19, the Union bargaining committee, having offered numerous compromises over 3 days, indicated that it had no other proposals at that time, left the bargaining table, and declined to return for a period that lasted some minutes. This brief standoff does not constitute impasse. The fact that parties are unable to make further movement towards an agreement on a particular day does not mean that they are at a bona fide bargaining impasse. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1171 (2006); see also *Dust-Tex Service*, 214 NLRB 398, 405 (1974) (employee’s comment that the parties were at impasse “for now,” means they are “not yet in agreement” as of that meeting, not that they had reached a bona fide impasse); *Royal Motor Sales*, 329 NLRB at 762 (“As a recurring feature in the bargaining process, impasse is only a temporary deadlock . . . ‘which in almost all cases is eventually broken, through either a change of mind or the application of economic force.’”).

In finding the absence of a valid impasse, I also considered that 2 years had passed since the district court ordered the Respondent back to the bargaining table and there were still significant issues dividing the parties. That does not weigh in favor of finding impasse in this case since the Respondent had bargained in bad faith during that 2-year period. Although there is no way of knowing for sure, it is certainly possible that an agreement would have been reached, or close at hand, had the Respondent approached bargaining with an open mind and sincere purpose to find common ground, or refrained from the individual acts of bad-faith bargaining found above. To assume that good-faith bargaining would have resulted in an impasse, and to permit the Respondent to succeed with its impasse defense on that basis, would reward the Respondent for the uncertainty caused by its violations of the Act. As the Supreme Court has observed, the “most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); see also *Planned Building Services*, 347 NLRB 670, 674 (2006) (Board resolves uncertainty caused by unlawful actions against the wrongdoer); see also *Regency Service Carts*, 345 NLRB at 717 (Respondent did not meet its obligation to bargain in good faith even after meeting over the course of 2-1/2 years).

⁷⁴ Tate dismisses the changes made by the Union in March 2009 as “miniscule.” Tr. 632. A review of the particulars of those changes shows that most of them were substantive and meaningful. See supra, sec. II.C.3. This is not to say that the Respondent could not reasonably refuse to agree to the Union’s new proposals, but merely that those proposals demonstrated that the Union remained flexible.

For the reasons discussed above, I find that, the Respondent violated Section 8(a)(5) and (1) by declaring impasse and, on April 1, 2009, unilaterally implementing a contract over the objections of the Union and in the absence of a good-faith impasse.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union as the exclusive collective-bargaining representative of its unit employees: from April 4, 2007, through July 2008, when it attempted to undermine the Union's status as collective-bargaining representative by refusing to agree to a recognition clause; in May and June 2007 by using an employee suggestion box to bypass, and otherwise undermine, the Union; in 2007 and 2008 when it engaged in regressive bargaining regarding seniority and layoff/recall; from July 2007 to January 28, 2008, when it engaged in regressive bargaining regarding a no-strike/no-lockout provision; from August 23, 2007, to May 2008 when it engaged in regressive bargaining regarding a drug testing proposal; during the period beginning on August 7, 2007, when it engaged in regressive bargaining regarding a safety committee; by insisting in its proposals upon retaining essentially unfettered control over a broad range of mandatory subjects of bargaining; by failing to provide, and/or by unreasonably delaying the provision of, information that the Union requested regarding employee suggestions, alleged union intimidation, the Respondent's merit wage system proposal, the Respondent's other facilities (labor costs, working conditions, and product lines), the definition of full-time employment for purposes of health insurance coverage under the Respondent's proposals, and the impact on unit employees of the changes unilaterally implemented by the Respondent on April 1, 2009; in May and/or June 2007 by unilaterally installing an employee suggestion box and soliciting employee suggestions for, inter alia, changes to terms and conditions of employment; on April 5, 2007, by unilaterally changing the practice regarding union assistance to unit employees with health insurance problems or questions; starting on October 16, 2008, by altering the parties' bargaining procedure in order to impede progress towards an overall agreement; from April 2007 onward, by engaging in an overall course of bad-faith bargaining; by declaring impasse and, on April 1, 2009, unilaterally implementing a contract (which included unilateral changes relating to disciplinary action, probationary period and employment, seniority, health and pension benefits, vacations, holidays, hours of work and overtime, drug testing, life and disability insurance, rest periods, and sickness and accident pay) over the objections of the Union and in the absence of a good-faith impasse.

4. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith, I recommend that the Respondent be ordered to meet, on request, with the Union and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if agreement is reached, embody such agreement in a signed contract.

The Respondent should be ordered to cease and desist from unilaterally changing the terms and conditions of employees in the bargaining unit without first bargaining in good faith with the Union to a valid impasse. Upon the Union's request, the Respondent should be required to retroactively rescind the unilateral changes and to make whole its employees for any losses of wages, vacation credits, holiday pay, health insurance, sickness and accident pay, and other benefits, they may have incurred as a result of the unilateral changes, as set forth in *Ogle Protective Services*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971). The Respondent should also be required to remit all payments it owes to retirement, health care and other funds, with interest as provided in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and to make the employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf. 661 F.2d 940 (9th Cir. 1981). The Respondent should be required to continue such contributions and otherwise honor the terms of the collective-bargaining agreement that expired on June 12, 2006, until it negotiates in good faith with the Union to a new contract or a bona fide impasse. *Crest Beverage Co.*, 231 NLRB 116, 120 (1977).

In addition to the usual remedies, the General Counsel asks that the Respondent be ordered to reimburse the Union for its bargaining expenses and both the Union and the General Counsel for all costs and expenses incurred in trial preparation and litigation of this case before the National Labor Relations Board. In *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the Board discussed the standards to be applied in deciding whether to grant an award of bargaining expenses. The Board stated that for the "vast majority" of bad-faith bargaining violations it will suffice to rely on a bargaining order accompanied by the usual cease-and-desist order and posting of notice. *Id.* at 859. It is necessary to go further than that, and award bargaining expenses, the Board stated, "[i]n cases of unusually aggravated misconduct . . . where it may fairly be said that respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." *Id.*, quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969). In such circumstances, the Board explained, "an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that

were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.” “[T]his approach,” the Board stated, “reflects the direct causal relationship between the respondent’s actions in bargaining and the charging party’s losses.”

Prior to October 16, 2008, the Respondent engaged in a course of bad-faith bargaining, but I conclude that that conduct was not so aggravated as to warrant the imposition of the bargaining expenses remedy. During that period the Respondent failed to bargain with the required open mind and serious intent to reach common ground, and also engaged in multiple specific bad faith bargaining violations—including attempts to undermine the Union’s status as collective-bargaining representative, regressive bargaining intended to frustrate open-minded consideration of compromise, unilateral changes, and failure to provide requested information in a timely manner. Moreover, the Respondent was determined that the Union’s success in forcing the Company to rescind the 2006 unilaterally imposed contract and resume good-faith bargaining would redound to the detriment of unit employees by leading to a contract that was even worse for employees than the one that the Respondent unlawfully imposed in 2006. Despite the unlawful conduct, however, the record does not show that, pre-October 16, the Respondent was generally intent on avoiding any agreement at all, but rather that it was bargaining with a closed mind. The Respondent’s pre-October 16 unlawful behavior was an impediment to progress in negotiations, but it did not completely preclude such progress, and tentative agreements were reached on a number of issues during that time period.

I conclude that as of the Respondent’s letter of October 16, 2008, the Respondent’s bad-faith bargaining became aggravated enough to require an award of bargaining expenses to the Union. As detailed above, it was at that point that the Respondent changed the parties’ bargaining procedure with the intention of avoiding further bargaining progress and speeding the parties towards deadlock. During negotiations after the October 16 letter, the Union repeatedly made proposals that moved in the direction of the Respondent’s positions on key issues, only to have the Respondent negotiators maintain an attitude of willful blindness to the Union’s efforts at compromise. Instead of recognizing the Union’s movement, and weighing possible compromises, the Respondent repeatedly asserted that no progress was being made and that the parties were already at impasse. The Respondent’s tactics reduced the negotiations to a sham, wasted the Union’s time and resources,

and undercut the economic strength of the Union in a way that cannot be addressed through the standard remedies. I note, moreover, that this is the second time during negotiations for the same collective-bargaining agreement that the Respondent has unlawfully declared impasse and imposed terms on employees. Thus, the Respondent has not been deterred by the standard remedies, and it is imperative that the Union be provided with relief that will protect it against the economic consequences stemming from the Respondent’s recalcitrance. Without such relief, the Respondent’s recalcitrance would be rewarded in that the Respondent will have succeeded in using unlawful conduct to compromise the Union’s economic strength at the bargaining table.

In *Frontier Hotel & Casino*, supra, the Board also discussed the standards under which the General Counsel’s request for an award of litigation expenses is to be considered. The Board stated that an order requiring a respondent to reimburse such expenses is appropriate “only where the defenses raised by the respondent are ‘frivolous’ rather than ‘debatable.’” 318 NLRB at 860, quoting *Heck’s, Inc.*, 215 NLRB 765 (1974). The Board also stated that “a respondent’s defenses will be considered debatable if they turn on issues of credibility.” 318 NLRB at 860; see also *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998) (authority to grant an award of litigation costs exists under both Section 10(c) of the Act and the Board’s inherent authority to control its own proceedings through an application of the “bad-faith” exception to the American Rule). Regarding numerous allegations contained in the complaints, the Respondent offered not only debatable defenses, but persuasive ones. *Houston County Electric Cooperative*, 285 NLRB at 1217 (declining to grant litigation expenses where some of the defenses were not only nonfrivolous but meritorious). In addition, the Respondent’s defenses to the two most consequential allegations in this case—i.e., the allegations of a course of bad-faith bargaining, and unilateral implementation of terms in the absence of a bona fide impasse—both implicate questions of credibility. The Respondent defended against those allegations by arguing that the Union’s own bad faith in bargaining created a situation in which the Respondent’s good faith could not be tested. I rejected those arguments in part because I credited Jeter’s testimony that the Union was trying to reach common ground and that its bargaining actions were motivated by good-faith reasons, not, as the Respondent asked me to infer, by a desire to drag out negotiations indefinitely.

[Recommended Order omitted from publication.]