

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CSC HOLDINGS, LLC and CABLEVISION SYSTEMS
NEW YORK CITY CORPORATION, a Single Employer,**

Respondent,

-and-

**COMMUNICATION WORKERS OF AMERICA,
AFL-CIO,**

Charging Party

Case 02-CA-085811
Case 02-CA-090823

Case 29-CA-097013
Case 29-CA-097557
Case 29-CA-100175
Case 29-CA-110974

**ANSWERING BRIEF ON BEHALF OF RESPONDENTS
CSC HOLDINGS, LLC and
CABLEVISION SYSTEMS NEW YORK CITY CORPORATION
IN OPPOSITION TO THE EXCEPTIONS OF THE
GENERAL COUNSEL AND THE CHARGING PARTY**

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Cablevision Systems New York City Corporation and CSC Holdings, LLC (collectively, “Respondent,” “Cablevision,” or the “Company”), respectfully submit this Answering Brief in opposition to the Exceptions of the General Counsel (“GC”) and the Charging Party, Communications Workers of America, AFL-CIO (“Charging Party”) to the December 4, 2014 Decision of Administrative Law Judge Steven Fish (“the ALJ”), and in support of Cablevision’s defenses to the Amended Second Consolidated Complaint (hereinafter, the “Complaint”).¹

INTRODUCTION

The ALJ’s decision correctly dismissed the surface bargaining allegations against Cablevision. Between May 2012 and February 2015, Cablevision engaged in hard but lawful bargaining for a first contract with the Union, Local 1109 of the Communications Workers of America (hereinafter the “Union”), which represents more than 250 employees at Cablevision’s facilities in Brooklyn. The parties ultimately reached a comprehensive and fair collective bargaining agreement on February 13, 2015, which was then overwhelmingly ratified by the Union’s membership and became effective on February 14, 2015 (the “Agreement”).²

Despite the exhaustive record of productive and successful bargaining in this case, culminating in the Agreement itself, the GC and the Charging Party raise a series of baseless exceptions to the ALJ’s finding that Cablevision did not engage in surface bargaining. The bargaining record wholly belies any assertion that Cablevision had no intent to reach an agreement. To the contrary, Cablevision proposed nearly all of the 30 bargaining sessions during the period reflected in the trial record, participated in seven days of mediation, and never refused

¹ All citations to the “Complaint” refer to, collectively, the Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing (General Counsel Ex. (“GCX”) 1, No. 2(N)), and the subsequent “Notice to Amend Second Consolidated Complaint and to Further Consolidate Cases” (GCX 1, No. 3(E), which is incorporated by reference in the Second Consolidated Complaint.

² Cablevision is concurrently submitting its motion to the Board to receive in evidence as a post-trial exhibit a copy of the February 14, 2015 collective bargaining agreement.

to meet with the Union. After the parties reached an agreement to discuss non-economic issues first, it was Cablevision that ultimately prompted the Union to provide a comprehensive wage proposal. Throughout the bargaining process, Cablevision made good faith proposals and counterproposals on all subjects, never “rigidly adhered” to any supposedly “predictably unacceptable” demands, and entered a total of 45 Tentative Agreements—on issues including Recognition, Grievance, Arbitration, Union Security, Management Rights, Payroll Deduction of Union Dues and Performance of Bargaining Unit Work—during the relevant period. Cablevision promptly responded to the Union’s many information requests, including requests for extensive data regarding non-unit employees, and produced more than 1,000 pages of documents. At a critical juncture, after the parties failed to reach an agreement during mediation, the Union substantially withdrew from the process, and the negotiations were salvaged only by Cablevision’s dogged efforts to get the Union to the table. Cablevision continued to work diligently over many months to find compromises with the Union that would and ultimately did produce the Agreement on February 14, 2015—an Agreement that neither the Charging Party nor the GC mentions in more than 200 pages of exceptions and briefing.

The bargaining history in this case includes the very facts that the Board has consistently found to evidence good faith bargaining: numerous sessions, tentative agreements, flexibility—in the form of modified proposals and counterproposals—and an expressed and demonstrated desire to reach agreement. *See, e.g., Garden Ridge Mgmt. Inc.*, 347 NLRB 131, 131, 134 (2006) (employer engaged in good faith bargaining where “agreement was reached during negotiations on many substantive contract provisions,” including 28 non-wage related tentative agreements); *Litton Sys.*, 300 NLRB 324, 330 (1990), *enfd on other grounds*, 949 F.2d 249 (8th Cir. 1991), *cert. denied* 503 U.S. 985 (1992) (concluding employer bargaining in good faith in light of

“frequent (53) meetings with the Union, its extensive explanations for its positions and extensive examination of the Union’s proposals, its agreement with the Union on at least 23 topics, [and] its numerous significant concessions”). Indeed, the evidence of good faith in this record far exceeds what the Board routinely finds sufficient to preclude a finding of surface bargaining. *See, e.g., K-B Res., Ltd.*, 294 NLRB 908, 908 (1989) (employer bargained in good faith where there was no refusal to meet with the union at reasonable times and places; the parties met six times within four months; and the employer “modified or withdrew” several proposals “in response to concerns expressed by the Union”).

Thus, it is not at all surprising that the ALJ rejected each and every one of the surface bargaining allegations. Specifically, the ALJ concluded that Cablevision had not refused to meet at reasonable times (ALJ Op. 213-14), had not refused to discuss economic terms (*id.* at 215), had not insisted on changing the scope of bargaining unit (*id.* at 225), had not “rigidly adhered” to “predictably unacceptable” proposals (*id.* at 227-28), had not refused to discuss Union Security (*id.* at 237), had not engaged in regressive bargaining (*id.* at 238), had not withdrawn from any Tentative Agreements (*id.* at 242), had not refused to discuss seniority or safety (*id.* at 243, 245), and had not delayed in providing wage information (*id.* at 249, 251). As to each of these allegations, the ALJ found that the record evidence contradicted the claim of bad faith, and therefore properly recommended dismissing the surface bargaining claim.

The GC and the Charging Party nonetheless raise a series of exceptions to the ALJ’s decision—but what does *not* appear in their Exceptions Briefs is just as telling. Neither the GC nor the Charging Party takes exception to the ALJ’s conclusion that Cablevision did not (1) fail to meet at reasonable times; (2) insist on changing the scope of the bargaining unit; (3) engage in regressive bargaining; (4) refuse to discuss Union Security; or (5) withdraw from a Tentative

Agreement. Given the absence of record support for these allegations—which represent *more than half* of the surface bargaining allegations set forth in the Complaint—the GC and the Charging Party have prudently chosen to abandon them. As explained below, the handful of remaining surface bargaining allegations are likewise baseless and easily refuted by the overwhelming evidence of good faith bargaining in this case.

Desperate to salvage their surface bargaining case, the GC and the Charging Party spin an elaborate narrative about an alleged plot to avoid an agreement, as revealed by the Company’s alleged conduct away from the bargaining table. The centerpiece of this story—and it is nothing more than a story—is the testimony of Simon Gomez, a former Cablevision supervisor who, at the time of the hearing, had a lawsuit pending against the Company seeking \$5.6 million in damages. Even a cursory review of the record confirms that the much-vaunted Gomez testimony is smoke-and-mirrors rather than smoking gun. The ALJ properly excluded Gomez’s statements under the collective bargaining privilege—but even if that testimony was admitted in full, it would not alter the conclusion that Cablevision bargained in good faith at all times and on all subjects.

In sum, the record fully supports the ALJ’s conclusion that Cablevision bargained in good faith. Accordingly, the ALJ’s order recommending dismissal of the surface bargaining allegation should be affirmed.

ARGUMENT

I. The ALJ Correctly Determined That Cablevision Bargained in Overall Good Faith (GC’s Exceptions 2-8; Charging Party’s Exceptions 1-2)

From May 2012 until February 2015, Cablevision bargained for a first contract with the Union. (JX 1.) The record of successful bargaining in this case completely refutes the allegation that Cablevision bargained with no intent to reach agreement. Instead, Cablevision worked

diligently to find the common ground that ultimately produced the ratified Agreement. (ALJ Op. 57, 245-50, 251-54.) The ALJ's conclusion should be affirmed.

The Board's charge on appeal is to determine whether Cablevision bargained with the Union with the intent to reach a collective bargaining agreement. *See NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960) (“[T]he essential thing is . . . the serious intent to adjust differences and to reach an acceptable common ground.”). That inquiry is governed by Section 8(d) of the National Labor Relations Act, which obliges both parties to bargain in good faith, but also makes clear that “such obligation does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). Either party is thus “entitled to stand firm by a bargaining proposal legitimately proffered.” *K-B Res., Ltd.*, 294 NLRB 908, 908 (1989) (internal quotation marks omitted). “[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952); *see also Logemann Bros. Co.*, 298 NLRB 1018, 1020-21 (1990) (dismissing allegation of surface bargaining). For their part, the Charging Party and the GC concede that the ALJ applied the appropriate legal standards in evaluating their allegations of surface bargaining. (Charging Party's Br. in Support of Exceptions 15; GC's Br. in Support of Exceptions 23-24; ALJ Op. 251-54.)

As detailed below, the record fully supports the ALJ's conclusion that Cablevision engaged in lawful, hard bargaining throughout the negotiation process. During the period reflected in the trial record, the parties met 30 times in bilateral bargaining sessions and participated in seven days of mediation with George Cohen, who was then the Director of the

Federal Mediation and Conciliation Service (“FMCS”).³ The parties reached a mutual agreement to discuss non-economic issues first, and later in the negotiations, it was Cablevision that prompted the Union to provide a comprehensive wage proposal, which the Union failed to do until March 2013.⁴ The parties reached Tentative Agreements on 45 subjects, including the issues of Recognition, Union Security, Payroll Deduction of Union Dues, Management Rights, No Strike, Grievance, Arbitration, and Performance of Bargaining Unit Work, among others. Cablevision responded promptly to all of the Union’s multiple and ever-changing information requests, even where the requests pertained to non-unit employees, and provided a total of more than 1,000 pages of documents.⁵

Because Cablevision led the efforts that ultimately resulted in the parties reaching the Agreement, the surface bargaining allegations should be dismissed.

A. Cablevision Bargained In Good Faith On All Subjects (GC’s Exceptions 9-10; Charging Party’s Exceptions 2-3)

According to the Bill of Particulars, Cablevision engaged in surface bargaining by “refus[ing] to discuss economic proposals” when “the Union never agreed to delay discussion of economic issues.”⁶ (GCX 1, No. 3(A); GCX 1, No. 3(F).) The ALJ properly dismissed this claim based on the Union’s statements and actions in numerous bargaining sessions,

³ (JX 1 ¶¶ 16, 27, 38, 51, 64, 73, 84, 96, 104, 115, 124, 147, 159, 171, 182, 196, 206, 220, 236, 247, 260, 270, 281, 295, 306, 338, 345, 357, and 388; and JX ¶¶ 315-16; JX 197; Tr. Vol. 14, p. 2114.)

⁴ (ALJ Op. 214-22; Tr. Vol. 4, p. 661-63; Tr. Vol. 13, pp. 1983, 1989-93, 1999-2000; Tr. Vol. 14, pp. 2140-52, 2240-41, ; JX 1 ¶ 277; JX 32, p. 6; JX 33, p. 3; JX 75, p. 24; JX 76, p. 9; JX 108, p. 3; JX 109, p. 2; JX 128; JX 136, p. 16; JX 137, p. 12; JX 170, pp. 7-9; JX 171, pp. 1, 5.)

⁵ (ALJ Op. 245-51; JX 1 ¶ 14; JX 10; JX 1 ¶ 32; JX 22; JX. 1 ¶ 37; JX 25; JX 1 ¶ 57; JX 35; JX 1 ¶ 93; JX 60; JX 1 ¶ 164; JX 104; JX 1 ¶ 265; JX 166; JX 1 ¶ 303; JX 153; Tr. Vol. 13, pp. 1977, 1981, 1989; Tr. Vol. 14, pp. 2128-39.)

⁶ The GC’s Exceptions to the ALJ’s decision on this allegation are themselves contradictory. In Exception 9, the GC excepts to the ALJ’s finding that Cablevision did not refuse to discuss economic issues. In Exception 10, the GC refers to Cablevision’s “discussion or lack of discussion” of economic issues, thereby acknowledging that Cablevision actually did engage in discussion of economic issues, but asserting that those discussions were in bad faith, a claim not made in the Complaint or in the Bill of Particulars.

demonstrating that the Union agreed to discuss non-economic issues first.⁷ (ALJ Op. 215-17.) Notably, this arrangement did not mean that the parties were barred from making economic proposals—which, as the ALJ recognized, both parties did—but rather that those proposals would be *discussed* at a future point. (ALJ Op. 216-18.) The allegation that Cablevision refused to discuss economic issues is further belied by the fact that, even before the Union finally stated its intent to begin bargaining over economics in February 2013, it was Cablevision that urged the Union to make a full wage proposal. (ALJ Op. 220; Tr. Vol. 14, pp. 2134-35, 2143-51, 2240; JX 136, p. 16; JX 137, p. 12.) The parties continued thereafter to discuss all issues, including economic issues, until they reached a complete Agreement.

1. Cablevision and the Union Agreed To Defer Negotiation Regarding Economic Issues

The ALJ’s findings of fact on this issue are in accordance with the testimony and exhibits presented during the hearing, including the bargaining session notes taken by both parties. For example, the contemporaneous notes of Alan Model (then Cablevision’s chief negotiator) from the parties’ first bargaining session, on May 30, 2012, reflect that the parties “agree to discuss non-economic first before economic.” (RX 26; Tr. Vol.13, p. 1991.) In accord with the agreement, the Company’s August 15, 2012 bargaining notes reflect that Model stated, “We’ll deal with economic driven proposals at a later time.” (JX 32, p. 6; Tr. Vol.13, pp. 1999-2000.) No objection to this statement appears in the Union’s August 15 notes, which state that, “some are economic and *we’ll hold off.*” (Tr. Vol. 4, pp. 661-63; JX 33, p. 3 (emphasis added).)

⁷ The ALJ erroneously found that the Union’s chief negotiator, William Gallagher, “made it clear that the agreement between the Union and Respondent to defer economics could be changed at any time by the Union.” (ALJ Op. 222.) But the ALJ further concluded—in keeping with both parties’ bargaining notes—that the Union did not actually demand to discuss any economic issues until February 2013, “when [Gallagher] sought to discuss [the Union’s] wage proposal and its attempt to bring the Brooklyn employees to the pay level of the replacement employees.” (ALJ Op. 222; Cablevision’s Br. in Support of Exceptions, pp. 105-06.)

In fact, both the Charging Party and the GC now concede that the parties had an agreement to defer negotiation regarding economic issues. The GC states that, “[t]he Union was initially willing to engage Respondent’s desire to discuss non-economic proposals first, so long as there was bargaining progress.” (GC’s Br. in Support of Exceptions 27; *see also* ALJ Op. 215; RX 26; Tr. Vol.13, p. 1991.) The GC further admits that the Union’s chief negotiator, William Gallagher, informed Model at the August 15, 2012 bargaining session that, “the Union agreed to leave economic issues for a later time, and if there was no progress, the Union would want to discuss the economic proposals.” (GC’s Br. in Support of Exceptions 29.) The Union similarly admits that Gallagher “*agreed* to proceed with non-economic items initially, but made it clear that *if* there was not enough progress he *would* want to talk about economics.” (Charging Party’s Br. in Support of Exceptions 26-28 (emphasis added).)

The record does not support the GC’s and Charging Party’s assertions that, on October 12, 2012—when Jerome Kauff took over as Cablevision’s lead negotiator—the Union demanded that the parties move on to economic issues. On October 12, 2012, Kauff stated that he had been informed that the parties had agreed to leave economics to the end. (ALJ Op. 215.) Gallagher then responded, “We were proceeding that way, but we need to see movement or something getting done, *otherwise*, we’re *going* to start wanting to talk about economics.” (ALJ Op. 215; Tr. Vol. 3, p. 375 (emphases added).) At no point did Gallagher testify that, on October 12, 2012—or on any other date prior to February 28, 2013—he demanded to move to economic issues right away. Rather, Gallagher testified that his statement to the Company was conditional: “if” progress was not made, the Union was “going to” want to talk about economics. (Tr. Vol. 3, pp. 373, 375, 384.) The Union’s agreement to defer discussion of economic issues was later reflected in its communications with its members. In a December 4, 2012 e-mail, Christopher

Calabrese, the Executive Vice President of CWA Local 1109, informed the bargaining unit that the Union's negotiators wanted to "finalize issues which we think are easy," and "[o]nce we get past these important issues, we can finally start working on economics." (ALJ Op. 216; RX 19.)

2. Cablevision Never Refused To Discuss Economic Issues With the Union

The parties' agreement to defer discussion of economic issues did not, of course, preclude either side from making proposals that had economic impact, or requesting discussion of such items. At the November 7, 2012 bargaining session, for example, the Union provided a list of items it wished to discuss, including the Audit department and Grade 13 upgrades, which could be construed as having economic impact. (ALJ Op. 216.) There is no evidence that the Company refused to discuss any of those items. In addition, on November 27, 2012, the Company made a proposal entitled "Applicable Company Benefits," which included jury duty and bereavement leave, items that were part of the economic proposals the Union had previously submitted. (ALJ Op. 216.)

The parties' agreement was again manifested in the bargaining session on December 5, 2012. Both the Company's and the Union's bargaining notes reflect that, in discussing the Audit department, Cablevision reiterated its understanding that discussion of economic proposals would be deferred. (JX 75, p. 24; JX 76, p. 9.) According to the Union's bargaining notes, Kauff said, "in so far that it is [an] economic proposal we will treat them as a group if it is [an] economic proposal." (JX 76, p. 9.) Once again, the record reflects no objection by the Union. The ALJ correctly construed this exchange as a discussion of whether the Audit department was an economic or non-economic issue and therefore should be deferred, not a refusal by Cablevision to discuss the Audit department at all. (ALJ Op. 216.)

The GC and the Charging Party put forward an entirely different account of the December 5, 2012 bargaining session, one that lacks any citation to trial testimony. According to this alternative narrative, Kauff “pushed off the discussion” of the Audit department, and Cablevision “would not discuss it.” (GC’s Br. in Support of Exceptions 30; Charging Party’s Br. in Support of Exceptions 29.) In fact, however, Gallagher testified that Kauff explained why he thought the Audit department was an economic issue, and Gallagher did not recall whether they continued to talk about the subject at that session or at a later session. (Tr. Vol. 3, pp. 377-79.) Neither side’s notes reflect any objection by the Union to Kauff’s explanation, much less a demand to address the issue at that point. (JXs 75-76.)

The parties’ discussion of economic versus non-economic issues at the December 20, 2012 bargaining session is further evidence of their agreement. During the December 20 session, Kauff addressed several issues with economic implications, stating, “there’s a number of proposals that are outstanding that are on the border of economic and non-economic. We’d like to talk about them now.” (ALJ Op. 70, 216; JX 86 p. 4; JX 87 p. 2.) The parties then discussed work schedules, overtime assignments, swapping of tours, job bidding transfers, travel and entertainment reimbursement. (ALJ Op. 70, 217; JX 86 pp. 4-15; JX 87 pp. 2-4.) Later in the same session, Kauff asked whether there were any other outstanding, non-economic proposals to discuss; in response, the Union raised the issues of union security, payroll deduction of union dues, and employee discounts. Kauff expressed his view that these issues had economic implications and said he would discuss them at a later session—and, as the GC concedes, the parties went on to discuss these issues less than three weeks later, on January 9, 2013.⁸ (JX 86, p. 18; JX 87, p. 5; Tr. Vol. 13, p. 380; ALJ Op. 73; GC’s Br. in Support of Exceptions 31.) The

⁸ The Charging Party completely skips over the January sessions in its brief, moving from December 20, 2012 to February 11, 2013. (Charging Party’s Br. in Support of Exceptions 29-30.)

Union did not ask to address any other items or make any statements that could be construed as a request to discuss wages or any other economic issue.⁹ (JX 86, p. 18; JX 87, p. 5; Tr. Vol. 14, pp. 2144-45.)

The parties' continued bargaining in January 2013 provides further support for the ALJ's conclusion that Cablevision never refused to bargain on economic issues. In a January 3, 2013 memo to the bargaining unit members, Calabrese stated that the Union was "happy to report that we came to agreement on the following issues: Employee Product Agreement (Free Cable), Employee services program (discounts), Commuter Program Policy, College Savings Plan, Savings Bond Program, Bethpage Federal Credit Union@ TD Bank Policy, Flexible Spending Account Policy, Wellness Program, Group Legal Plan, and Employee Verification Program." (RX 20.) Calabrese also reported that the parties "reached Agreement on Recognition of the Union, Complete Agreement, and Work Assignment Staffing and Leaves of Absence." He concluded by indicating that, although there were many issues still outstanding and the bargaining was moving slower than the Union liked, "incremental progress" was being made. (RX 20, p. 2.) Nothing in the January 3 memo remotely suggests that Cablevision had refused to discuss economics or any other subject.

Moreover, throughout the January 2013 bargaining sessions, the Company never refused to discuss economic issues, and the Union continued to act in accordance with the parties' agreement to defer discussion of major economic issues, including wages, to a later date. (ALJ Op. 73, 216-18.) For example, the Union's January 3, 2013 bargaining notes reflect that Cablevision referred to night wage differentials as an economic issue. (JX 95, p. 4; Tr. Vol. 4,

⁹ Indeed, the GC's description of the December 20 bargaining session implicitly acknowledges the parties' agreement by stating, "Gallagher responded that the Union had a few outstanding proposals that they viewed as *non-economic* and should *therefore* be addressed." (GC's Br. in Support of Exceptions 30 (emphasis added).)

pp. 669-70.) The bargaining notes contain no objection or demand by the Union that the issue of night differential be negotiated immediately. Cablevision did not, as the GC asserts, refuse to discuss night differentials on January 3; rather, it rejected the Union's initial proposal and explained that the night differentials already being paid were generous. (ALJ Op. 71, 217; JX 94, p. 9-10; JX 95, p. 4.) Cablevision obviously was not cutting off all further discussion of night differentials, since it offered to send to the Union a written summary of the Company's current policy. (ALJ Op. 71, 217.) An offer to provide information about a current practice, to be used in further discussions about that practice, is hardly evidence of a "take it or leave it attitude." (GC's Br. in Support of Exceptions 31.) If, as the GC asserts, rejecting a union's initial proposal on a subject is tantamount to a refusal to bargain, an employer would run the risk of committing an unfair labor practice every time it rejects a proposal to change a current practice. The GC fails to cite any authority—because none exists—in support of this extreme proposition.

At the January 16, 2013 bargaining session—which the GC's Brief skips entirely—Kauff said, "[w]e've gone through outstanding matters to date that are non-economic, and we believe we've responded to you on all of those matters. There are a number of things we are waiting for you on, and we think it would be important for you to know what we are waiting for to avoid confusion." (JX 108, p. 3; JX 109, p. 2.) Yet again, the Union did not attempt to raise any economic items or disavow the parties' understanding to defer economics. In fact, Gallagher specifically asked, "[d]oes the Company have more proposals that are non-economic?" (JX 108, p. 4.)¹⁰

¹⁰ The fact that the Company said it needed time to digest the Union's proposal on medical benefits, first submitted at the January 17, 2013 negotiating session, is far from a refusal to bargain over this issue. (JX 116, p. 9; JX 117, p. 4.) The January 30, 2013 bargaining notes of both the Union and the Company reflect that Cablevision referred to the Union's proposal on medical benefits and stated that it made sense for the parties to

Indeed, as late as the February 5, 2013 bargaining session, which was after the January 24, 2013 filing of the instant surface bargaining charge, Gallagher again acknowledged the parties' earlier agreement to defer discussion of economic issues. He told Kauff that:

You stated we had an informal agreement—be careful with those terms. Alan Model said he'd rather deal with non-economics first. *I said something about how I can agree to that and let's see how we do.* Today is February 5 and that was May 30—we're not doing too well. Let me finish, you spoke for 5 minutes, I never speak that long. You said you think we're close on these issues—are we close on Discharge?

(JX 128 (emphasis added); ALJ Op. p. 217). Gallagher here explicitly admitted that the parties had agreed in May 2012 to defer discussion of economics. As the ALJ observed (ALJ Op. p. 217), moreover, Gallagher did not specifically request even on February 5th to bargain on wages, benefits or any other economic subject. Rather, as the notes make clear, Gallagher moved on to the subject of Discharge, a non-economic subject. The General Counsel's and Charging Party's continued pursuit of this baseless allegation is a futile and desperate case of grasping at straws.

3. The Union Finally Submitted a Complete Wage Proposal Following a Request By Cablevision

That the Union finally submitted a complete wage proposal *in response to a request from Cablevision* is further evidence that the Company did not refuse to bargain on economic issues.

On February 11, 2013, the Union raised the issue of the wage rate being paid to the 22 permanent replacements hired on January 30, 2013. (ALJ Op. 218.) Far from refusing to discuss this economic issue, Kauff explained the Company's rationale for the replacements' pay rate and

start getting ready to discuss economics. Neither set of notes contains any objection by the Union to this reference to the prior arrangement to defer economic issues. (JX 123, p. 12; JX 124; Tr. Vol. 4, pp. 670-74.) Cablevision clearly did not refuse to discuss the Union's medical benefits proposal, and in fact asked the Union to provide information the Company needed to prepare a counterproposal on medical benefits. (JX 123, p. 12; Tr. Vol. 14, p. 2142.) The Union failed to provide the information at the next session on February 5, 2013. (JX 128, p. 2; JX 129, p. 1.) Once again, the evidence in this case consistently reflects nothing other than good faith bargaining and a mutual understanding to defer discussion of economic issues.

told the Union that the Company expected the non-economic issues to be resolved soon, at which point the parties could turn to economic items.¹¹ (ALJ Op. 218; JX 136, p. 13; Tr. Vol. 14, pp. 2146-47, 2240.) Kauff also asked the Union to tender a comprehensive proposal on compensation, stating: “[W]e’d like to be better prepared when we get to a discussion about wages. It would be helpful if you could think about that and whether you can give us a wage proposal at our next meeting or tell us when you can give it to us. We’re looking for specific thoughts on grades, promotional increases, any wage progressions, on annual increases, and term/duration [as it is tailored to wages].” (JX 136, p. 16; JX 137, p. 12; Tr. Vol. 14, pp. 2146-47, 2240.) The Union acknowledged that it had not yet provided a comprehensive wage proposal and still was not ready to do so.¹² (JX 136, p. 16; JX 137, p. 12; Tr. Vol. 14, pp. 2147-49, 2240.)

It was not until the February 25, 2013 bargaining session that the Union for the first time submitted what could be termed a wage proposal (Union Proposal Nos. 54-55). (ALJ Op. 218; JX 1 ¶ 246; JX 150; JX 155 (Union Proposal Nos. 54 and 55); Tr. Vol. 14, pp. 2149-51.) But even these proposals failed to include wage rates, a wage progression, or a proposal for wage increases, as Cablevision had requested. Nonetheless, the Company did not refuse to discuss these proposals, and the parties in fact discussed the Union’s two proposals, as well as another economic issue—double time for the seventh day of work—during the February 25 session. (ALJ Op. 218; Tr. Vol. 14, pp. 2149-50; JX 149, pp. 5-8, 12-14.)

¹¹ The GC’s statement that Kauff “dismissed” Gallagher’s comment and moved on to another subject is incorrect; Kauff actually asked Gallagher if they could discuss discipline and discharge and Gallagher responded “be my guest.” (JX 136, p. 12-13.)

¹² The Union’s December 31, 2012 e-mail, which requested non-unit wage information “[i]n order to make a wage proposal,” thereby acknowledged that the Union had not yet made a comprehensive wage proposal. (JX 92; Tr. Vol. 14, p. 2146.) The Union’s Proposals No. 1 and 19, made in May 2012, were not comprehensive wage proposals, since they addressed only retroactive pay, not what the Union was proposing going forward, and did not contain any specific number or percentage increase. (JX 15; Tr. Vol. 13, pp. 2147-49, 2239-40.)

On February 28, 2013, the Union changed course and claimed, for the first time, that there was no agreement to address non-economic issues first. (JX 157, p. 15; JX 158, p. 9; Tr. Vol. 14, p. 2143.) But even as Gallagher railed against the notion of an agreement, he admitted that “while Model had suggested leaving economic matters until the end, the Union had taken the position that *it would see how negotiations progressed*”—thereby acknowledging that, at a minimum, the Union had acceded to a practice of deferring discussion of economic issues. (GC’s Br. in Support of Exceptions, p. 33 (emphasis added); JX 157, p. 15; JX 158, p. 9.) Kauff testified, and the ALJ correctly observed, that the Union’s disavowal of the parties’ tacit agreement was “academic” at that point, because the parties had already begun to discuss economic issues. (Tr. Vol. 14, p. 2143; ALJ Op. p. 222.)¹³ During the same session, Kauff responded to the Union’s wage proposals by rejecting them, while explaining that the rejection “doesn’t mean we aren’t talking about it, and if you want to talk about it further, we’ll talk about it further.” (ALJ Op. 220; JX 157 p. 17, GC’s Br. in Support of Exceptions 34.) As the ALJ concluded, this cannot be construed as a refusal to bargain over economics. (ALJ Op. p. 220.) Finally, Kauff reiterated the Company’s request for a comprehensive wage proposal, and the Union responded that it would provide one when it received the information it had requested that day. (ALJ Op. 220.)

At the parties’ next session, on March 6, 2013, “the Union conceded that its February 25th proposals (Union Proposal Nos. 54-55) were not a full-fledged wage proposal.” (ALJ Op. 220.) When Kauff asked how the February 25th proposals worked with the Union’s initial proposals, and what wage rates the Company was supposed to implement on the first day of the proposed

¹³ Along with this “disavowal,” the Union requested additional information it said it needed in order to make a comprehensive wage proposal, even though almost two months had passed since the Union received the wage information it had requested on December 31, 2012. (JXs 157-58; Tr. Vol. 14, p. 2135-37.) Cablevision provided the additional information at the next bargaining session on March 6, 2013. (JX 1 ¶ 265; JX 166; Tr. Vol. 14, p. 2137.)

agreement, Calabrese did not have an answer and Gallagher stated “the next time we meet, you will know where we are coming from” with respect to wages. (Tr. Vol. 14, p. 2150; 2240-41 JX 164, p. 8; JX 165, pp. 3-4.)

Finally, on March 14, 2013, the Union made a complete wage proposal (Union Proposal No. 56), which replaced all prior wage-related proposals. (JX 1 ¶ 277; JX 173; JX 170, pp. 7-9; JX 171, pp. 1, 5; Tr. Vol. 14, p. 2151.) The Union’s wage proposal sought substantial, locked-in wage increases based on length of service and job classification, as well as large bonuses. (JX 173 (Union Proposal No. 56); Tr. Vol. 14, p. 2152.) Although the Union had requested and received information regarding the compensation model for non-unit employees, nothing in Union Proposal No. 56 resembled the compensation model used in the rest of the Cablevision footprint. Moreover, Union Proposal No. 56 required wage increases substantially greater than those provided to the employees in the rest of the footprint, and sought to have those increases guaranteed for the term of the contract, a protection not enjoyed by other Cablevision employees. (Tr. Vol. 14, pp. 2152-53; *compare* JX 173 (Union Proposal No. 56), *with* JX 228, p. 3.)

At the April 9, 2013 bargaining session, Cablevision submitted a comprehensive counter-proposal in the form of a complete collective bargaining agreement, which included proposals on wages, medical, retirement, paid time off, and numerous other economic issues, as well as the remaining non-economic items and all 43 Tentative Agreements that the parties had previously reached. (JX 188, pp. 1-2; JX 189, p. 1; JX 1 ¶ 300; JX 89; Tr. Vol. 14, pp. 2153-54.) The GC contends that, in rejecting the surface bargaining allegation, the ALJ ignored the “suspicious timing” of the Company’s proposal, which was made three weeks before the Consolidated Complaint in this matter was issued. The GC appears to contend that the timing is “suspicious” simply because the Company was aware that a complaint might or might not be issued on the

surface bargaining charge that had been filed on January 24, 2013. (*See* GCX 1, No. 1 (I).) The bargaining record refutes this (already dubious) contention, because it demonstrates that the timing of the Company’s wage proposal resulted from the fact that both parties acted in accordance with their agreement to defer discussion of economic issues, and the Union itself did not make a comprehensive wage proposal until March 14, 2013.¹⁴ That the Company chose to respond to the Union’s proposal by tendering a complete contract is further evidence of its intention to reach an agreement.

The Union did not respond to the Company’s proposal at the bargaining session on April 16, 2013, stating that it needed more time to review the proposed collective bargaining agreement. (JX 193, p. 4; JX 194, p. 4.) The Union then cancelled the session scheduled for April 18. (JX 195.) Despite the absence of a counter-proposal on wages, Cablevision submitted a revised wage proposal at the parties’ next bilateral session on July 31, 2013. (JX 1 ¶ 343; JX 222 (Company Proposal No. 36); Tr. Vol. 14, p. 2154.)

On August 15, 2013—a full four months after receiving the Company’s initial wage proposal—the Union made a counter-proposal on wages. (JX 1 ¶ 351; JX 228 (Union Proposal “Salary”); Tr. Vol. 14, pp. 2155-57.) This proposal, which dramatically altered the Union’s position, sought the same wages as the employees in the rest of the footprint—as opposed to the non-footprint based wage increase sought previously in Union Proposal No. 56. (JX 228; Tr. Vol. 14, pp. 2239-45.) As bargaining continued, the parties gradually moved toward agreement on this subject, and eventually reached a mutually satisfactory conclusion in the Agreement.

* * *

¹⁴ The GC contends that the ALJ “placed undue weight on the wage proposal made by Respondent eleven (11) months after bargaining began”—but conveniently ignores the fact that the Union itself did not make a comprehensive wage proposal until ten months after bargaining began. (GC’s Br. in Support of Exceptions 36.)

In sum, the ALJ correctly determined, from the evidence in the record, that the Union and Cablevision agreed to defer their discussion of economic issues at the beginning of the negotiations, that Cablevision never refused to discuss economic issues and that it was Cablevision that ultimately had to prod the Union into making a comprehensive wage proposal, to which the Company promptly responded. Cablevision continued to be the driving force in moving the discussion of wages forward up to and through the trial, which continued after the close of the record in the trial and finally led to the signed and ratified Agreement.

B. Cablevision Made Good Faith Proposals And Counterproposals On All Subjects And Did Not Rigidly Adhere To So-Called “Predictably Unacceptable” Demands (GC’s Exceptions 11-21; Charging Party’s Exceptions 2, 5-9)

The GC and the Charging Party in their exceptions accuse Cablevision of “rigidly adher[ing]” to “predictably unacceptable” proposals on (1) Performance of Bargaining Unit Work; (2) Management Rights; (3) Discipline and Discharge; and (4) Contracting. (GC’s Br. in Support of Exceptions, p. 27; Charging Party’s Br. in Support of Exceptions 19-21.) The ALJ carefully examined the bargaining record and correctly determined that Cablevision bargained in good faith on all four of these issues and did not “rigidly adhere” to any “objectively unacceptable” proposals. (ALJ Op. 225-34.)

It must first be noted that judging whether a party violated Section 8(a)(5) or Section 8(b)(3) of the Act by assessing the content of specific bargaining proposals and whether they are “predictably unacceptable” violates Section 8(d) of the Act and the pertinent decisions of the United States Supreme Court.¹⁵

¹⁵ Section 8(d) defines collective bargaining as follows:

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

Addressing the then-new Section 8(d), early after enactment of the Taft-Hartley amendments to the Act, the Supreme Court, in its 1952 decision in *NLRB v. American National Insurance Co.*,¹⁶ explained that:

In 1947, the fear was expressed in Congress that the Board “has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.” . . . Section [8(d)] contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.

Thus it is now apparent from the statute itself that . . . the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

343 U.S. at 404 (quoting H. R. Rep. No 245, 80th Cong., 1st Sess. 19 (1947)) (other footnotes omitted). Subsequently, in a case alleging that a labor union had bargained in bad faith in violation of the Act, the Supreme Court re-affirmed the rule expressed in its *American National Insurance Co.* decision:

[I]t remains clear that §8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements. *Labor Board v. American National Ins. Co.*, 343 U.S. 395, 404. . . . Discussion conducted under [the §8(d)] standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take. . . . But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences. . . .

thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, **but such obligation does not compel either party to agree to a proposal or require the making of a concession**

29 U.S.C. § 158(d) (emphasis supplied).

¹⁶ 343 U.S. 395, *aff'g* 187 F.2d 307 (5th Cir.), *denying enforcement in relevant part to* 89 NLRB 185 (1950).

NLRB v. Insurance Agents' International Union, 361 U.S. 477, 487-488 (1960), *aff'g* 260 F.2d 736 (D.C. Cir.), *denying enforcement to* 119 NLRB 768 (1957).

The particular contract proposal in dispute in *American National Insurance*, was a management rights clause that the employer had offered as a counterproposal to the union's demand for unlimited arbitration. The Board had held that the employer had failed to bargain in good faith when it persisted in its management rights proposal after the union declined to accept it. 343 U.S. at 408. In effect, the Board had determined that a proposal on a mandatory subject of bargaining that was unacceptable to the union could not be insisted upon by the employer in good faith bargaining. The Supreme Court ruled to the contrary:

Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. . . .

343 U.S. at 408-409.

In the present case, paragraph 12(b) of the Complaint alleges in relevant part that Cablevision “engaged in surface bargaining with no intent of reaching agreement” by “rigidly adhering to proposals that are predictably unacceptable to the Union.” (GCX 1, No. 2(N), ¶12(b)(4).) This allegation flouts the holding of the Supreme Court that good faith bargaining within the meaning of Section 8(d) of the Act cannot be assessed by the Board looking to whether a party's proposal is acceptable or unacceptable to the counterparty in the negotiations. That kind of assessment is unavailable to the Board under the Act. Thus, the GC's and the Charging Party's exceptions, which assert that Cablevision rigidly adhered to “predictably

unacceptable” proposals on Performance of Bargaining Unit Work, Management Rights, Discipline and Discharge, and Contracting, exceed the statutory authority of the Board to find a failure to bargain in good faith, and they should be summarily dismissed.

The GC, in its Bill of Particulars, re-casts the allegation as a claim that the four proposals at issue to which Cablevision had allegedly “rigidly adhered” were “objectively unacceptable to ‘any self-respecting’ union.” (GCX 1, No. 3(F).) This formulation is not meaningfully different, and it too runs afoul of Section 8(d) of the Act and the seminal Supreme Court decisions discussed above. Nor is the insertion of a “no self-respecting union” element, itself requiring a necessarily subjective analysis, in accord with Board law, as discussed *infra*.

Indeed, judging a party’s good faith by forecasting whether a proposal is “acceptable” is not only beyond the Board’s statutory charter, it is beyond the Board’s *capacity* and the ability of any other would-be seer—as this case demonstrates. There are any number of reasons why a party in bargaining might accept contract terms that another party would not, including the strength of its bargaining position, the importance it places on the subject, and whether it is willing to compromise that issue for concessions on other, more important topics. Given that, it is reasonable as well for a bargaining party to propose—and press for—a proposal that a different union in a different negotiation might not accept. There likewise is no rule of law under which a party must abandon a proposal after it is first rejected—Section 8(d) states just the opposite—and contracts often are achieved precisely because one party eventually wins the other over to its position. In this very case, many of the proposals that are “predictably unacceptable” in the GC’s personal view were accepted in a form not greatly dissimilar from the original. Additionally, the very fact that other unions have accepted proposals that the GC “predicts” no “self-respecting” union would shows the error in any such “acceptability” standard.

It likewise is not permissible for the Board to transgress the bounds of Sections 8(d) and 8(a)(5) by assessing, as it has in some cases, whether purportedly objective factors indicate that a party's proposals "taken as a whole" constitute bad faith bargaining. *See, e.g., Public Serv. Co. of Okla.*, 334 NLRB 487, 487-488 (2001). The Board should overrule all prior decisions by which it has devised standards—whether objective or subjective—for sitting in judgment of the substance of a party's proposals, because the Supreme Court has twice held the Board cannot do so under Section 8(d).

In any event, even if the Board were to engage in the improper task of judging the content of Cablevision's proposals, none of those proposals—whether assessed subjectively or (supposedly) objectively—came close to being so "unacceptable" as to constitute evidence of bad faith, and Cablevision did not "rigidly adhere to" or "insist upon" any such proposal or demand. (ALJ Op. 227-28.)

Rather, the bargaining record makes clear that Cablevision modified its proposals and made counterproposals in response to the Union's own proposals and positions in an effort to reach agreement. In the course of this give and take, the Union actually *accepted* two of the four allegedly "unacceptable" proposals—performance of bargaining unit work and management rights. (ALJ Op. 92, 108.) On the two remaining topics—contracting and discipline and discharge—the parties made substantial progress toward an agreement during the period of the negotiations that ended with the close of the trial. (ALJ Op. 228-29, 233-34.) These issues continued to be the subject of productive negotiations until the parties reached an overall Agreement. Because the bargaining record belies any assertion that Cablevision ran afoul of the "predictably unacceptable" standard urged by the GC and the Charging Party, the ALJ's conclusion was correct.

Further analysis of current Board law reinforces the point. As noted previously, the Board will not “decide that particular proposals are either ‘acceptable’ or ‘unacceptable’ to a party.” *Reichhold Chemicals, Inc.*, 288 NLRB 69, 69 (1988) (“*Reichhold II*”), *enf. denied in part on other grounds*, 906 F.2d 719 (D.C. Cir. 1990). Instead, it “examine[s] proposals when appropriate and consider[s] whether, on the basis of *objective factors*,” a demand made during negotiations “is *clearly* designed to frustrate agreement.” *Id.* (emphasis added). In *Reichhold II*, the Board made clear its view that it may consider the objective “acceptability” of a party’s proposals *only* where there is “intransigence or insistence on extreme proposals which is evidence of an overall intent to frustrate the collective-bargaining process.” *Id.* at 71.¹⁷ The Board has, moreover, held on many occasions that an employer’s refusal to concede on a proposal fundamentally opposed to a union’s position in bargaining is privileged by Section 8(d) of the Act. *See, e.g., Alcan Cable West*, 214 NLRB 236, 243 (1974).

In applying the “objectively unacceptable” doctrine, the Board evaluates a party’s bargaining conduct taken as a whole, including whether that party has made significant concessions in the course of bargaining or reached tentative agreements on other issues. In *Larsdale, Inc.*, 310 NLRB 1317 (1993), for example, the Board rejected the ALJ’s finding that the employer had engaged in surface bargaining by adhering to its proposals regarding wages, health insurance, and pensions. The fact that the employer “made a number of significant concessions” demonstrated “a flexible good-faith approach to bargaining,” and its “failure to make . . . concessions” on other issues did not manifest an intent to avoid agreement. *Id.* at 1320

¹⁷ The Board further explained that it must “strive to avoid making purely subjective judgments concerning the substance of proposals.” *Id.* at 69. Under these standards, the *Reichhold II* Board undertook an analysis of the employer’s conduct and found, based on objective factors consistent with the ALJ’s evaluation of the bargaining here, lawful hard bargaining. Moreover, the General Counsel’s claim that the proper test to apply to determine whether a proposal is evidence of bad faith bargaining is set forth in *Tomco Communications*, 220 NLRB 636, 636 (1975) (GC’s Br. in Support of Exceptions, 48-49), is simply incorrect, as that case pre-dates and is in consistent with the Board’s 1985 and 1988 landmark decisions in *Reichhold I* and *Reichhold II*.

(internal quotations omitted); *see also Garden Ridge Mgmt., Inc.*, 347 NLRB 131, 131 & n.5 (2006), *aff'd* 349 NLRB 1108 (2007) (rejecting surface bargaining allegation where parties entered into tentative agreement on 28 issues).

In a concurring opinion in *APT Medical Transportation, Inc.*, 333 NLRB 760 (2001), (cited extensively by the Charging Party at page 46 of its Exceptions Brief), Member Liebman made two critical observations, directly applicable here, in support of her conclusion that, although there were factors in that case indicating the employer's lack of good faith, on balance the evidence did not support a finding of surface bargaining. First, she opined that—despite the employer's lack of movement on management rights, no-strike, arbitration, and union security—a concession it made on seniority, and tentative agreements reached on rotation of overtime, supervisory duties, the definition of part-time employees, and job bidding “weigh[] against an inference that the Respondent had no serious interest in reaching an agreement.” *Id.* at 762. Second, and according to Member Liebman, perhaps most importantly, the fact that the parties had not yet started bargaining economics, “where compromises might well have been made[,] is a factor weighing against the inference of bad-faith bargaining.” *Id.*

Both factors relied upon by Member Liebman are present in Cablevision's bargaining: (1) concessions by Cablevision and tentative agreements reached (many of both, in fact); and (2) the allegations of bad faith are supposedly evidenced by various Cablevision proposals that were made before the parties, by agreement, had reached economic subjects, where further compromise often occurs, and indeed in this case, where breakthroughs were ultimately made

that produced the Agreement that is even further proof contradicting the claim that Cablevision was determined to avoid reaching an agreement.¹⁸

The Board continues to look at how the parties progress in negotiations, not where the parties began or how long it takes them to reach an agreement. For example, in *Leader Communications Inc.*, 361 NLRB No. 28 (2014) and 359 NLRB No. 90 (2013), the Board rejected the Judge's finding that the employer had engaged in surface bargaining by adhering to its initial proposals on contract duration, wages and nonwage benefits.¹⁹ The fact that the parties reached tentative agreements on a number of non-economic issues and the employer, in its final offer, acceded to the union's position on just cause in seniority demonstrated, as Member Johnson observed, "the Respondent's intent to reach an agreement." 361 NLRB No. 28, slip op. at 1, n.1, citing *Larsdale, Inc.*, 310 NLRB 1317, 1320 (1993) (employer did not engage in bad-faith bargaining where it failed to make concessions with respect to wages, health insurance, pensions, proposed elimination of grievance arbitration, dues checkoff, seniority job bidding, super-seniority for union officials, paid time for grievance processing and successors and assigns clause but *did* make a number of significant concessions on other issues).²⁰ See also *Garden Ridge Mgmt., Inc.*, 347 NLRB 131, n.5 (2006) (General Counsel failed to prove that employer

¹⁸ In fact, the Board has expressly recognized that, "it is not unusual at the outset of negotiations for the parties, both union and management, to make demands which they realize, in all likelihood, will not be included in the final agreement." *I. Bahcall Indus., Inc.*, 287 NLRB 1257, 1261 (1988).

¹⁹ The Board in *Leader Communications* did affirm the ALJ's finding that the employer had engaged in bad faith bargaining by repudiating an overall tentative agreement without good cause, when it belatedly claimed its negotiator did not have full authority to enter into the tentative agreement, a situation not present in this matter.

²⁰ In *Larsdale*, the Board specifically rejected the ALJ's finding of bad faith based on the substance of the employer's initial proposals, stating "[t]he judge's findings are based essentially on the content of the Respondent's proposals. The judge said that they were 'predictably unacceptable.' In our view, the proposals were an aspect of hard bargaining, and such conduct, standing alone, does not constitute bad-faith bargaining." 310 NLRB at 1319, n. 5 (citing *Reichhold Chemicals*, 288 NLRB 69 (1988)).

bargained without an intention to reach agreement where parties entered into tentative agreement on 28 articles), *aff'd. on reconsideration*, 349 NLRB. 1108, 1108-09 (2007)).

In this case, the bargaining record clearly demonstrates that Cablevision adopted a flexible, good-faith approach and made diligent efforts to reach agreement on as many issues as possible. Indeed, Cablevision led the efforts that resulted in 45 Tentative Agreements on critical issues, including Recognition, Grievance, Arbitration, Union Security, Management Rights, Dues Check-off, and Performance of Bargaining Unit Work. (ALJ Op. 81.) The parties reached a total of 35 Tentative Agreements prior to February 2013, the end of the certification year. (ALJ Op. 81.) In many cases, the parties reached a tentative agreement only after the Company made significant concessions to the Union.

The allegation of surface bargaining is further and strikingly contradicted by the Union's own communications from its Executive Vice President, Christopher Calabrese, to the Union's members on what was occurring at the bargaining table during the same time that Cablevision is alleged in the Complaint to have been bargaining in bad faith. For example, in August 2012, December 2012, and January 2013, Calabrese repeatedly admitted that the bargaining was productive, that the Company was providing requested information, that issues were being substantively discussed, and that progress was being made; and, he reported that agreements on many subjects had been reached. (Respondent Exhibit ("RX") 85, August 15, 2012; RX 84, December 6, 2012; RX 86, p. 1, December 20, 2012; RX 20, January 3, 2013.)

Faced with a clear record of good-faith bargaining, the Charging Party attempts to downplay the importance of the Tentative Agreements by citing *Southern Tours, Inc.*, 167 NLRB 363, 363-64 (1967), *enfd* 401 F.2d 629 (5th Cir. 1968) and *Southwest Chevrolet Corp.*, 194 NLRB 975, 975 n.1 (1972), *enfd sub nom. Behrendt v. NLRB*, No. 72-1216, 1972 WL 3090 (7th

Cir. Nov. 21, 1972) for the proposition that reaching a contract does not negate a prior refusal to bargain. But these cases are clearly inapposite, since the employers in both *Southern Tours* and *Southwest Chevrolet Corp.* argued that the subsequent collective bargaining agreement rendered the prior surface bargaining allegation moot. Here, Cablevision asserts only that the collective bargaining agreement is compelling evidence that the Company bargained with the intent to reach such an agreement.

The Charging Party's reliance on *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 608-09 (7th Cir. 1979), and *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 50 (2d Cir. 1974), is also misplaced. In those cases, the Board found that the employers' proposals were evidence of bad faith bargaining because, taken as a whole, they would have put the employees in a worse position than they would have been without a union and damaged the union's ability to function as a bargaining representative. But the proposals in those cases were extreme and far-reaching and bear no resemblance to anything proposed by Cablevision in this case.²¹ More importantly, Cablevision compromised on nearly every subject that was on the table, thereby propelling the bargaining process toward an overall Agreement.

²¹ In *Wright Motors*, the employer's proposals included: (1) a guarantee of an "open shop," limiting the union's right to secure members and check off authorizations, (2) a management rights clause, *not subject to the grievance procedure*, which gave the company exclusive control over hours, work rules, and production, and allowed the company to shut down its business without regard to the effect on employees, (3) a no-strike, no-lockout clause which required the union to fine any employee who engaged in a prohibited work interruption, granted the company the right to seek an injunction and damages against the union without arbitrating the claim, made all union members liable individually and collectively for damages, and required the union to waive its legal right to remove a suit from state to federal court, (4) an article on arbitration providing only limited and permissive arbitration, and (5) a provision allowing the company to set hourly wage rates and to grant promotions at its sole discretion. 603 F.2d at 608 n.5. In *Continental Insurance Co.*, the finding of bad faith was predicated on (1) the company's refusal to recognize the union as the sole and exclusive bargaining representative unless the union agreed not to organize or represent other company employees, (2) the company's insistence that *arbitrators* of grievances be *picked exclusively by the company* and (3) wage, vacation and severance pay proposals substantially less generous than the benefits provided to employees before the union was certified. Cablevision's proposals are not in any way comparable to the proposals at issue in these cases.

Thus, the totality of the bargaining belies the claim of surface bargaining, and the GC's and Charging Party's narrow focus on a few proposals does not withstand scrutiny. Indeed, a close examination of the course of bargaining as to each of the four proposals at issue lends strong support to the ALJ's conclusion that the Company's proposals were not "predictably unacceptable" when made, and none was "rigidly adhered to" throughout the bargaining process.

1. Performance of Bargaining Unit Work

Cablevision could not have rigidly adhered to a "predictably unacceptable" proposal on Performance of Bargaining Unit Work because, after considerable give and take, the parties reached a Tentative Agreement on the issue in March 2013—even before the Consolidated Complaint was issued in April 2013. (Tr. Vol. 14, pp. 2176-77; Tr. Vol. 4, pp. 614-15; JX 1, ¶ 279; JX 175 (Union Proposal 2(a).) The parties' Agreement makes clear that Cablevision's bargaining on this subject cannot reasonably be seen as predictably unacceptable.

Cablevision made its initial proposal on this subject on July 2, 2012. (ALJ Op. 85; JX 23; Tr. Vol. 13, pp. 2009-10.) The proposal sought the right to assign bargaining unit work to supervisory and non-unit employees, as the Company had always done. This proposal was not at all unusual; indeed, Model testified he had proposed this type of clause in other negotiations and that he knew of other collective bargaining agreements with similar provisions. (Tr. Vol. 13, p. 2013.) Model surely had no basis to think it was impossible that the Union would agree to this proposal. He did not, however, indicate that the Company's initial proposal on Performance of Bargaining Unit Work was final or non-negotiable. (Tr. Vol. 13, pp. 2012-13; Tr. Vol. 14, pp. 2176-80.)

On July 31, 2012, the Union counter-proposed that supervisory employees could not be assigned *any* bargaining unit work—a dramatic change from the status quo. (ALJ Op. 85; JX 31 (Union Proposal No. 29); Tr. Vol. 13, pp. 2010-11.) However, the Union did not assert—either

in July 2012, or at any other point in the bargaining process—that Cablevision’s initial proposal was predictably or objectively unacceptable, or that no self-respecting union would agree to such a proposal. (Tr. Vol. 13, p. 2012; Tr. Vol. 14, pp. 2176-80.)

The parties did not simply pass these proposals back and forth, but actively discussed them. Cablevision explained that it wanted to maintain the flexibility to assign non-unit employees, including supervisors, to perform unit work when that was necessary to provide service to customers, as the Company had always done. (JX 26; Tr. Vol. 4, pp. 614-615; Tr. Vol. 13, p. 2011; Tr. Vol. 14, pp. 2177-78.) Cablevision further explained that it was not asking the Union to give up its ability to argue that, when non-unit employees are consistently assigned unit work, those employees become part of the bargaining unit. At the July 31, 2012 bargaining session, Gallagher indicated that the Union did not have a problem with supervisors helping employees on bargaining unit work. (JX 26, p. 5; JX 27, p. 2.) Calabrese stated he did not want a supervisor to do work that should be done by a bargaining unit employee—but Gallagher acknowledged that the parties had the same intention and simply needed to work out the language. (ALJ Op. 85; Tr. Vol. 13, p. 2012; JX 26, p. 5; JX 27, p. 2.)

Notwithstanding the common ground identified through the parties’ discussions, working out language that would accommodate the interests of both parties required additional efforts. The Union’s proposals continued to place many restrictions on the Company, effectively denying Cablevision the flexibility it deemed necessary. For example, the Union proposed that Cablevision’s flexibility in assigning work to non-unit employees be restricted to unexpected circumstances or during training or quality assurance. (JX 1 ¶ 82; JX 50 (Union Proposal No. 29A); JX 1 ¶ 129; JX 82 (Union Proposal No. 29B); Tr. Vol. 14, pp. 2178-79.) Both parties

continued to exchange modified proposals on the issue. (JX 1 ¶ 266; JX 167 (Company Proposal 12C); Tr. Vol. 4, pp. 614-615; Tr. Vol. 14, pp. 2177-79.)

In an effort to loosen the log jam, on March 6, 2013—well before the Consolidated Complaint was issued—Cablevision largely adopted the Union’s latest proposal on Performance of Bargaining Unit Work. (JX 1 ¶ 266; *compare* JX 167 (Company Proposal No. 12C) *with* JX 82 (Union Proposal No. 29B)). Because the subject was then part of a package of proposals, the parties did not enter into a Tentative Agreement on the issue immediately. At the next bargaining session, on March 14, 2013, Cablevision uncoupled the package of proposals containing Performance of Bargaining Unit Work, and the parties entered a Tentative Agreement on the issue. (ALJ Op. 92; JX 1 ¶ 279; JX 175; Tr. Vol. 14, p. 2179; Tr. Vol. 4, pp. 615-17.)

Given that Performance of Bargaining Unit Work was resolved to the satisfaction of both parties at an early date, and as the result of compromise on both sides, the claim that this proposal was “predictably unacceptable” must fail.

2. Management Rights

The contention that Cablevision insisted on a “predictably unacceptable” Management Rights proposal (GCX 1, No. 2(N) ¶ 12(b)(4)) is also completely unfounded. In fact, in its second proposal on this subject, on October 12, 2012, the Union substantially adopted the Company’s proposal. (ALJ Op. 102; JX 1, ¶ 82; JX 51, Union Proposal 30A). Thereafter, the parties had minor differences to resolve, and they ultimately reached a Tentative Agreement on Management Rights on August 15, 2013.²² (ALJ Op. 108; JX 1, ¶ 350; JX 227; Tr. Vol. 14,

²² The Charging Party’s attempt to minimize the importance of the Tentative Agreement by asserting that the agreement was beneficial to Cablevision is entirely disingenuous. (Charging Party’s Br. in Support of Exceptions 74-76.) The Charging Party conveniently ignores the fact that the parties reached a Tentative Agreement on Management Rights as part of a package that included one of the Union’s most important proposals—Union Security. (Tr. Vol. 14, pp. 2201-03; Tr. Vol. 4, p. 617.)

p. 2201; Tr. Vol. 4, p. 617.) A proposal that a union substantially adopts as its own cannot be deemed predictably unacceptable.

Board law makes clear that employer proposals to retain broad management rights do not violate the Act. *See Am. Nat'l Ins. Co.*, 343 U.S. at 408-09 (bargaining for broad management rights clause, even where the union rejects it, is not grounds to find bad faith); *Aztec Bus Lines, Inc.*, 289 NLRB 1021, 1042-43 (1988) (rejecting bad faith bargaining contention based on employer's initial broad management rights proposal, when final proposal added a "just cause" standard and binding arbitration). Indeed, it is well-settled that employers may lawfully propose and insist—even to impasse—on broad management rights clauses that cover mandatory subjects of bargaining. *See, e.g., Star Expansion Indus. Corp.*, 164 NLRB 563, 566, 582, 585-87 (1967), *aff'd*, 409 F.2d 150 (D.C. Cir. 1969).

The legitimacy of Cablevision's Management Rights proposal is not subject to serious dispute. As Model testified, Cablevision sought to ensure that the language of its proposal afforded the Company the flexibility to act on the covered subjects, and the Union's proposed language was clearly inadequate to accomplish that result. (Tr. Vol. 13, pp. 2020-21; JX 23.) Model further testified that he had proposed the same management rights language in several negotiations with other unions, and that the language had been accepted. (Tr. Vol. 13, pp. 2021-22.) Neither the GC nor the Charging Party put forward any evidence to controvert Model's testimony on that subject.

Moreover, all of Cablevision's proposals expressly limited the exercise of any management right where it was circumscribed by another provision of the collective bargaining agreement. (Tr. Vol. 14, pp. 2201-02.) Inclusion of this limiting language is itself evidence of the Company's good faith in seeking broad management rights. *See, e.g., Coastal Elec. Coop.*,

Inc., 311 NLRB 1126, 1127 (1993) (“it is well established that insistence on a broad management-rights clause is not itself inherently unlawful or evidence of bad faith. Furthermore, the first paragraph of the management-rights clause that had been agreed to early on by the parties expressly stated that management’s reservation of authority was limited by whatever the parties agreed to elsewhere in their contract.”) (citation omitted). The GC completely ignores this important limiting language in its argument on Management Rights.

At the hearing, the Charging Party claimed that the Union objected to including in the Management Rights clause a right to subcontract, promote, demote, and fill vacancies—but no such objection was voiced at the bargaining table. (*Compare* Tr. Vol. 3, p. 421, *with* JXs 20-21.) Indeed, the Union included the right to subcontract, promote, demote, and fill vacancies in its *own* Management Rights proposal on October 12, 2012. (JX 1 ¶ 82; JX 51 (Union Proposal No. 30A).) And the right to promote and demote were included in the Union’s initial Management Rights proposal, July 31, 2012. (JX 31 (Union Proposal No. 30).) Plainly, the inclusion of these subjects in the Company’s Management Rights clause was not predictably unacceptable, when the Union’s own proposals were in accord.²³

Cablevision also modified its Management Rights proposal several times during the course of negotiations, never characterized any of its proposals as final or non-negotiable, and

²³ Another area of clearly good faith discussion between the parties was the application of the Company’s performance management system. In brief, the Company distinguished between performance management—where an employee was not doing anything wrong but was unable to bring his/her performance up to standards even after a performance improvement plan—and discipline. The parties disagreed about whether performance management should be covered by Management Rights or Discipline and Discharge (the Union’s view). Initially, the subject was covered in the Company’s separate proposal entitled “Meeting Company Standards” (JX 1 ¶ 131; JX 84; Tr. Vol. 14, pp. 2199, 2200; JX 80, p. 9; JX 108, p. 3), but Cablevision later withdrew the Meeting Company Standards proposal on February 28, 2013 at the Union’s request (JX 1 ¶ 254) and included a modified version of the language from that proposal in the Management Rights proposal. (JX 1 ¶ 253; JX 160.) Most importantly, the Union then adopted the Company’s language on Meeting Company Standards in large part in its next proposal on Management Rights. (JX 1 ¶ 269; JX 168 (Union Proposal No. 30B).) The parties included similar language in the final, tentatively agreed-upon Management Rights clause. (JX 1 ¶ 350; JX 227 (Company Proposal 7(D)).)

never claimed that the parties had reached an impasse on the subject. (Tr. Vol. 14, pp. 2201-02; Tr. Vol. 4, p. 616-17.) In view of the Union's receptiveness to the Company's Management Rights proposal, and the parties' eventual Tentative Agreement on the subject, the claim that the Company rigidly adhered to a predictably unacceptable Management Rights proposal is meritless.

3. Discipline and Discharge

The contention that Cablevision rigidly adhered to a predictably unacceptable proposal regarding Discipline and Discharge is also unfounded, especially because Cablevision made several significant concessions in order to move the parties toward an agreement on this issue. Cablevision made its original proposal on Discharge and Discipline on July 2, 2012, and then made five subsequent proposals—on December 5, 2012, January 30, February 11, March 14, and September 11, 2013—each modifying the original in response to the Union's comments. The ALJ correctly concluded that although the parties had not reached agreement on this subject, "Respondent has not insisted or adhered to its discharge proposals, . . . it has bargained with the Union about them and made concessions in response to the Union's concerns. It has, therefore, not refused to bargain in good faith with the Union concerning these subjects." (ALJ Op. 234.)

The mere fact that Cablevision's initial proposal permitted discharge based on "proper cause"—rather than the "just cause" standard the Union wanted—does not make the proposal "predictably unacceptable." (JX 23, p. 12.) That is especially so because both Model and Kauff testified *without contradiction* that other unions have accepted discipline and discharge language that does not include a just cause standard. (Tr. Vol. 13, pp. 2019-20, 2031; Tr. Vol. 14, pp. 2185-97.) At the hearing, the Company introduced into evidence a total of eight collective bargaining agreements that include discipline and discharge provisions that do not contain a "just

cause” standard. (Tr. Vol. 14, pp. 2185-97).²⁴ The eight agreements Cablevision introduced—which represent a wide variety of industries and unions—included agreements that Kauff or his law firm had negotiated, as well as one agreement that Kauff and his law firm did not negotiate that appears on the U.S. Department of Labor’s website.²⁵

Nor was the “proper cause” standard proposed by the Company one that would have put the employees in a worse position than they would have been without the Union, or somehow have damaged the Union’s ability to function as a bargaining representative. As Model explained, the “proper cause” standard conceded to the Union a protection that employees did not have under the at-will standard, as it clearly placed a limit on the Company’s unfettered right to discipline and discharge employees. (Tr. Vol. 13, p. 2016.) Moreover, under the proposed “proper cause” standard, the Union could successfully challenge a discipline or discharge decision before an impartial arbitrator by showing that Cablevision did not have a good faith basis to believe that the employee had engaged in the behavior alleged. (Tr. Vol. 13, p. 2016; Tr. Vol. 4, pp. 651-52.)

The bargaining record further belies any assertion that Cablevision’s Discipline and Discharge proposals were “predictably unacceptable.” Over the course of several bargaining sessions, Cablevision made numerous modifications to its proposals to address the Union’s concerns, as follows:

²⁴ (See RX 50, p. 11 (Contractor’s Association of Greater New York (“CAGNY”) and United Brotherhood of Carpenters); RX 51, p. 31 (CAGNY and General Building Laborers, Local Union); RX 52, p. 14 (St. Michael’s Cemetery and Local 47 United Service Workers Union); RX 53, p. 11 (God’s Love We Deliver and International Brotherhood of Teamsters, Local 202); RX 54, p. 4 (River Operating Company, Inc. (Yankee Stadium) and Local F-72, International Alliance of Theatrical State Employees and Moving Picture Operators); Tr. Vol. 14, pp. 2193-94 (citing RX 55 (Madison Square Garden, LP and Theatrical Teamsters Local 817, International Brotherhood of Teamsters)); RX 56, p. 7 (True Entertainment, LLC and Motion Picture Editors Guild); RX 57, p. 1 (American National Insurance Company and United Food and Commercial Workers International Union).)

²⁵ See RX 57, available at http://www.dol.gov/olms/regs/compliance/cba/private/7400_10-4-15.pdf.

On December 5, 2012, Cablevision modified its proposal by defining “proper cause” to require that the Company conduct a good faith investigation before making any decisions regarding discipline or discharge. (JX 1 ¶ 120; JX 77 (Company Proposal No. 8B); Tr. Vol. 14, p. 2184; Tr. Vol. 4, p. 651-52.) Under the modified proposal, the Union could succeed in a challenge to a discipline or discharge decision by showing that Cablevision failed to conduct a good faith investigation. (Tr. Vol. 14, p. 2184; Tr. Vol. 4, p. 652.)²⁶

Thereafter, in response to the Union’s concern that arbitrators were more familiar with the term “just cause,” Cablevision modified its proposal again by replacing the term “proper cause” with “just cause,” while defining “just cause” in the same way as “proper cause” had been defined. (JX 1 ¶ 231; JX 143 (Company Proposal No. 8D); Tr. Vol. 14, p. 2184; Tr. Vol. 4, p. 654.) The Union brushed this change aside as meaningless—but it is certainly not uncommon to use the term “just cause” in a collective bargaining agreement, while at the same time defining that term in a manner that recognizes the employer’s right to take action based on its reasonable judgment.²⁷

Cablevision made yet another concession to the Union when it modified its proposal to remove the “good faith belief” and “good faith investigation” language and specify that, in cases

²⁶ Cablevision also added another significant concession—a provision, with which the Union agreed, that in instances where a decision is made to impose discipline less than discharge, the decision would not create a precedent, thereby allowing the Company to exercise leniency in discipline (*e.g.*, by issuing a warning) without concern that its leniency could operate to prevent the Company from imposing more serious discipline in a future case. (JX 1 ¶ 120; JX 77; Tr. Vol. 14, pp. 2183-84.)

²⁷ For example, a collective bargaining agreement with International Brotherhood of Teamsters, Local 202 states, in pertinent part: “*Just cause* under this Article shall include but shall not be limited to insubordination, disloyalty, use or possession of a controlled substance, violation of the Employer’s reasonable rules, codes or policies, theft of Employer services, and the *Employer’s reasonable judgment* that an Employee’s skill, ability, performance or attendance are unsatisfactory.” (RX 53 (emphasis added); *see also* RX 54 (agreement between River Operating Company, Inc. (Yankee Stadium) and Local F-72, International Alliance of Theatrical State Employees and Moving Picture Operators) (“Maintaining discipline and order is a responsibility of the Employer. Accordingly, the Union recognizes the right of the Employer to take disciplinary action up to and including discharge. No employee shall be disciplined, up to and including discharge except for *just cause, exercised in the Employer’s reasonable judgment.*”) (emphasis added).)

where the Union presents evidence that the Company was objectively mistaken, Cablevision cannot be found to have had just cause, and the Union will prevail in challenging the decision. (JX 1 ¶ 362; JX 236 (Company Proposal No. 8G); Tr. Vol. 14, pp. 2184-85; Tr. Vol. 4, pp. 654-55.) This change cannot be minimized, particularly in view of the Union's repeated argument during bargaining that it would be unfair to sustain a discharge where it proves that an employee did not commit the act alleged but cannot disprove the Company's good faith belief.

The continued evolution of Cablevision's proposals in response to concerns raised by the Union is the very antithesis of bad faith bargaining. *See, e.g., K-B Res., Ltd., Inc.*, 294 NLRB at 908, 910 (1989) (no surface bargaining where the entire course of bargaining demonstrates that the employer "modified, redrafted, and withdrew proposals in major areas in response to concerns expressed by the Union," and "put forth legitimate business rationales and justifications in support of many of the changes it sought"). That is particularly true where, as here, the Company did not insist that any of its proposals were final or non-negotiable or claim that the parties were at an impasse on the subject. *See, e.g., Aztec Bus. Lines*, 289 NLRB at 1021, n.2 (1988) (declining to decide whether employer's proposal was evidence of bad faith "because we agree with the [union] that the [employer] did not insist to impasse on the proposal").

As with each of the other disputed proposals, the Union made no claim in the course of negotiations that any of Cablevision's Discipline and Discharge proposals were predictably or objectively unacceptable. (Tr. Vol. 14, p. 2181.) Nor did the Union ever claim that the Company was legally obligated to accept a just cause standard. Notwithstanding the Union's silence at the bargaining table, the Charging Party now attempts to argue that the fact that some former Cablevision affiliates have a different definition of "just cause" in other collective bargaining agreements is somehow evidence that Cablevision's proposal here was "predictably

unacceptable.” (Charging Party’s Brief in Support of Exceptions p. 60.) But the inclusion of a just cause provision in a contract negotiated by a related entity with a different union does not compel adoption of a similar provision in future, unrelated negotiations. Indeed, even between the same parties, previously negotiated provisions on fundamental terms remain subject to negotiation. *See Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981) (that prior contracts contained certain provisions did not make them “sacrosanct and not subject to negotiation in future contracts” because “[a] ‘once in, forever in’ concept . . . has no basis in logic or law”). In the end, Cablevision settled this and every other subject in the final Agreement.

4. Contracting

Cablevision also did not rigidly adhere to a predictably unacceptable proposal on Contracting. Rather, it initially sought to preserve its longstanding practice of contracting the work performed by bargaining unit employees—a practice common in the industry—and thereafter modified its proposal to limit its freedom to contract. An employer’s initial proposal to retain broad discretion over contracting is not evidence of bad faith bargaining. *See, e.g., K-B Res., Ltd. Inc.*, 294 NLRB at 909 n.14 (no surface bargaining where subcontracting provision gave the employer the right to subcontract work when necessary, and employer assured union that it could grieve if a problem arose). The GC’s and the Charging Party’s arguments here are further weakened by the fact that the Company’s proposal was modified several times in response to the Union’s concerns.

Cablevision’s initial proposal on Contracting was merely a continuation of the status quo. (ALJ Op. 229; JX 56; Tr. Vol. 4, p. 645; Tr. Vol. 14, p. 2205.) Cablevision has had a longstanding practice, consistent with industry standards, of contracting out approximately 50% of its “trouble calls” (*i.e.*, home or office visits in response to customer complaints), and

approximately 95% of its installation work. (ALJ Op. 228; Tr. Vol. 14, pp. 2203-04.) The Union was well aware of this practice—but nonetheless sought to reduce Cablevision’s use of contractors by 90%. (ALJ Op. 228, Tr. Vol. 4, p. 645-48; Tr. Vol. 14, p. 2204.)

Thereafter, both parties bargained hard over this important provision, but both parties also showed gradual movement on the issue. (ALJ Op. 228-29; Tr. Vol. 4, p. 649; Tr. Vol. 14, p. 2205.) For example, the Union modified its proposal to permit Cablevision to contract work to the extent it did not cause the layoff of any employees in the bargaining unit. (JX 1 ¶ 47; JX 30 (Union Proposal No. 7A); Tr. Vol. 14, p. 2205.) The Union then arguably engaged in regressive bargaining when it modified its proposal on March 6, 2013 to state that contracting would be barred if it diminished the “terms and conditions of employment” for any bargaining unit members—language that would have prevented Cablevision from using contractors to control overtime during periods of high customer demand. (JX 168, Union Proposal No. 7C; Tr. Vol. 14, pp. 2206-07.) The Union eventually modified its proposal to remove this limitation. (Tr. Vol. 14, p. 2207-08.)

Contrary to the Charging Party’s assertion, Cablevision did not present an “unyielding defense of the status quo,” but instead modified its Contracting proposal several times in an attempt to address the Union’s concerns. (Charging Party’s Br. in Support of Exceptions 70.)²⁸ Cablevision Proposal No. 23A amended the contracting provision to provide that, if the contracting of trouble-call work increased significantly, Cablevision would discuss the matter

²⁸ The Charging Party’s description of the ALJ’s decision in *Santa Barbara News-Press*, Case 31-CA-28589, 2010 WL 3285398 (May 28, 2010) *aff’d* 362 NLRB No. 26 (2015), is misleading. The ALJ in that case did *not* find that a desire to maintain the status quo on a particular issue is “inconsistent with good faith bargaining.” (Charging Party’s Br. in Support of Exceptions 70.) Rather, the ALJ recognized that “a genuine and sincerely held view may be put forward and defended without violating the Act.” *See* 358 NLRB No. 141, slip op. at 83 (citing *Pease Co. v NLRB*, 666 F.2d 1044 (6th Cir. 1981)). The ALJ’s statement that it was only the “the rigid offering and defense of a range of proposals not for their own sake, but rather because the party is aware the proposals are anathema to the other side” that constituted bad faith bargaining, “because there is no true intention by the offering party to reach agreement” (*id.*) is, moreover, not in accord with the objective standard enunciated in *Reichhold II*.

with the Union. (JX 1 ¶ 276; JX 172 (Company Proposal No. 23A); Tr. Vol. 14, pp. 2209-10.) Thereafter, in the face of the Union’s continued resistance, the Company’s proposal on July 31, 2013 agreed that contracting trouble calls that resulted in the layoff of any field service employees would be prohibited—a substantial concession. (JX 1 ¶ 343; JX 222; ALJ Op. 229; Tr. Vol. 4, p. 650; Tr. Vol. 14, pp. 2208-09.) On August 15, 2013, the Company further amended its Contracting proposal to provide that if the contracting work *other* than trouble calls were to result in layoffs in the bargaining unit, the Company would first discuss the matter with the Union in order to explore other options. (JX 2 ¶ 350; JX 227 (Company Proposal No. 23C).)

Thus, although the parties had not yet reached an agreement on the issue of Contracting by the close of trial, there had been substantial movement by Cablevision. The Company showed a willingness to compromise—despite the importance of this issue to its daily operations—and never suggested that any Contracting proposal it made was final or non-negotiable, or declared that the parties were at an impasse. (Tr. Vol. 4, pp. 650-51; Tr. Vol. 14, pp. 2211, 2222.)

Any remaining argument that Cablevision’s Contracting proposal was “predictably unacceptable” is put to rest by the fact that many unions—including the CWA itself—have agreed to collective bargaining agreements granting employers the discretion to contract. For example, in a collective bargaining agreement the CWA entered with AT&T, the CWA recognized the employer’s right to contract work. (RX 59, p. CWA001481; Tr. Vol. 14, pp. 2214-15.) An Agreement between the CWA and AT&T Internet Services similarly allows the employer to contract work. (RX 61, p. 85; Tr. Vol. 4, p. 2217.)²⁹ The Charging Party has not

²⁹ Other CWA contracts—including one signed by Larry Cohen, the CWA president—include similar provisions allowing the employer the discretion to contract work. (See RX 62, p. 116 (collective bargaining agreement between CWA and AT&T Midwest); Tr. Vol. 14, p. 2218; RX 63, p. 241 (collective bargaining agreement

explained how the Union can agree to these contracting provisions in other collective bargaining agreements, but still claim that Cablevision was bargaining in bad faith by proposing the same thing here. In fact, the Contracting provision the parties ultimately agreed on in the February 2015 Agreement permits subcontracting.

Thus, the bargaining record makes clear that retaining a right to contract is not an extreme proposal, and that Cablevision demonstrate no intransigence on this or any other subject.

* * *

In sum, the parties reached Tentative Agreements on two of the four allegedly improper proposals in 2013—one before the Complaint was even issued—and the parties ultimately reached agreement on the two remaining proposals in the final Agreement. (*See* Agreement, Article X (Contracting) and Article XXII (Discipline and Discharge).) As the ALJ properly noted, tentative agreements reached during bargaining are significant evidence of lawful, good faith bargaining. *See, e.g., Garden Ridge Mgmt.*, 347 NLRB at 131, 134. The GC’s and Charging Party’s arguments reduce to a claim that these Tentative Agreements took too long, and that the Board should ignore the productive discussions that produced these Tentative Agreements and sit in judgment of the reasonableness of Cablevision’s positions. The Act does

between CWA and Pacific Bell Telephone Co., Nevada Bell Telephone Co., AT&T Services, Inc., AT&T Video Services, Inc., and SBC Global Services, Inc.); Tr. Vol. 14, p. 2221.)

In addition, Kauff and his law firm have also negotiated contracts in which other unions agreed to provisions that permit an employer to contract out at its discretion. (Tr. Vol. 14, pp. 2211-13.) For example, a collective bargaining agreement between True Entertainment and the Motion Pictures Editors Guild provides the employer with the right to contract out at its discretion. (RX 56, p. 7; Tr. Vol. 14, pp. 2212-13.) A collective bargaining agreement between Summit Security Systems and the Allied International Union provides the employer, in the Management Rights clause, with the discretion to subcontract work. (RX 58, p. 11; Tr. Vol. 14, pp. 2212-13.) A collective bargaining agreement between Horizon Blue Cross Blue Shield of New Jersey and Local 32 Office and Professional Employees International Union similarly places no restriction on the employer’s right to subcontract when the employer believes it necessary. (RX 60, p. 33; Tr. Vol. 14, p. 2216.) Collective bargaining agreements that appear on the U.S. Department of Labor’s website likewise include provisions that do not place restrictions on an employer’s right to contract. (Tr. Vol. 14, pp. 2215-21; RXs 60-63.)

not permit this. Thus, the ALJ's conclusion is plainly correct: Cablevision did not rigidly adhere to any of the four disputed contract proposals and did not bargain in bad faith.

C. Cablevision Bargained In Good Faith On Seniority and Safety (GC's Exceptions 22-23; Charging Party's Exceptions 2, 10-11)

The GC and Charging Party belatedly assert that Cablevision bargained in bad faith on seniority and safety. These allegations—which do not appear in the Complaint, the Bill of Particulars, or anywhere in the hearing record—violate the notice requirements contained in the Board's Rules and Regulations. In any event, as the ALJ correctly concluded, these allegations confuse the rejection of a bargaining proposal, which is protected under Section 8(d), with the refusal to discuss a bargaining proposal. Because Cablevision lawfully rejected the Union's proposals—and explained its reasons for doing so—the ALJ's conclusion should be affirmed.

1. The Seniority and Safety Allegations Violate Cablevision's Right to Fair Notice

As an initial matter, the allegation that Cablevision refused to bargain over seniority and safety clearly violates the notice requirements contained in the Board's Rules. Section 102.15 of the Board's Rules and Regulations provides that a complaint “shall contain . . . [a] clear and concise statement of the acts which are claimed to constitute unfair labor practices.” 29 C.F.R. § 102.15(b). Where a complaint fails to set forth a clear statement of the allegedly unlawful acts, the Board will dismiss belated allegations as violating the notice requirement. In *New Era Cap Co.*, 336 NLRB 526 (2001), for example, the Board dismissed allegations of unfair labor practices that “were not set forth in the amended complaint,” reasoning as follows:

It was not until the General Counsel's posthearing brief that these statements were alleged to be unlawful. Thus, the Respondent was never placed on notice that it needed to defend against those allegations, nor did the Respondent have the opportunity to call . . . witnesses to rebut the allegations. In these circumstances, we do not find that the allegations were fully and fairly litigated. Therefore, we reverse the judge and dismiss the allegations.

Id. at 526 (citation omitted); *see also Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171-72 (2006) (affirming denial of post-trial motion to amend in part because employers were not on notice of the additional allegations); *and Consol. Printers, Inc.*, 305 NLRB 1061, 1064 (1992) (same).

In this case, the Complaint alleged in general terms that Cablevision engaged in surface bargaining by “refusing to discuss mandatory subjects of bargaining.” (GCX 1, No. 2(N).) The Bill of Particulars then restricted that allegation to the following: Cablevision “refused to discuss economic proposals and the Union never agreed to delay discussion of economic issues.” (GCX 1, No. 3(A); GCX 1, No. 3(F).) Notably, the Company’s request for a Bill of Particulars specifically inquired whether “safety” was included in the surface bargaining allegation, and the GC’s Bill of Particulars—which makes no mention of safety or seniority—clearly conveyed that it was not. (GCX 1, No. 3(F).) Indeed, the GC’s and Charging Party’s Exceptions Briefs fail to cite even a single line of the hearing transcript on this subject—which confirms that these issues were not raised or litigated at trial. (GC’s Br. in Support of Exceptions 51-54; Charging Party’s Br. in Support of Exceptions 79-88.) Thus, there is no allegation in the Complaint, the Bill of Particulars, or the hearing record that Cablevision failed or refused to negotiate regarding either safety or seniority.

Having overlooked these safety and seniority allegations both in its pleadings and during the hearing, the GC should not be permitted to advance them now. Here, as in *New Era Cap*, these allegations were raised for the first time in the GC’s post-hearing brief, with the result that Cablevision “was never placed on notice that it needed to defend against those allegations, nor did [Cablevision] have the opportunity to call . . . witnesses to rebut the allegations.” 336 NLRB at 526. In these circumstances, the seniority and safety allegations were not “fully and fairly

litigated.” *Id.* Nor can it be “glibly assumed” that Cablevision’s handling of the case “would have been unchanged had [it] been aware of the . . . new allegations” at the time of the hearing. *Consol. Printers*, 305 NLRB at 1064.

The General Counsel’s violation of due process requirements here is far greater even than in the cited cases. The General Counsel in the present case has not even attempted to amend the Complaint to allege the new seniority and safety bargaining violations.

For all these reasons, the Board should dismiss the allegations regarding seniority and safety for lack of proper notice under the Board’s Rules and Regulations.

2. Cablevision Did Not Refuse To Discuss Seniority or Safety

In any event, the GC’s and Charging Party’s arguments regarding seniority and safety conflate the rejection of a bargaining proposal, which is protected under Section 8(d), with the refusal to *discuss* a bargaining proposal, which is not. As the ALJ correctly recognized, Cablevision never refused to discuss these topics or asserted that such discussion was not required. (ALJ Op. 243-45.) Rather, the Company explained its reasons for rejecting the Union’s proposals and, with regard to safety, later made a counterproposal that the Union accepted. Because Cablevision’s conduct was well within the bounds of lawful bargaining, the ALJ’s decision rejecting these allegations should be affirmed.

Section 8(d) of the Act expressly provides that parties must “confer in good faith with respect to . . . terms and conditions of employment,” but that “such obligation does *not* compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d) (emphasis added). Rather, Board law recognizes, “[a] party . . . is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party.” *Challenge-Cook Bros.*, 288 NLRB 387, 388-89

(1988) (internal quotation marks omitted; ellipsis in original); *see also Midwest Television, Inc. d/b/a KFMB Stations*, 349 NLRB 373, 374 (2007) (same).

In this case, the bargaining record clearly reflects that Cablevision bargained in good faith on the subject of seniority. At the November 27, 2012 bargaining session, Kauff—who was then the Company’s chief negotiator—explained why Cablevision did not want seniority to trump qualities like effort, skill, initiative and teamwork. (ALJ Op. 131; JX 69, p. 14: “Seniority, to us, is demoralizing for a newer employee who possesses initiative and skill, particularly if they’re losing out in some way to someone who doesn’t possess the same skills and ability in their judgment.”) Kauff further explained that Cablevision does take length of service into account in making layoff and recall decisions, but did not want seniority to be the deciding factor, as the Union had proposed. (ALJ Op. 133.) After careful review of the bargaining record, the ALJ observed that the GC and Charging Party “seem to be confusing conduct of rejecting a proposal with refusing to discuss it. . . . It is not unlawful to reject a seniority proposal, and [Cablevision] is not required to agree to one.” (ALJ Op. 243.) The ALJ’s conclusion in this regard is fully consistent with the bargaining record and with settled Board law.

The bargaining record similarly confirms that Cablevision bargained in good faith on the subject of safety. At the January 9, 2013 bargaining session, Kauff explained that the Company viewed safety committee meetings as unnecessary because safety issues were already discussed at weekly toolbox meetings. (ALJ Op. 135-136.) At the same time, however, Kauff indicated that Cablevision *agreed* with the Union that “[t]here is value in having semi-annual meetings . . . to discuss matters of mutual interest including safety.” (ALJ Op. 136.) Cablevision thereafter submitted a counterproposal that provided for semi-annual meetings to discuss matters including

safety, and the parties reached a Tentative Agreement on the issue on January 16, 2013. (ALJ Op. 244.) The subject on which Cablevision purportedly refused to bargain was thus timely resolved to the satisfaction of both parties.

* * *

Thus, the assertion that Cablevision refused to bargain on seniority and safety is contrary to both the bargaining record and the Board's Rules and Regulations. The ALJ's decision dismissing these allegations should be affirmed.

D. Cablevision Provided Timely Responses to All Information Requests (GC's Exceptions 24-25; Charging Party's Exceptions 2, 4)

Cablevision more than satisfied its obligation to respond to the Union's numerous and substantial information requests, producing more than 1,000 pages of material requested by the Union and answering countless questions during numerous bargaining sessions.³⁰ The Union never alleged at the bargaining table that Cablevision failed to provide any of the information it sought, or that any of Cablevision's responses were inadequate. (Tr. Vol. 13, pp. 1977, 1981, 1989; Tr. Vol. 14, pp. 2128-39.) Instead, the only allegation relating to requests for information is that Cablevision was slow in providing certain information—in response to a single paragraph of the Union's dozens of requests—regarding non-bargaining unit employees. (GCX 1, No. 3(F).)³¹ There is no allegation, let alone any evidence, that Cablevision failed to provide any information requested by the Union.

The GC and the Charging Party both mischaracterize the grounds for the ALJ's dismissal

³⁰ (JX 1 ¶ 14; JX 10; JX 1 ¶ 32; JX 22; JX 1 ¶ 37; JX 25; JX 1 ¶ 57; JX 35; JX 1 ¶ 93; JX 60; JX 1 ¶ 164; JX 104; JX 1 ¶ 265; JX 166; JX 1 ¶ 303; JX 153.)

³¹ Paragraph 12(b)(9) of the Complaint alleges that Cablevision "significantly delayed" its provision of relevant wage information. (GCX 1, No. 3(A).) The GC has acknowledged that this is the same allegation as in Paragraph 13 of the Complaint (*i.e.*, that Cablevision "delayed in finalizing" the same information). (GCX 1, No. 3(F).)

of this allegation. The ALJ did not dismiss this allegation solely because the Union did not “protest early or loud enough” about “insufficient” information the Company provided. (GC’s Br. in Support of Exceptions 54.) Nor did the ALJ fault the Union for failing to “repeat[]” its requests while the Company remained “silent.” (Charging Party’s Br. in Support of Exceptions 38.) Rather, the ALJ systematically examined the Union’s many information requests and concluded that the Company responded to each request, and that Cablevision, far from remaining “silent,” followed up with the Union to determine whether it had satisfied the Union’s changing requests. The bargaining record wholly supports the ALJ’s ultimate conclusion that Cablevision timely complied with the only information request in regard to which it was allegedly dilatory.

The Union made its initial request for information about the benefits and compensation of non-bargaining unit employees in a letter dated August 23, 2012.³² Model’s office received the letter on August 27, 2012, while he was on his honeymoon. (ALJ Op. 245; JX 1 ¶ 61; JX 38; Tr. Vol. 13, p. 2000-01; Charging Party’s Br. in Support of Exceptions 35.) Consistent with Board law—which requires the Union to establish the relevance of information it requests, *see, e.g., Chrysler, LLC*, 354 NLRB 1032, 1032-33 (2010)—Cablevision inquired about the relevance of the requested non-unit information in a letter dated September 5, 2012. (ALJ Op. 245-246; JX 1 ¶¶ 61-63; JX 39; Tr. Vol. 13, pp. 2001-02; Tr. Vol. 14, p. 2130.) The Union responded in a letter dated September 11, 2012, but the letter did not arrive until September 17. (JX 40; Tr. Vol. 13, pp. 2002-03.) The ALJ correctly concluded that September 17 was the relevant date for purposes of assessing the timeliness of the Company’s response. (ALJ Op. 249.)

At the October 12, 2012 bargaining session, Cablevision informed the Union that it

³² Although the GC attempts to date the first of the Union’s information requests to March 23, 2012, he also admits that no actual request was made on that date, because “Gallagher explained that he had to consult with his superior, conduct research and gather samples in order to put together his information request.” (GC’s Br. in Support of Exceptions 55.)

would provide the requested information at the next session. (ALJ Op. 246; JX 46, p. 1; Tr. Vol. 14, p. 2130.) As promised, at the next bargaining session, on October 26, 2012, Cablevision provided information regarding the benefits of non-bargaining unit employees, as well as a comparison of wages and grade levels between two representative job titles in Brooklyn and elsewhere in the footprint. (JX 54, pp. 5, 11; JX 55, p. 6; JX 60.) Kauff explained that comparisons of two representative titles were provided as examples, because the Union's request would otherwise require complex and time-consuming calculations for more than 10,000 employees. (ALJ Op. 246; JX 54, p. 14.) Cablevision Vice President Paul Hilber, who also attended the negotiations, further explained that the Company could not provide the full set of requested comparisons because the grade levels in Brooklyn no longer matched grade levels elsewhere in the footprint. (ALJ Op. 246; JX 54, p. 14.) Upon receiving the non-unit information, the Union did not assert that the information was inadequate in any way. Instead, Chris Calabrese stated that the Union would "provide a list of what we want compared." (ALJ Op. 246; JX 54, p. 14; Tr. Vol. 14, pp. 2131-32, 2263-65.) Hilber replied, "When you come back with more, we can do a comparison and come back with career progression." (ALJ Op. 246; JX 54, p. 14.)

The Union made no further mention of the request for non-unit comparisons until two months later, on December 31, 2012, when Gallagher sent an e-mail requesting "[w]age comparisons as given to us on October 26, 2012 . . . for all titles in the bargaining unit." (JX 92; Tr. Vol. 14, pp. 2132-34.) Cablevision provided the requested wage information for all equivalent, non-unit employees in the Bronx on January 9, 2013. (ALJ Op. 247; JX 1 ¶ 164; JX 104.) By limiting the data comparison to the Bronx facility, Cablevision was able to respond promptly to the Union's request. (Tr. Vol. 14, pp. 2134-35.) The Union did not ask for

additional information on January 9, and did not complain during bargaining that the information provided on that date was inadequate in any way. (ALJ Op. 247; Tr. Vol. 14, p. 2135; JX 102, pp. 5-11; JX 103, pp. 3-4.)

In evaluating the record as to the Union's initial information request, the ALJ correctly held that the Company's October 26 response, measured from September 17, was timely. (ALJ Op. 249.) Although the ALJ recognized that the information Cablevision provided was limited, he concluded that the Union's request itself was "not at all clear," and that Cablevision's explanation for the limited scope of the response was "not frivolous or specious." (ALJ Op. 249.) The ALJ did not, as the Charging Party contends, fault the Union for not repeating its August 23 request; instead the ALJ specifically found that, prior to the December 31 e-mail, the Union had not requested a comparison of all titles. (ALJ Op. 250.) Thus, the cases cited by the Charging Party in which an employer "remain[ed] silent" after an information request are wholly inapposite, because that is not what happened here. (Charging Party's Brief in Support of Exceptions 38.) Instead, to ensure that it had provided all of the information that the Union requested, during the February 5, 2013 session, Cablevision asked the Union if there were any outstanding information requests. (ALJ Op. 247; JX 128, p. 2; JX 129, p. 1.) The Company's bargaining notes reflect that Kauff stated: "Will you review your notes and let us know if there is any additional information that has been requested and not provided?" (JX 128, p. 2.) The Union did not identify any unaddressed requests. (*Id.*)

It was not until February 28, 2013—seven bargaining sessions after Cablevision provided the information that had been requested on December 31, 2012—that the Union informed the Company it needed additional, historical wage information for non-unit employees (essentially, comparing their wages before and after the 2012 wage adjustments) in order to prepare its wage

proposal. (ALJ Op. 247; JX 1 ¶ 255; JX 157, p. 2; JX 158, p. 1; Tr. Vol. 14, pp. 2136-37.) Cablevision provided that additional information six days later, at the next session on March 6, 2013. (ALJ Op. 247; JX 1 ¶ 265; JX 166; JX 164, p. 1; JX 165, p. 1; Tr. Vol. 14, p. 2137.) The record is clear that the information the Union requested on February 28, 2013 was not addressed by the Union's earlier information requests, and neither Gallagher nor any other Union representative in attendance at the February 28 session claimed that the information was the subject of a prior request. (ALJ Op. 250; Tr. Vol. 14, pp. 2136-37.) The Union asked no questions about the information produced on March 6, 2013, and did not indicate that the information was inadequate in any way. (ALJ Op. 248; JXs 164, 165.)

During the May 2013 mediation, the Union requested additional wage information concerning non-unit employees that had not been previously requested, and the Company promptly provided it. (ALJ Op. 248; Tr. Vol. 14, p. 2137-39; JX 229.) On August 15, 2013, the Company provided a single, corrected sheet of information after it realized there was an error in one pay rate on one sheet among the documents that it had provided to the Union during the mediation. (ALJ Op. 248; Tr. Vol. 14, pp. 2138-39; JX 229.) During the hearing, the Charging Party argued for the first time that, because the wage information was corrected on August 15, 2013, Cablevision did not fully comply with the Union's information request until August 23, 2012, a full year after the request was made. (*See* Charging Party's Br. in Support of Exceptions 41.) This contrived allegation is directly contrary to the GC's Complaint, which alleges that Cablevision's delay in providing the wage information ended *on or about March 6, 2013*. (GCX1, No. 2(N), ¶ 13; GCX1, No. 3(A).) The GC has not pled and should not now be permitted to pursue this belated allegation. *See* Section C. 1, *supra*.

Moreover, the ALJ did not, as the GC contends, dismiss the Charging Party's claim by

concluding that a “minor, inadvertent error cannot be construed as indicia of surface bargaining.” (GC’s Br. in Support of Exceptions 55 (internal quotation marks omitted).) The ALJ’s reference to a “minor, inadvertent error” was clearly limited to the information Cablevision provided on August 15, 2013, which corrected a single piece of information it had provided to the Union during the May 2013 mediation. (ALJ Op. 251.) The ALJ, after carefully reviewing the actual requests, rejected Gallagher’s testimony that the information requested during the May 2013 mediation was the same information the Union had requested on August 23, 2012. (ALJ Op. 251.) In reaching that conclusion, the ALJ characterized Gallagher’s testimony on this point as “self-serving, unpersuasive and contrary to the Union’s conduct during the negotiations.” (ALJ Op. 251.)

In sum, the ALJ reviewed the documents and testimony submitted at trial and correctly concluded as follows:

- (1) The Union made an “unclear” request for non-unit information on August 23, 2012, and provided its justification for seeking non-unit information on September 17, 2012;
- (2) The Company timely provided information on October 26, 2012, while explaining that it had not yet conducted a comparison of unit and non-unit titles throughout the workforce, and the Union responded that it would provide a list of the comparisons it wanted;
- (3) The Union did not request any further comparisons until December 31, 2012, and Cablevision timely provided the requested information on January 9, 2013;
- (4) On February 5, 2013 the Company asked the Union if there was any additional information it needed;

- (5) On February 28, 2013, the Union responded with a request for different information, and the Company timely provided additional information on March 6, 2013;
- (6) The information that the Union requested and the Company provided during the May 2013 mediation was not the same information as the Union had previously requested, and the Company made a minor correction to that information on August 15, 2013.

(ALJ Op. 249-50.) Neither the GC nor the Charging Party has explained how or why the above timeline is inaccurate in any way. Instead, they have continued to insist that the August 23, 2012 information request and the subsequent information requests addressed the same information—an allegation the ALJ properly rejected after carefully examining each request. Because the ALJ correctly concluded that the Company provided timely responses to all of the Union’s information requests, his ruling on this issue should be affirmed.

E. Cablevision Did Not Enter Tentative Agreements To Escape Surface Bargaining Charges Or Stall Negotiations To Encourage Decertification

Faced with a clear record of progress and ultimate success at the bargaining table, the GC and the Charging Party are forced to concoct new—and wildly incorrect—theories to explain away Cablevision’s good-faith bargaining. First, the GC and the Charging Party contend that Cablevision entered Tentative Agreements with the Union only to escape allegations of surface bargaining. Second, the GC and the Charging Party contend that Cablevision stalled the bargaining process in order to encourage decertification of the Union. Both of these contentions are wrong.

1. Cablevision Entered Tentative Agreements On Substantial Subjects Throughout the Bargaining Process

The bargaining record refutes the GC's and Charging Party's assertion that Cablevision entered Tentative Agreements with the Union merely to escape the allegations of surface bargaining. (Charging Party's Br. in Support of Exceptions 17-18; GC's Br. in Support of Exceptions 25-26.)

Between the commencement of bargaining on May 30, 2012 and January 17, 2013—the last session prior to the filing of the January 24, 2013 surface bargaining charge—the parties had already met 16 times and reached 34 Tentative Agreements.³³ Indeed, the Union was “happy to report” to its members that agreements had been reached on “Employee Product Agreement (Free Cable), Employee services program (discounts), Commuter Program Policy, College Savings Plan, Savings Bond Program, Bethpage Federal Credit Union @ TD Bank Policy, Flexible Spending Account Policy, Wellness Program, Group Legal Plan, and Employee Verification Program,” as well as “Recognition of the Union, Complete Agreement, and Work Assignment Staffing and Leaves of Absence.” (RX 20.) The Union had, in fact, previously told

³³ The tentative agreements and the dates on which they were reached are: Purpose (7/31/12) (JX28), Non-Discrimination (7/31/12; JX28), Passengers (7/31/12; JX28), Modification (7/31/12; JX28), Separability and Savings Clause (7/31/12; JX28), Employee Probationary Period (7/31/12; JX29), Outside Employment/Conflicts of Interest (8/15/12; JX37), Maintenance and Cleanliness of the Facility (10/12/12; JX49), Collective Bargaining (10/26/12; JX56), Reporting Requirements (10/26/12; JX57), Access to Facilities (11/7/12; JX66), Bulletin Boards (11/7/12; JX67), No-Strikes or Lockouts (12/5/12; JX78), Company-Union Relationship (12/5/12; JX78), Grievance Procedure (12/20/12; JX89), Jury Duty Pay (11/27/12; JX89), Bereavement Pay (11/27/12; JX89), Leaves of Absence (1/3/13; JX98), Employee Assistance Program (1/3/13; JX89), Employee Product Program (1/3/13; JX89), Employee Services Program (1/3/13; JX89), Commuter Program Policy (1/3/13; JX89), NY State 529 College Savings Program (1/3/13; JX89), Savings Bond Program (1/3/13; JX89), Bethpage Federal Credit Union & TD Bank Policy (1/3/13; JX89), Flexible Spending Account Policy (1/3/13; JX89), Wellness Program (1/3/13; JX89), Group Legal Plan (1/3/13; JX89), Employment Verification (1/3/13; JX89), Complete Agreement (1/3/13; JX100), Recognition (1/3/13; JX100), Work Assignment/Staffing (1/3/13; JX100), Employee Relations Consultations (1/16/13; JX114), and Union Representation (1/17/13; JX120). The importance of many of these items (e.g., Grievance Procedure, Separability and Savings, Recognition, and the many locked-in benefits, among others) cannot seriously be disputed.

its members that several of the subjects that were resolved prior to the surface bargaining charge were “important issues.” (RX 19.)

In addition, over the next three months, and before the Complaint was even issued, the parties continued to negotiate and reached nine more Tentative Agreements. On April 9, 2013, Cablevision proposed a complete collective bargaining agreement, which included all 43 Tentative Agreements that had been reached by that date, as well as Cablevision’s proposals on every open economic subject, including wages, fringe benefits, and paid time off. (JX 1 ¶ 300; JX 89.) Plainly, the parties had made substantial progress toward a complete agreement long before the Complaint alleging surface bargaining was issued on April 29, 2013.

Following Cablevision’s tender of a complete contract, the parties met on April 16, 2013, and the Union requested substantial information regarding Cablevision’s medical plan and its proposed 401(k) plan, which were included in the contract proposal. The parties then embarked on an intensive effort to reach an overall agreement by participating in seven days of mediation in May 2013. This course of conduct confirms the Union’s interest in pursuing the details of Cablevision’s contract offer, as well as the *bona fides* of Cablevision’s offer as a basis for continuing negotiations. (JX 1 ¶¶ 306, 311-12.)³⁴

³⁴ The Charging Party’s attempts to cast aspersions on Cablevision’s efforts to reach an agreement during mediation are meritless. (Charging Party’s Br. in Support of Exceptions 41 n. 17, 50 and n. 20, 58.) First, the Charging Party omits the fact that the parties’ agreement to mediate included an agreement to conduct a private election if they reached a tentative collective bargaining agreement. (JX 197.) This understanding was obviously entered into in lieu of the processing of a decertification petition that had previously been filed (*see* Case No. 29-RD-138839), and was the subject of a Stipulated Election Agreement. Second, the fact that the parties made progress during mediation demonstrates Cablevision’s good faith throughout the process. In addition, the Company’s proposal to build on that progress in the subsequent, on-the-record bargaining based on the same private election understanding the Union had readily signed onto for mediation is further evidence of good faith. That understanding was in place when additional progress was made, and notwithstanding that the Union’s decision to dispatch with it and move forward without it was its prerogative on a permissive subject, the Charging Party cannot be heard to complain that the Company’s making of a proposal to advance the parties to final stage bargaining is anything other than evidence of good faith.

Following the mediation, the Union—as the ALJ noted, and the record clearly demonstrates—substantially withdrew from the bargaining process. (ALJ Op. 64 (“When the May 2013 mediation did not produce an agreement, [Cablevision] continued to press for meetings, proposing four dates in June . . . , all of which were rejected by the Union.”).) The bargaining process and the possibility of an overall agreement were salvaged only by Cablevision’s dogged efforts to bring the Union to the table and keep talking about their differences. (ALJ Op. 64.) No employer engaged in surface bargaining would make such an effort when a union is resisting bargaining and is as disengaged as was the Union in this case.

Thus, there is no basis for the claim that Cablevision was stirred to action by the prospect of a surface bargaining charge. Instead, the record reveals steady progress—often at Cablevision’s insistence—over a period of many months.

2. The Allegation That Cablevision Stalled To Encourage Decertification Violates Cablevision’s Right to Fair Notice and Is Refuted By the Bargaining Record

Nothing in the Complaint, the Bill of Particulars, or the hearing record reflects any allegation that Cablevision was “stall[ing] negotiations in the hope that employees would decertify the Union,” as both the Charging Party and the GC now improperly assert. (Charging Party’s Br. in Support of Exceptions 4-15; *see also* GC’s Br. in Support of Exceptions 24-27.) This allegation must be rejected because it is both inexcusably belated and without merit.

As previously noted, *see* Section C. 1, *supra*, Section 102.15 of the Board’s Rules and Regulations requires “[a] clear and concise statement of the acts which are claimed to constitute unfair labor practices.” 29 C.F.R. § 102.15(b). Absent such a statement, the Board will dismiss belated allegations of unfair labor practices as violating the notice requirement set forth in the Rules. *See New Era Cap*, 336 NLRB at 526. As with their belated seniority and safety allegations, the Charging Party’s and GC’s post-trial addition of a new theory of surface

bargaining deprived Cablevision of fair notice, in violation of Section 102.15 of the Board's Rules and Regulations. Neither the pleadings nor the hearing record contain allegation that Cablevision was deliberately dragging out negotiations in order to assist bargaining-unit employees in pursuing a decertification petition. As a result, Cablevision "was never placed on notice that it needed to defend against those allegations," and Cablevision had no "opportunity to call . . . witnesses to rebut the allegations." *New Era Cap*, 336 NLRB at 526. Having concealed its "running out the clock" allegation during the hearing in this matter, the GC should not be permitted to advance it now.³⁵

In any event, there is no basis in the record to conclude that Cablevision intended to stall the negotiations for any purpose. Instead, the record demonstrates that the Union contributed significantly to the time consumed by the bargaining process, as follows:

The Union consumed the first four months of the certification year, from February 7, 2012 to May 30, 2012, by delaying the initiation of bargaining and submitting a voluminous initial request for information.³⁶ Over the next several months, from May 30, 2012 to August 15, 2012, the Union slowly parceled out its initial proposals—which included a series of confusing wage proposals³⁷—and continued to add new proposals thereafter.³⁸ The Union's initial

³⁵ Even if the GC had moved to amend the pleadings—and he has not—Board law would not permit such an amendment under these circumstances. The Board has previously rejected untimely amendments where the GC "did not explain the delay," "the delay was 'of consequence' given that respondent had presented its defense," and "it could not be 'glibly assumed' that respondent's handling of its case would have been unchanged." *Stagehands Referral Serv.*, 347 NLRB at 1172 (citing *Consol. Printers, Inc.*, 305 NLRB at 1064). Here, the GC has not explained why he withheld this allegation until after the hearing record had closed. The delay is certainly "of consequence" given that Cablevision had already presented its case—and submitted post-trial briefing—before the GC first asserted this theory. And it cannot be assumed that Cablevision's presentation would have been unchanged had it known of the GC's new theory at the time of the hearing. Consistent with settled Board law, the GC's new allegation should be dismissed.

³⁶ (JX 1 ¶¶ 5-10, 13, 16; JXs 4, 5, 6, 7, 9, 11, 13, 14; Tr. Vol. 13, pp. 1974-79; Tr. Vol. 3, pp. 365-66.)

³⁷ The Union made two vague wage-related proposals: one merely asking for a "substantial wage increase" (JX 1 ¶ 21; JX 15 (Union Proposal No. 1); (Tr. Vol.14, pp. 2147-49)), which Model testified was unlike any proposal he had previously encountered in 20 years of collective bargaining (Tr. Vol. 13, p. 1983); and another asking for the "same enhanced wages, benefits and other terms and conditions of employment, as given to non-bargaining

proposals covered a total of 47 subjects, and its numerous counter-proposals throughout the certification year resulted in substantial additional discussions, all of which Cablevision engaged in diligently.³⁹

In addition, the Union did not request information concerning non-unit employees, which it supposedly needed to submit a wage proposal, until August 23, 2012.⁴⁰ The Union, in fact, made piecemeal information requests concerning many subjects throughout 2012 and well into 2013. And the Union's many questions about and oral requests for information consumed substantial amounts of time at bargaining sessions.⁴¹ As detailed *supra*, the Union also failed for many weeks in the winter of 2013 to tender a comprehensive wage proposal that Cablevision—the party allegedly refusing to bargain over economics—had repeatedly requested.⁴²

If this overwhelming evidence were not enough, the new “running out the clock” claim is put to rest by the GC's and the Charging Party's concession that Cablevision did, at all pertinent times and throughout the certification year, bargain at reasonable times with the Union. As previously noted, the ALJ expressly concluded that Cablevision had not “violated its obligation to meet at reasonable times” and that Cablevision's “scheduling proposals do not constitute an

unit employees on May 1, 2012.” (JX 1 ¶ 21; JX 15 (Union Proposal No. 19, “Retroactive Pay”); Tr. Vol. 13, pp. 1983-84; Tr. Vol. 9, p. 1585.) At the time it delivered these two proposals, the Union made no effort to explain or provide any guidance on how they fit together. Further, the Union said it would add a percentage component to the “substantial wage increase” proposal as the parties negotiated. (JXs 13-14; Tr. Vol. 13, pp. 1984-85.) The Union failed to do so, however, until ten months later, on March 14, 2013. (JX 173, Proposal 56; Tr. Vol. 14, p. 2241; Tr. Vol. 9, p. 1585.) Prior to that, on February 25, 2013, nine months after the first bargaining session, the Union made two additional compensation-related proposals (Career Progression and Automatic Upgrades) that appeared to directly conflict with its original compensation-related proposals. (JXs 149-50, 155 (Proposal 55); Tr. Vol. 14, pp. 2149-50.)

³⁸ (JX 1 ¶¶ 21, 36, 48, 58, 83, 95, 130, 194, 246, 277; JXs 15, 24, 31, 36, 52, 62, 83, 121, 155, 173.)

³⁹ (JX 1 ¶¶ 21, 36, 47, 48, 58, 72, 82, 94, 114, 129, 145, 156, 180, 192, 217; JXs 15, 24, 30, 31, 36, 44, 50, 51, 61, 73, 82, 91, 99, 113, 132.)

⁴⁰ (JX 1 ¶ 61; JX 38; Tr. Vol. 13, pp. 2000-01.)

⁴¹ (JX 20, pp. 2-7, 13-20; JX 54, pp. 11-13; JX 75, pp. 16, 21-22; JX 80, pp. 10-12, 14; JX 86, pp. 8-13, 17.)

⁴² (JX 92, 136, pp. 13, 16; JX 137, p. 12; Tr. Vol. 14, pp. 2134-35, 2146-49, 2240.)

indici[um] of bad faith bargaining.” (ALJ Op. 214.) Neither the GC nor the Charging Party excepted to this conclusion. This concession—that Cablevision did *not* delay the bargaining—is fatal to their allegation that Cablevision “stalled” the negotiations in order to run out the clock on the certification year and permit the filing of a decertification petition.

In sum, more than half of the certification year was consumed by the Union’s delay in the commencement of bargaining; the Union’s slow pace in getting its proposals on the table; the number and complexity of the Union’s proposals and counter-proposals; and the Union’s many information requests spread out over many months. Despite all of this, the parties made substantial progress toward a collective bargaining agreement during the certification year. Because Cablevision was fully engaged in the bargaining process—and was, indeed, driving the process forward—the Company cannot fairly be charged with stalling the negotiations.⁴³

II. The ALJ Correctly Determined That Cablevision Bargained In Good Faith Regardless Of Any Conduct Occurring Away From The Table (GC’s Exceptions 5, 8; Charging Party’s Exceptions 12-15)

Having failed to prove surface bargaining based on Cablevision’s bargaining conduct, the Charging Party and the GC resort to allegations based on Cablevision’s conduct away from the table. These allegations are equally meritless.

A. The ALJ Correctly Considered the Totality of the Circumstances in Evaluating Cablevision’s Bargaining Conduct

The Charging Party and the GC argue that the ALJ failed to properly consider the Company’s away-from-the-table conduct when assessing Cablevision’s bargaining conduct.

⁴³ The Charging Party attempts to bolster its surface bargaining allegations by pointing to Dolan’s statements expressing disappointment in the outcome of the union vote. (Charging Party’s Br. in Support of Exceptions 24.) But an employer has the right to offer its opinion and communicate its views about a union under Section 8(c) of the Act and the First Amendment. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Charging Party therefore errs in urging the Board to construe these statements as “evidence of an unfair labor practice,” and commits the same error with regard to other statements by Dolan. (See Cablevision’s Br. in Support of Exceptions 50-51.)

Even assuming that the ALJ was correct in finding that Cablevision had engaged in certain unfair labor practices unrelated to the parties' negotiations, and notwithstanding Cablevision's exceptions to those findings, the ALJ correctly concluded that such conduct did not negate Cablevision's good faith in the parties' negotiations.

Although the Board looks at the "totality of the circumstances"—including conduct "both at and away from the bargaining table"—in evaluating a claim of surface bargaining, *Hardesty Co.*, 336 NLRB 258, 260-61 (2001), conduct away from the bargaining table is only "considered for what light it sheds on conduct at the bargaining table," *Litton Microwave Cooking Prods.*, 300 NLRB 324, 330 (1990). For that reason, the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." *Id.* Thus, where an employer's "conduct at the bargaining table does not show an intent to frustrate agreement," the employer's "conduct away from the table does not, on its own, warrant a finding of overall surface bargaining." *St. George Warehouse, Inc.*, 341 NLRB 904, 907-08 (2004).

The facts in this case—including the 30 bargaining sessions, seven days of mediation and 45 Tentative Agreements—are similar to those in *Litton*. In that case, given the employer's "frequent (53) meetings with the Union, its extensive explanations for its positions and extensive examination of the Union's proposals, its agreement with the Union on at least 23 topics, its numerous significant concessions, and the absence of evidence that it procedurally tried to frustrate the bargaining process," the Board concluded that the employer had bargained in good faith despite committing several away-from-the-table unfair labor practices, including unilateral changes in conditions of employment. 300 NLRB at 327. Similarly, in *St. George Warehouse*, the Board found that—despite the fact that the employer violated Section 8(a)(1) in statements made following bargaining sessions, unilaterally transferred bargaining unit work to temporary

employees, and refused to provide information to the union—the employer’s conduct at the bargaining table “d[id] not show that the [employer] intended to frustrate agreement.” 341 NLRB at 907-08. The Board therefore concluded that the away-from-the-table unfair labor practices “[did] not warrant a finding of surface bargaining, absent more persuasive evidence of misconduct *at the bargaining table.*” *Id.* at 907 (emphasis added).

Thus, even where the Board has found multiple instances of unfair labor practice conduct away from the table, it has refused to find surface bargaining when the totality of circumstances reflect that the employer met many times with the union, bargained to agreement on many issues, made concessions throughout bargaining, supplied requested information, and did not otherwise engage in dilatory or obstructive tactics at the bargaining table. *See Flying Foods Group, Inc.*, 345 NLRB 101, 108 (2005) (“Respondent’s misconduct away from the table . . . has not been shown to have influenced its conduct at the bargaining table.”); *River City Mechanical*, 289 NLRB 1503, 1505 (1988) (no finding of surface bargaining, because there was “no showing that the provocative and unlawful away-from-the-table statements of the Respondent’s officials influenced the aims or attitudes of [the negotiator] in advancing contract proposals on behalf of the Respondent [in good faith]”).

Here, as in *Litton* and *St. George’s Warehouse*, there is no nexus between the away-from-the-table conduct and the actual bargaining sufficient to support a surface bargaining allegation. A significant number of the alleged unfair labor practices occurred in the Bronx and involved an entirely separate workforce than the Brooklyn bargaining unit. Moreover, the alleged unfair labor practices in the Bronx occurred during a limited period of time and did not involve management personnel who participated in bargaining. This conduct is not sufficient to overcome the extensive evidence of good faith bargaining.

The handful of alleged unfair labor practices that related to employees in the bargaining unit likewise had no measurable impact on the parties' negotiations. The principal incident cited by the Charging Party and the GC is the alleged "rabbit hole" comment made by Cablevision Vice President Rick Levesque.⁴⁴ (Charging Party's Br. in Support of Exceptions 22-23; GC's Br. in Support of Exceptions 67.) This isolated remark does not negate the overwhelming evidence that Cablevision intended to reach an agreement with the Union, since "a stray statement indicating inflexibility [in bargaining] will not overcome the general tenor of good faith negotiation." *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 758 (6th Cir. 2003) (citing *Indus. Elec. Reels, Inc.*, 310 NLRB 1069, 1072 (1993)). That is particularly true here, since the statement was allegedly made in early February 2013—after the parties had already reached Tentative Agreements on 35 subjects. Further, Levesque's alleged remark did not portend Cablevision's actual bargaining conduct: On April 9, 2013, not long after the remark supposedly was made, the Company proposed a complete collective bargaining agreement—containing all 43 Tentative Agreements already reached by the parties and additional provisions needed to round out the agreement—a contract that the Union could then and there have accepted and executed.

Moreover, the Board has previously rejected surface bargaining allegations premised on far more egregious comments. In *St. George Warehouse, Inc.*, for example, the employer's negotiator told a union representative that, "[W]e both know what's going to happen here; you're not going to get a contract, and the Union [is] going to end up abandoning the shop." 341 NLRB at 908 (internal quotation marks omitted; second alteration in original). Even so, the Board dismissed the surface bargaining charge, concluding that this "isolated statement" was

⁴⁴ Cablevision has previously explained why the ALJ erred in finding—based on the uncorroborated testimony of a Union steward—that Levesque made such a statement. (Cablevision's Br. in Support of Exceptions 91-94.)

insufficient to outweigh the evidence of the employer's willingness to continue negotiations. *Id.* Thus, even assuming that Levesque made the "rabbit hole" remark, that statement—which did not suggest, much less predict, that there would be no contract—is insufficient to outweigh the evidence of productive bargaining thereafter. Similarly, the single comment by Daryl Gaines, allegedly instructing a handful of employees not to engage in Union-related activity, cannot reasonably be said to have either reflected the course of bargaining or had any impact on that bargaining.

The same is true with respect to Cablevision's decision to rescind "smart meter" training and the August 1, 2013 memo announcing that rescission—neither of which had any impact on Cablevision's overall good faith bargaining. (*See* Cablevision's Br. in Support of Exceptions 95-102.) Only a week after instituting smart meter training, the Company realized it had acted prematurely—and at the next bargaining session, the parties were bargaining over the meters. (JXs 225, 226, 234, 235, 247.) The fact that Cablevision promptly engaged in bargaining over smart meter training restored the Union's status as the bargaining agent to whatever minor extent it was curtailed by the Company's brief unilateral change and the explanatory letter that followed. In any event, both of these events occurred long after March 4, 2013, the date on which, according to the General Counsel's Complaint, the alleged surface bargaining scheme expired. (Compl. ¶ 12(a).) The ALJ was therefore correct in finding that the August 2013 smart meter issue, which occurred five months after the end of the surface bargaining alleged in the Complaint, had no relevance to the bona fides of the Company's bargaining.

The only other alleged unfair labor practice that had any connection to Brooklyn is the permanent replacement of the 22 economic strikers on January 30, 2013. (Cablevision's Br. in Support of Exceptions 55-86.) The Charging Party's argument that the replacement of the 22

strikers “reflects *directly* on its surface bargaining, forewarning all other employees that they had best not speak out to protest the Company’s lack of progress [in negotiations],” is fatally flawed, because it ignores what actually happened. (Charging Party’s Br. in Support of Exceptions 22.) The strikers were not “fired”; rather, they were permanently replaced, which was perfectly lawful but for the fact that (according to the ALJ) Cablevision informed the strikers of the replacement decision prematurely. Informing these employees that they had been “replaced” and not fired, as numerous witnesses called by the GC acknowledged, immediately conveyed that the Company considered the employees to be lawfully entitled to strike and entitled to recall. (*See* Tr. Vol. 14, pp. 2299-2300.) More importantly, Cablevision underscored this by explaining, in a memorandum to all Brooklyn bargaining unit employees the very same day, that it had “permanently replaced” the employees who had refused to work, as it had the right to do “in order to ensure that its business is not interrupted,” and that “[i]f a position opens up in Brooklyn at their level, *these replaced employees are entitled to be reinstated and fill that open position.*” (JX 249.) (emphasis added).

Thus, the opposite of the message claimed by the Charging Party was actually conveyed by the Company and at the same time, the Company continued to bargain intensively and productively. One need look no further than the bargaining session on January 30, 2013—the day of the strike—to dispense with any argument that Cablevision intended not to reach a collective bargaining agreement. On the same day that Cablevision permanently replaced the 22 strikers, the parties engaged in a substantive discussion of proposals, the Company responded to a Union information request, and the parties reached a Tentative Agreement on the important subject of Arbitration. (JX 1, ¶¶ 196-204.) Plainly, Cablevision was engaged in good faith bargaining at the table.

The Charging Party makes much of a January 30, 2013 e-mail sent by Cablevision Vice President Rick Levesque to employees in Brooklyn regarding the Board’s decertification process, repeatedly pointing to it as evidence of bad faith bargaining. (See GCXs 11, 106; Charging Party’s Br. in Support of Exceptions 3, 6, 15, 21-22.) This argument is wholly misplaced, as the e-mail was both lawful and had nothing to do with the bargaining process, and the timing of the e-mail was a mere coincidence and had nothing to do with the Union’s strike that commenced later the same morning.⁴⁵ Most importantly, neither the Complaint nor the GC’s Bill of Particulars allege that this e-mail was an unfair labor practice. A lawful statement regarding the decertification process that does not mention bargaining and is not even alleged to be an unfair labor practice cannot be evidence of bad faith bargaining.

Thus, the undisputed evidence makes clear that, notwithstanding any conduct away from the table, Cablevision had the requisite intent “to reach an acceptable common ground” with the

⁴⁵ The e-mail was sent at 7:54 a.m.—before Levesque first encountered the strikers in the cafeteria of the Avenue D facility, around 8:10 a.m. (GCX 11; see also Cablevision’s Br. in Support of Exceptions 62.) (Levesque sent a substantially identical e-mail to a different group of recipients at 7:56 a.m. (GCX 106).) This timeline belies any assertion that the e-mail was sent as part of a coordinated effort to encourage decertification.

Moreover, the first two sentences make clear that the e-mail was sent in response to employee inquiries about Union assertions that, as a result of an unfair labor practice charge that had been filed days before, there would be no decertification vote. The e-mail states that, “Some Union representatives are expressing the opinion that there won’t be a decertification vote. Also, the Union just filed a baseless Labor Board Charge that we think was filed in order to block a decertification election.” (GXs 11, 106.) Significantly, the e-mail does not say anything about the strike—which had not yet occurred—or the bargaining process. Instead, it simply explains that, “the decertification election process is governed by law,” and that “Cablevision cannot and will not encourage or discourage you from supporting, signing or filing a decertification petition.” The e-mail further advised that, “If you want to know more about a decertification election petition, you may call the National Labor Relations Board at 718/330-7713 or 7714 and ask for the Information Officer.” These statements—which accurately referred to the decertification process and made clear that Cablevision was not encouraging the filing of a decertification petition—were entirely lawful. See, e.g., *Exxel/Atmos Inc. v. NLRB*, 147 F.3d 972, 976 (D.C. Cir. 1998) (statement accurately describing decertification procedure and advising employees to contact the Board for information held lawful); *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409-10 (1992), *remanded in part on other grounds*, 117 F.3d 1454 (D.C. Cir. 1997) (no violation where employer gave general information about decertification process, location of Board’s office, and noted that a decertification petition would have to be filed soon, citing employer’s Section 8(c) right to furnish accurate information if it does so without making threats or promises of benefits). Likewise in this case, Section 8(c) prohibits treating these lawful, constitutionally-protected statements as evidence of bad faith bargaining.

Union. *Ins. Agents' Int'l Union*, 361 U.S. at 485. Cablevision participated in 37 days of bargaining—and seven days of mediation with the Director of the FMCS—over the 18-month period between May 30, 2012 and December 17, 2013. During that same period, Cablevision repeatedly modified its proposals and counter-proposals in response to concerns raised by the Union, provided volumes of information requested by the Union, and consistently pressed the Union to come to the bargaining table to continue negotiations. The parties reached a total of 45 Tentative Agreements, which were later incorporated in the final Agreement. Moreover, Cablevision's statements, both at the table and to employees at the conclusion of each bargaining session, also are clear evidence of its intention to get a collective bargaining agreement in place and of its commitment to work for as long as it took to resolve issues through bargaining.⁴⁶

The unavoidable conclusion is that, regardless of any events occurring outside the negotiations, Cablevision bargained with every intention of reaching agreement with the Union. None of the alleged unfair labor practices can be shown to have had any impact whatsoever on the Company's negotiations or on what was achieved at the bargaining table. *See River City Mechanical*, 289 NLRB at 1505 (dismissing surface bargaining allegation where there was “no showing” that the unfair labor practices “influenced the aims or attitudes” of the negotiator). The ALJ's conclusion is therefore correct and should be affirmed.

B. The Testimony of Simon Gomez Was Properly Excluded Under the Collective Bargaining Privilege, And In Any Event Does Not Alter The Conclusion That Cablevision Bargained In Good Faith

Having failed to prove surface bargaining on any other basis, the GC and the Charging Party pin their hopes on the testimony of former Cablevision supervisor Simon Gomez.

⁴⁶ (See Tr. Vol. 14, p. 2311 (citing RX 64-66); Tr. Vol. 13, pp. 2081-82, 2085-87 (citing RX 31-49); JX 64, pp. 1, 8; JX 69, pp. 1, 21, 24; JX 80, p. 10; JX 86, pp. 16, 17, 22; JX 94, p. 9; JX 102, p. 1; JX 108, pp. 4, 19; JX 116, pp. 6, 9; JX 123, pp. 11, 16; JX 128, pp. 6, 11, 16-18 20; JX 136, p. 2; JX 149, pp. 4, 9, 10; JX 157, p. 8; JX 170, pp. 2, 11, 13; JX 178, pp. 6, 14, 22.)

(Charging Party’s Br. in Support of Exceptions 22; *see* GC’s Br. in Support of Exceptions 25.) Contrary to their assertions, the ALJ correctly determined that certain testimony given by Gomez was subject to the collective bargaining privilege and should be excluded. But even if the ALJ had admitted Gomez’s clearly biased testimony in its entirety, it would not alter the finding that Cablevision bargained in good faith.

1. The ALJ Correctly Excluded The Testimony of Simon Gomez Under the Collective Bargaining Privilege

Simon Gomez, a former Cablevision supervisor, was called as a witness by the GC. Gomez testified that, during two meetings with managers and supervisors—which he repeatedly referred to as “strategy” meetings—Cablevision Vice President Barry Monopoli relayed certain comments that Cablevision CEO James Dolan allegedly made concerning how the Company would handle bargaining with the Union. (Tr. Vol. 4, pp. 520, 525-26, 556-58, 564.) As the ALJ correctly concluded, these statements related to Cablevision’s collective bargaining strategy and were therefore protected from disclosure.

The Board has long recognized that certain internal union and employer communications relating to negotiations are privileged because disclosure would be detrimental to the collective bargaining process. The bargaining privilege is founded on Section 1 of the Act, which states that it is “the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining.” 29 U.S.C. § 151. In *Berbiglia, Inc.*, 233 NLRB 1476 (1977), the Board held that a union was not obligated to produce written communications with its members, officials or organizations, or other internal documents relating to its strategy in an alleged unfair labor practice strike. In revoking the employer’s subpoena for the documents, the ALJ—in an opinion later affirmed by the Board—concluded that, “If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of

exposure.” *Id.* at 1495. The need for confidentiality regarding a party’s bargaining strategy is “so self-evident as apparently never to have been questioned,” the ALJ observed. *Id.*; *see also* *Champ Corp.*, 291 NLRB 803, 818 (1988) (revoking subpoenas that “clearly called for exposing crucial material regarding pending union negotiations” (internal quotation marks omitted)).

The Board has since confirmed that the bargaining privilege protects the negotiating strategies of both the union and the employer. In *Boise Cascade Corp.*, 279 NLRB 422 (1986), the employer was not obligated to produce “its historical overview of negotiations with the Union and its future negotiating strategy” because such disclosure “might well have a tendency to frustrate the overall purpose of collective bargaining between the parties.” *Id.* at 432. In so holding, the ALJ concluded that “[a] proper bargaining relationship between the parties mandates that [the employer] be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing [it].” *Id.* *See also* *NLRB v. Federal Labor Relations Authority*, 952 F.2d 523, 527, 529-531 (D.C. Cir. 1992) (finding that the Board itself is entitled to a like privilege under the Federal Services Labor-Management Relations Statute and is not obligated to produce agency (management) documents that reflect bargaining strategies to the National Labor Relations Board Union) (citing, *inter alia*, *Boise Cascade*). Labor law commentators have similarly recognized that “[i]t makes sense” that the bargaining privilege “applies to employers as well as unions,” because “each has a similar interest in protecting from disclosure its internal thinking and strategizing on bargaining.” David I. Goldman, *Union Discovery Privileges: Protecting Union Documents and Internal Information from Subpoena*, 17 Labor L. 241, 244 (2001); *see also* Mitchell H. Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 Berkeley J. Emp. & Labor L. 221, 242 (2008) (“[U]nder Board law, the protection of

confidential labor relations information extends not only to unions, but also management.”).

The Board has cited *Berbiglia* with approval in the course of evaluating the role of privilege generally in cases under the Act. In *Patrick Cudahy, Inc.*, 288 NLRB 968 (1988), which involved alleged surface bargaining, the Board considered an employer’s petition to revoke subpoenas seeking its bargaining notes, letters, memoranda, communications and strategies. Citing *Berbiglia*, the Board held that the vast majority of the documents at issue were protected from disclosure by the attorney-client privilege, reasoning that “if collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure,” *Id.* at 971 (quoting *Berbiglia, Inc.*, 233 NLRB at 1495). Notwithstanding the “strong policy reasons favoring disclosure”—including the “deterrence of ‘sham’ bargaining”—the Board concluded that “the countervailing policy reasons underpinning the privilege itself and the policy consideration of fostering collective bargaining” must prevail. *Id.* at 973; *see also Quality Roofing Supply Co.*, JDR-1-11, 2011 NLRB LEXIS 444, at *25 (NLRB Div. of Judges Aug. 17, 2011) (“This privilege affording protection to documents that reveal strategies related to collective bargaining . . . has been specifically endorsed by the Board as part of its exposition of the law of privilege in labor relations cases in *Cudahy.*”).⁴⁷

⁴⁷ The Charging Party makes much of the fact that the Board in *Patrick Cudahy* relied on attorney-client privilege rather than bargaining privilege to shield documents from disclosure, going so far as to assert that, if the Board had truly endorsed a bargaining privilege, it “would not have needed to reach” the “superfluous” question of attorney-client privilege. (Charging Party’s Br. in Support of Exceptions 10.) This argument ignores both that the bargaining privilege was already well established when *Patrick Cudahy* was decided, and that bargaining privilege was not even at issue in the case. Every disputed document in *Patrick Cudahy* concerned communications between the employer and the law firm it had hired to render legal advice in connection with contract negotiations. 288 NLRB at 968. Because the employer objected to the production of documents only to the extent the documents fell within the scope of attorney-client privilege, the only issue before the Board in *Patrick Cudahy* was the scope of the attorney-client privilege and the Charging Party’s implication that any conclusion can be drawn from the absence of a discussion of bargaining privilege is completely misleading. In short, *Berbiglia* and *Boise Cascade* remain good law, and neither *Patrick Cudahy* nor any other Board decision has ever suggested otherwise.

The GC and the Charging Party nonetheless assert that Gomez’s testimony is unprotected because the collective bargaining privilege does not protect evidence reflecting an intent to commit an unfair labor practice. (Charging Party’s Br. in Support of Exceptions 9-10; GC’s Br. in Support of Exceptions 19-20.) That argument has no support in the caselaw, and it is in the nature of any privilege that it will exclude relevant documents and testimony from evidence, including documents and testimony that might be indicative of the alleged violation at the heart of a case. Indeed, it is in circumstances where a party believes the evidence will aid its case that disputes about privilege are typically fought. If bargaining strategy materials could be compelled, and then sifted through for evidence of unfair labor practices, it would produce precisely the chilling effect on developing a bargaining strategy that *Berbiglia* is intended to prevent. As the Board explained (again) in *Patrick Cudahy*, “[I]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure.” 288 NLRB at 971 (quoting *Berbiglia, Inc.*, 233 NLRB at 1495).

Accordingly, the Board has applied the collective bargaining privilege in unfair labor practice cases where the privileged information “would, in fact, be relevant,” and where “complete disclosure might help an arbitrator to reach a more just result.” *Boise Cascade*, 279 NLRB at 432. Far from suggesting that it warrants less protection or weight than any other privilege, the Board has underscored the breadth and “necessity” of the collective bargaining privilege.⁴⁸ *Berbiglia*, 233 NLRB at 1495; *see also Boise Cascade*, 279 NLRB at 432 (“A proper bargaining relationship between the parties *mandates* that Respondent . . . be able to plan

⁴⁸ The GC provides no authority—because there is none—for the proposition that oral testimony is less deserving of protection under the collective bargaining privilege than documentary evidence. (*See* GC’s Br. in Support of Exceptions 19.)

in confidence a strategy for altering or changing its maintenance improvement program.”) (emphasis added).⁴⁹

The GC’s and the Charging Party’s claims that the bargaining privilege should only apply to “lawful” or “good faith” strategies are similarly unavailing. The post hoc analysis of a party’s bargaining strategy envisioned by the GC and Charging Party would necessarily require disclosure of the information sought to be protected in the first place, completely eviscerating the privilege in the process. As the Board has previously explained, this type of evidence is not necessary to litigate bad faith bargaining cases—indeed, “‘sham’ bargaining cases have been litigated for many years without the benefit of th[is] sort of disclosure.” *Patrick Cudahy*, 288 NLRB at 973. Applying the GC’s and Charging Party’s approach to the collective bargaining privilege “would result, essentially, in swallowing up the privilege altogether.” *Id.* Again, the rule of *Berbiglia* is that such evidence may not be compelled—not that bargaining strategies must be disclosed so that the parties and ALJ may then assess their relevance to the case.⁵⁰

The Charging Party goes a step further, arguing that Gomez’s testimony should have been admitted because this situation is analogous to the crime-fraud exception to the attorney-client privilege. (Charging Party’s Br. in Support of Exceptions 10-11.) But the Board has

⁴⁹ The Charging Party cherry-picks—and then belabors—the only ALJ decision to question the collective bargaining privilege, *Taylor Lumber & Treating, Inc.*, 326 NLRB 1298 (1988), going so far as to assert that “the fact ‘the ALJ chose not to follow *Berbiglia* in *Taylor Lumber* is a further indication of the weakness of any *Berbiglia* rule.’” (Charging Party’s Br. in Support of Exceptions 8 n.3 (citation and alterations omitted).) But the Charging Party fails to acknowledge that *Taylor Lumber* is both non-precedential and an outlier. The Charging Party cannot have it both ways; it cannot attack (or ignore) non-precedential decisions it does not like, and then claim those it does like somehow reflect the Board’s view. An ALJ’s failure to apply Board law reflects an error by the ALJ, not some defect in the Board’s precedent.

⁵⁰ The Charging Party repackages the same argument by asserting that Gomez’s testimony should not be covered by the bargaining privilege because the statements Gomez attributed (indirectly) to Dolan do not reveal a “bargaining strategy,” but rather a strategy not to reach an agreement. (Charging Party’s Br. in Support of Exceptions 9.) In fact, the alleged statements purportedly concern a *strategy toward bargaining*, and that is the reason the Charging Party seeks to admit them. Moreover, the Charging Party’s proposed exception to *Berbiglia* would swallow the rule, permitting parties to discover *all* strategy materials and then engage in a post hoc analysis of which materials evince a genuine “bargaining strategy.” That would eviscerate the privilege, as explained above.

already considered and rejected this argument, concluding that the crime-fraud exception does not extend to unfair labor practices generally or Section 8(a)(5) allegations in particular. *Patrick Cudahy*, 288 NLRB at 974 (“[W]e now reject the position taken by the Board . . . that a violation of the National Labor Relations Act constitutes a crime or fraud for purposes of the crime or fraud exception.”). In so holding, the Board recognized that there were policy arguments favoring disclosure of privileged information, but concluded that “countervailing policy reasons,” including “the policy consideration of fostering collective bargaining,” outweighed these concerns. In other words, the same interests that *Berbiglia* protects—“the policy consideration of fostering collective bargaining”—trump any interest in uncovering evidence of unfair labor practices. *Id.* at 973.

The GC also argues that the ALJ should have balanced the interests of each party before applying the collective bargaining privilege, as in *Boise Cascade*. (GC’s Br. in Support of Exceptions 21-22.) But weighing the parties’ interests here would not affect the determination that Gomez’s testimony should be excluded. The interest the ALJ identified in *Boise Cascade*—that the employer “be able to plan in confidence a strategy”—applies equally to Cablevision in this case. 279 NLRB at 432. The GC’s repeated insistence that Cablevision has no legitimate interest in preventing disclosure of evidence concerning bad faith bargaining misses the point. (GC Br. In Support of Exceptions 22.) The collective bargaining privilege exists not to protect evidence of unfair labor practices, but to protect the free flow of information so that the parties are “able to formulate their positions and devise their strategies without fear of exposure.” *Berbiglia*, 233 NLRB at 1495. Like any party to collective bargaining, Cablevision had a legitimate interest in the confidentiality of its bargaining strategy, and protecting that interest advances the Act’s fundamental purpose of “encouraging the practice and procedure of collective

bargaining.” 29 U.S.C. § 151. The rule sought by the GC would obliterate the privilege and intrude deeply into parties’ bargaining preparations, fundamentally altering how collective bargaining agreements are negotiated.

Finally, the Charging Party’s specious argument that Cablevision somehow waived the bargaining privilege, either by failing to provide an evidentiary basis for it, or by disclosing statements regarding its bargaining strategy to “roughly 40 or so” managers, simply has no basis in Board law. (Charging Party’s Br. in Support of Exceptions 4-5, 12-13.) Contrary to the Charging Party’s assertions, there were no facts that needed to be developed at trial on this point; indeed, presenting such “facts” would only serve to further undermine the privilege. The only issue is whether the communications on their face relate to the Company’s bargaining strategy—a legal, not factual, issue. Cablevision made a timely objection when the issue arose during the hearing. (*See* Tr. Vol. 4, pp. 526-29.) There is no basis to claim that Cablevision waived the privilege by its conduct at the hearing.

Moreover, the Charging Party fails to provide any authority—because there is none—for the proposition that the bargaining privilege is limited to members of the negotiating team. Instead, the privilege applies to the employer, in order to facilitate the free exchange of ideas within management. Thus, almost by definition, the privilege must include supervisors and managers who are often consulted by the employer’s negotiators when developing bargaining strategies. *Berbiglia* itself recognizes that that a union’s claim of the privilege is not limited to the union’s negotiating team but rather covers the entire membership. 233 NLRB at 1495 (revoking subpoena seeking information “discussed in meetings between the union *and members of the bargaining unit*”) (emphasis added). There is no authority for limiting the employer’s privilege as suggested by the Charging Party, and doing so would fundamentally alter the

privilege, causing a substantial chilling effect on the very communication the privilege is intended to protect. Limiting the privilege to the party's official negotiators will effectively prevent unions and employers from developing strategies with a wider cross-section of their members or management (including direct supervisors and middle-managers), and will hinder effective collective bargaining.

Because the ALJ's recitation and application of Board law on this issue is plainly correct, the Board should affirm the ALJ's conclusion that Gomez's testimony was subject to the collective bargaining privilege.

2. Even If Gomez's Excluded Testimony Is Considered, The Finding Of No Surface Bargaining Remains Unchanged

Even if Gomez's testimony is not protected by the collective bargaining privilege, his testimony should not be credited and does not, in any event, alter the conclusion that the surface bargaining claim must be dismissed.

First, Gomez should have been discredited as a witness because his testimony was disputed by another, credible witness, and because of his clear bias against Cablevision. As an initial matter, and as raised in Cablevision's exceptions and addressed in its exceptions brief, the ALJ erred in characterizing Gomez's testimony as "largely undisputed and undenied by Monopoli." (ALJ Op. 40.) The ALJ appears to have overlooked Monopoli's direct testimony that he (Monopoli) had only two conversations with Dolan, and that neither of them concerned union negotiations in Brooklyn. (Tr. Vol. 13, p. 1922.) Monopoli also denied making any of the comments Gomez attributed to him. (Tr. Vol. 13, pp. 1922-23.) Contrary to the ALJ's assertion, this testimony by Monopoli clearly contradicted Gomez's version of events.

The ALJ further erred in failing to consider Gomez's significant biases against the Company, as also raised in Cablevision's exceptions and addressed in its exceptions brief. (ALJ

Op. 40.) Gomez admitted on the stand that he believed he had been terminated unfairly, and that he had a lawsuit pending against Cablevision seeking approximately \$5.6 million in damages for race discrimination. (Tr. Vol. 4, pp. 598-601; RX 6, p. 13.) As part of that lawsuit, Gomez alleged that he had complained to both Monopoli and Dolan about various issues, and that neither Monopoli nor Dolan had addressed his complaints. (Tr. Vol. 4, pp. 599-600.) Given Gomez's obvious and substantial bias against Cablevision in general, and Dolan and Monopoli in particular, Gomez's testimony should be discredited entirely. *See Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, slip op. at 3-5 (2011) (reversing ALJ's credibility determination and explaining that "the Board has consistently held that where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility") (quoting *J.N. Ceazan Co.*, 246 NLRB 637, 638 n.6 (1979) (internal quotation marks omitted; ellipsis in original); *see also E.S. Sutton Realty Co.*, 336 NLRB 405, 405 n.2 & 407 (2001) (reversing ALJ's credibility determination).

Moreover, even if Gomez's testimony is credited in its entirety, the Charging Party and the GC grossly overstate the importance of that testimony. The statements Gomez attributed to Monopoli, who was not a member of Cablevision's bargaining committee, were made in the Bronx, at a facility outside the bargaining unit. The statements were also made to a group of Cablevision managers—not employees, let alone bargaining unit employees. Thus, the alleged comments were made both away from the table and far removed from the negotiations underway in the Brooklyn bargaining unit. There is no evidence whatsoever that these comments had any effect on the negotiations, or that remotely corroborates these statements as an accurate summary of the Company's conduct at the bargaining table. As much as the GC and the Charging Party might wish to shift the focus of this case away from Cablevision's diligent—and ultimately

successful—efforts to reach a collective bargaining agreement, the isolated comment Gomez attributes to a manager who was uninvolved in the bargaining process cannot compel a finding of surface bargaining.

* * *

In sum, none of the unfair labor practices sustained by the ALJ had any impact whatsoever on what was achieved at the bargaining table, and none negates Cablevision’s good faith bargaining. For that reason, the ALJ properly found—indeed, was compelled to find—that Cablevision bargained in good faith.

III. Extraordinary Remedies Are Unwarranted (GC’s Exceptions 26-28; Charging Party’s Exceptions 12-15)

The GC and the Charging Party request that the Board order certain extraordinary remedies which the ALJ appropriately declined to impose. They, or in certain instances just the Charging Party, seek (a) a notice reading by a management official; (b) an extension of the Union’s certification year; (c) payment of the Union’s collective bargaining expenses by Cablevision; and (d) payment of the Charging Party’s litigation expenses by Cablevision. The ALJ correctly concluded that none of these extraordinary remedies is appropriate in this case, as the unfair labor practices found have not “infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies.” *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (internal quotation marks omitted)).

Most importantly, the handful of unfair labor practices remaining in this case did not impact the bargaining, as the ALJ properly concluded, and do not for any reason warrant more than the Board’s standard remedies. This is particularly so in light of the fact that the parties have entered into the two-year Agreement.

A. The ALJ Correctly Declined To Order a Public Notice Reading

The Charging Party and the GC seek to force a Cablevision executive to read publicly the remedial notice to Company employees. That punitive measure is not supported by the facts of this case, lies beyond the remedial authority of the Board, and violates the First Amendment.

The ALJ correctly held that the unfair labor practices at issue in this case were not “so numerous, pervasive, and outrageous” that a public notice reading remedy is warranted under existing Board law. (ALJ Op. 268.) These unfair labor practices—almost entirely Section 8(a)(1) violations limited to organizing in one location—can be remedied by the standard cease-and-desist order and posting and distribution of the Board’s Notice to Employees in both physical and electronic form, as ordered by the ALJ. With regard to the one Section 8(a)(3) violation, the allegedly “discharged” economic strikers were already back at work long before the trial in this case began, and payment of their back pay, with interest—some of which has already been paid—will make all strikers whole. The single “refusal to bargain” violation in this case relates solely to training on “smart meters.” Within about a week, the Company realized its mistake and fully restored the status quo, and the parties thereafter remedied the violation by bargaining on this subject during their contract negotiations. (ALJ Op. 150.) In other words, all unfair labor practices found by the ALJ will be entirely remedied by the standard Board remedies of a cease and desist order, written notice to the affected employees and back pay, and no special remedies are warranted. (ALJ Op. 271.)

Moreover, as the ALJ correctly concluded, the unfair labor practices here were not pervasive or outrageous, circumstances that the Board has said render a notice reading necessary “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). Only where the conduct of a respondent employer is deemed to be “egregious” has the Board suggested that a notice reading will be appropriate. *Ishigawa*

Gasket Am., Inc., 337 NLRB 175, 176 (2001) *aff'd*, 354 F.3d 534 (6th Cir. 2004). In *Ishigawa Gasket*, the Board found numerous Section 8(a)(1), 8(a)(3), and 8(a)(4) violations, including threatening to and actually decreasing annual bonuses for union supporters, soliciting grievances, engaging in illegal surveillance of employees, and discriminatorily suspending and terminating union supporters. *Id.* The Board nonetheless concluded that this was not “an egregious case,” and thus no public notice reading was required. *Id.* The same must be said here. Cablevision’s violations were certainly not egregious and were not accompanied by a failure to negotiate in good faith with the Union.

In arguing for a notice reading, both the GC and the Charging Party highlight the “discharge of the strikers,” which greatly exaggerates the alleged violation. The ALJ found only that Cablevision had prematurely announced the permanent replacement of the strikers, from which he concluded that, under Board law, they technically had been discharged. Cablevision has excepted to this finding, but regardless of the outcome of that exception, the claim that these workers—economic strikers, to be sure—were actually discharged is an outright distortion. In reality, Cablevision immediately acknowledged that the workers were strikers entitled to their *Laidlaw* rights to return to work, and returned every single one of the 22 strikers to work six months before the trial began.

Because the strikers were never “fired” by Cablevision, the two cases cited by the Charging Party in support of its exception are factually distinguishable. In both cases, the ALJ made affirmative findings of retaliatory *termination* of union supporters. *See Farm Fresh Company/Target One, LLC*, 361 NLRB No. 83, slip op. at 15 (2014) (finding “Respondent violated Section 8(a)(3) and (1) of the Act because it *discharged* Aguirre because of her union and protected activities”) (emphasis added); *OS Transport LLC*, 358 NLRB No. 117, slip op. at

20 (2012) (finding that “Respondent has not . . . persuasively shown that it would have fired [Pizano] absent his union and protected activity”). Here, the employees were on strike and replaced—not terminated—and they all returned to work well before the Complaint was even issued in this case. *Excel Case Ready*, 334 NLRB 4 (2001), cited by both the GC and the Charging Party, is likewise inapposite. There, the employer told employees “that it was ‘going to take care of the troublemakers,’ *i.e.*, ‘weed[] out people’ for ‘wanting to be in the Union,’ and then ‘they won’t have a problem no more.’” *Id.* at 4 (alteration in original). The employer then proceeded to discharge four of the union’s organizers in violation of the Act. *Id.* This is far afield from the instant case, where Cablevision was confronted with an economic work stoppage and exercised its right to replace the striking workers (and in any event, if the ALJ’s decision that it did so prematurely is affirmed, his order that Cablevision pay them back pay with interest for the brief periods prior to their recalls is more than sufficient to remedy the violation).

The GC and the Charging Party also cite purportedly unlawful activity by Dolan as grounds for a public reading of the notice. This argument is similarly meritless. The mere fact that an executive was involved in a few violations (as the ALJ erroneously found here) cannot warrant a public reading of a notice. In *Chinese Daily News*, 346 NLRB 906 (2006), cited by the ALJ, the Board did not order a reading of the notice, even though it concluded that a “majority of [the] unfair labor practices were committed directly by the Respondent’s president . . . or other high-ranking management officials.” *Id.* at 911-12. In denying the request for the public reading, the Board noted that there was no “evidence to show that the Board’s traditional remedies are insufficient.” *Id.* at 909. The same conclusion is compelled here. The few violations found to involve Dolan occurred in addresses to employees during a brief period in 2012, and were found to violate the Act with respect to employees in only one location (outside

the bargaining unit). The remedies already ordered are more than sufficient for the violations of the Act found by the ALJ.

Ordering a public reading of the notice is inappropriate for another, more fundamental reason: It trenches on the First Amendment, which protects the right “to speak and the right to refrain from speaking.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). At the heart of the First Amendment’s protections is an “individual’s right to speak his own mind” and not be “compel[led] . . . to utter what is not on his mind.” *W. Va. State Bd. Of Educ. v. Barnette*, 391 U.S. 624, 634 (1943) (prohibiting compulsory recitation of the pledge of allegiance). Thus, government action that compels speech “cannot be justified by a mere showing of some legitimate governmental interest.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Rather, the government mandate must be *narrowly tailored* to promote a *compelling* government interest. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). If a less restrictive alternative would serve the government’s purpose, it must be taken. *Id.*

Here, the government is demanding, under threat of penalties, that a Cablevision executive personally read a notice with which the executive and the Company disagree. That cannot withstand First Amendment scrutiny. The government’s commandeering of company management as its mouthpiece tramples the free speech rights of Cablevision—and of the individual forced to make the reading—by coercing the reader to “utter what is not in his mind.” *Barnette*, 319 U.S. at 634. The Company is entitled to its own viewpoints and expression as to that content, and cannot be forced to present—and therefore associate itself with—a contrary message mandated by the Government. *Cf. Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) (“Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth

Amendments.”). The Board’s desire to “promot[e] an approved message”—“however enlightened [the] purpose may strike the government”—cannot come at the expense of Cablevision’s rights to choose what it wants to say and what it does not want to say. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995); see also *Pac. Gas & Electric v. Public Utilities Comm’n*, 475 U.S. 1, 16 (1986) (prohibiting state commission from dictating the content of a utility’s newsletters).⁵¹

That is particularly the case here, where clear and obvious, less intrusive means exist for achieving the government’s legitimate objectives. Indeed, a less restrictive means of achieving the government’s purpose *has already been imposed*: the posting and distribution of the notice to all employees.⁵² The GC has not satisfied its burden to demonstrate that this alternative “will be ineffective to achieve its goals.” *Playboy Entm’t Grp., Inc.*, 529 U.S. at 816.

In truth, the GC’s and the Charging Party’s Exceptions Briefs make clear that the purpose of the forced reading they seek is punitive, rather than remedial—to punish Cablevision and its executives by making them serve as mouthpieces for the government, and thereby to recant the views they previously expressed. The Charging Party, for example, seeks a public reading by “James Dolan or some other highly placed Company official” in order to “*deliver the message* to employees that the Board *will not tolerate* such violations even when emanating from the highest

⁵¹ The Board also could not take the extreme step of forcing Cablevision to read the required notice without Cablevision having the opportunity to rebut, in the same public statement, the content of the Board’s selected speech. Cablevision has a “right to be free from government restrictions that abridge its own rights in order to enhance the relative voice of its opponents.” *Pac. Gas*, 475 U.S. at 14 (internal quotation marks omitted). Cablevision’s engaging in First Amendment-protected “counter-speech” to the government’s message is also a less restrictive option that is more respectful of Cablevision’s rights than dictating the entire content of the Company’s message.

⁵² The GC and the Charging Party also contend that a public reading of the notice is necessary for those employees that are not able to access the notice on the Company’s bulletin boards. (GC’s Br. in Support of Exceptions 90; Charging Party’s Br. in Support of Exceptions 88.) But the ALJ already ordered that the notice be sent to all employees “electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means,” in addition to posting the notice on Company bulletin boards. (ALJ Op. 271.) This is more than sufficient to achieve the goal of employee awareness without impinging on Cablevision’s speech rights.

corporate office.” (Charging Party’s Br. in Support of Exceptions 88, 91 (emphases added); *see also* GC’s Br. in Support of Exceptions 93.) That punitive objective—which is flatly unconstitutional—also contravenes the purpose of the Act and represents an independent reason to deny this excessive remedy. *See Republic Steel Corp v. NLRB*, 311 U.S. 7, 11-12 (1940) (the Board’s “power to command affirmative action is remedial, not punitive”); *HTH Corp.*, 361 NLRB No. 65, slip op. at 19 (2014) (Member Miscimarra, concurring in part, dissenting in part) (“The Board’s remedial authority, though broad, is strictly limited to measures that are ‘remedial,’ not punitive.”). The Board’s cases recognize that when a notice reading is proper at all, the remedial purposes of the Act are sufficiently advanced when a Board agent reads the notice in place of an employer representative. *See Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) (ordering the notice to be “publicly read by a responsible corporate management official or by a Board agent in the presence of a responsible management official”); *Fieldcrest Cannon*, 318 NLRB at 473 (same). The Charging Party and the GC do not acknowledge, much less request, the alternative of a reading by a Board agent. They seek a public shaming rather than a remedy appropriate to the purposes of the Act.

For all the reasons set forth above, the ALJ correctly concluded that a notice reading is unnecessary, and that traditional postings and electronic distribution are more than sufficient to effectuate the purposes of the Act. Because the violations found were “not so numerous, pervasive, and outrageous” as to warrant any public reading, and because any compelled reading would infringe Cablevision’s First Amendment rights and even Board law, the Charging Party’s and the GC’s exceptions should be denied.⁵³

⁵³ Should the Board overturn the ALJ’s ruling and require any notice reading, the reading should occur only in the specific Bronx and Brooklyn locations where the affected workers were employed. Remedies under the Act are to be narrowly tailored to the underlying violation because broader requirements do not effectuate the specific remedial purposes of the Act. *See Performance Friction Corp. v. NLRB*, 117 F.3d 763, 768 (4th Cir. 1997);

B. The ALJ Correctly Declined To Order an Extension of the Union’s Certification Year

The ALJ was also correct in declining to order any extension of the Union’s certification year. As the ALJ correctly concluded, the GC failed to prove that Cablevision engaged in surface bargaining with the Union. (ALJ Op. 254.) Accordingly, any extension of the Union’s certification year would be inappropriate. *See Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992), *enfd* 9 F.3d 113 (7th Cir. 1993). This is particularly so since the Union has subsequently entered into a two-year collective bargaining agreement with the Company. Under *Ludlow Typograph Co.*, 108 NLRB 1463 (1954), “where an employer and a certified union execute [a] contract within the certification year, the certification year merges with that contract, after which *there is no need to protect the certification further.*” *John Vilicich*, 133 NLRB 238, 240, n.8 (1961) (emphasis added). Since the parties here have reached an agreement, the purpose of extending the Union’s certification year—that is, to allow time to reach a contract—is now moot. Accordingly, the ALJ correctly denied the request for an extension of the Union’s certification year, and the Exceptions to that ruling should be denied.

C. The ALJ Correctly Denied Reimbursement of the Union’s Bargaining Expenses

The Charging Party seeks reimbursement of the Union’s bargaining expenses, which the ALJ correctly denied. (ALJ Op. 269.) The Board awards bargaining expenses only “[i]n cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent’s

Hickmott Foods, Inc., 242 NLRB 1357, 1357 (1979). A remedial order “must . . . be congruent with the scope of [the violation], so that its enforcement neutralizes the [violation], and does not go beyond.” *Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251, 259 (4th Cir. 1994); *see also U.S. Postal Serv.*, 345 NLRB 426, 426 n.3 (2005) *enfd*, 486 F.3d 683 (10th Cir. 2007) (narrowing order to require posting only at specific facilities affected by unfair labor practices instead of all facilities in the area). Here, the ALJ expressly determined that the violations he found were limited to facilities in the Bronx and Brooklyn. (*See, e.g.*, ALJ Op. 268 (“I recognize that I have not found that the wage and benefit increases granted at the other facilities to be unlawful nor that any of the 8(a)(1) violations found involved these facilities.”).) Accordingly, any notice reading must be narrowly tailored to the Bronx and Brooklyn locations where the alleged violations occurred.

substantial unfair labor practices have infected the core of a bargaining process to such an extent” that traditional remedies will not eliminate their effects. *Frontier Hotel & Casino*, 318 NLRB at 859. Here, nothing “infected the core of the bargaining process,” because, as the ALJ correctly found, “Respondent engaged in hard but lawful bargaining to achieve a contract that it considers desirable.” (ALJ Op. 252.) As such, there is no bad faith bargaining to be remedied, and there can be no extraordinary remedy of reimbursement of the Union’s bargaining expenses. *See Monmouth Care Ctr.* 354 NLRB 11, 69 (2009) (negotiation expenses not an appropriate remedy when no surface bargaining violation occurred).

Even if the Board were to overturn the ALJ’s clearly correct finding that Cablevision bargained in good faith, an award of bargaining expenses does not properly follow. For the “vast majority” of bad-faith bargaining violations, a cease-and-desist order and the posting of a notice “will suffice to induce a respondent to fulfill its statutory obligations.” *Frontier Hotel*, 318 NLRB at 859. This is particularly so here, since the parties have entered into the Agreement that, at a minimum, is powerful evidence that Cablevision has already fulfilled its statutory obligations and that the Union has achieved the agreement for which it was bargaining. Reimbursement of the Union’s expenditures in its successful effort to reach an agreement is therefore inequitable and unwarranted.

Accordingly, the Charging Party’s exception seeking reimbursement of the Union’s bargaining expenses should be denied.⁵⁴

⁵⁴ It should also be observed that the Charging Party is not the certified representative of the Brooklyn bargaining unit (JX 2), and thus cannot claim to be entitled to bargaining expenses.

D. The ALJ Correctly Declined to Order Reimbursement of the Charging Party's Litigation Expenses

The Charging Party also erroneously seeks payment of its litigation expenses. As an initial matter, the D.C. Circuit has held that the Board lacks authority to award litigation costs under Section 10(c) of the Act, concluding that “a fair reading of the Supreme Court’s decisions suggests to us that the order that the employer pay its adversaries’ attorney’s fees is punitive and is not directly related to effectuating the policies of the Act.” *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997). Although the Board has subsequently concluded that it does have the authority to award litigation expenses based on the “bad faith” exception to the American Rule, *see, e.g., Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998), these decisions are contrary to the D.C. Circuit’s holding in *Unbelievable* and should not be applied here.

Even assuming that such a remedy is available, as the Board itself has stated, “[i]t is well settled that the assessment of costs against a respondent is an *extraordinary remedy not ordinarily imposed*.” *Retlaw Broadcasting, Co.*, 324 NLRB 1148, 1148 (1997) (emphasis added). As long as the defenses raised by the respondent are “debatable” rather than “frivolous,” such a remedy is inappropriate. *Id.*; *see also Heck’s, Inc.*, 215 NLRB 765, 767 (1974) (same). For a defense to be considered “frivolous,” it must present “no legitimate issue of credibility.” *Frontier Hotel & Casino*, 318 NLRB at 861. Even where the employer is found to have “engaged in clearly aggravated and pervasive misconduct or in the flagrant repetition of conduct previously found unlawful,” the Board will not award litigation costs. *Mt. Airy Psychiatric Ctr.*, 230 NLRB 668, 681 (1977) (internal quotations omitted). The Charging Party cannot meet the Board’s high bar for the reimbursement of litigation costs.

In support of its claim for litigation costs, the Charging Party points to no problematic “defenses” at all, let alone ones that were “frivolous.”⁵⁵ The Charging Party’s principal argument for litigation costs is based on Cablevision’s decision not to call Dolan as a witness. (Charging Party’s Br. in Support of Exceptions 94.) Such a decision can hardly be considered “frivolous,” and does not warrant an award of litigation costs.

In reality, not calling Dolan to testify was not a “defense”; it was a trial decision based on the sufficiency of the evidence already presented. The record reflects that Cablevision mounted a full and robust defense against the Charging Party’s claims, producing several key witnesses who refuted them—Monopoli, Clark, Hildebrand, and Questell. As explained below, and demonstrated in detail in Cablevision exceptions and exceptions brief, this was more than non-frivolous: it should have been persuasive.

It is, moreover, well established that a party “is under no obligation to call every witness” at its disposal to prove its case. *Int’l Bus. Sys., Inc.*, 258 NLRB 181, 192 (1981). The Board has further held that there is “no basis for inferring that” a witness’s testimony would have been adverse where a party has “elected not to call” a witness because “other record evidence” made that witness’s testimony “unnecessary.” *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1022 (2006). In *Roosevelt Memorial*, the Board recognized that, where an employer had “already elicited testimony from two high-level managers,” it “understandably chose not to call yet another witness to testify on the same point” when it still had to operate a business during the hearing. *Id.* Federal courts have also repeatedly made clear that, given the unique demands on their time, senior corporate officers like CEOs should not be expected to appear at trial or in

⁵⁵ The Charging Party repeatedly relies on the ALJ’s findings with respect to Cablevision’s evidence as support for the proposition that Cablevision’s defenses are “frivolous,” but the ALJ—who reviewed and assessed the evidence in support of these defenses—denied the Charging Party’s request for litigation expenses, and thus necessarily found that Cablevision’s defenses were *not* frivolous. (*See* ALJ Op. 269.)

deposition when others are available to testify to the same matter. See *In re Ski Train Fire of November 11, 2000 Kaprun Austria*, No. MDL 1428, 2006 WL 1328259, at *10 (S.D.N.Y. May 16, 2006); *Six West Retail Acquisition v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001).

The Charging Party ignores the substantial evidence in the record—including the above-mentioned testimony by several Cablevision witnesses—rendering Dolan’s testimony unnecessary and superfluous. First and foremost, the verbatim transcripts of Dolan’s speeches on February 1, 2012 and April 12, 2012 are both in the record, along with witness testimony regarding his speeches on April 25, 2012 and June 26, 2012. (Tr. Vol. 12, pp. 1645-48; Tr. Vol. 13, pp. 1907-12, 1914-18.) Moreover, Cablevision called Vice President of Compensation Lisa Questell, who conducted the market analysis and recommended the wage increase, and Wilton Hildenbrand, who reviewed and approved Questell’s recommendations. (Cablevision’s Br. in Support of Exceptions 16, 24, 29, 33-37.) Both of these witnesses definitively testified that Union organizing did not factor into their plan to provide wage increases to employees, and was never discussed at any of the management meetings regarding the wage increases. The Charging Party purports to question the weight and credibility of Questell’s and Hildenbrand’s testimony—but their testimony was wholly uncontroverted at the hearing. (Cablevision’s Br. in Support of Exceptions 34.) In any event, “the necessity for evaluating the credibility of witnesses ordinarily renders a respondent’s defense debatable rather than frivolous.” *Frontier Hotel & Casino*, 318 NLRB at 861.

Given this “other record evidence,” Dolan’s testimony was “unnecessary,” *Roosevelt Mem’l Med. Ctr.*, 348 NLRB at 1022, and Cablevision’s decision not to call him as a witness can hardly be considered frivolous given the consistent testimony of two other executive officers in

Cablevision’s defense. Thus, this is hardly a case where an employer presented *no* evidence at all, as in the Charging Party’s principal authority cited in support of its request for this extraordinary relief. *See Care Manor of Farmington, Inc.*, 318 NLRB 330, 335 (1995) (awarding litigation costs where respondent failed to present any evidence at the hearing, “in effect admitting that it had violated the Act, but . . . forcing the Board and the Union to litigate the matter nevertheless.”).

Had the Charging Party wanted Dolan to testify, it could have subpoenaed him for that testimony. And in fact, the GC initially issued a subpoena for Dolan’s testimony at trial, but then *all parties* entered into a pretrial stipulation receiving evidence of Dolan’s recorded presentations to employees into the trial record—and releasing Dolan from the subpoena to testify in exchange. If there is anything “frivolous” here, it is the Charging Party’s demand for litigation expenses over a witness’s failure to testify when the Charging Party failed to subpoena him and then joined in a stipulation to forego his testimony. The ALJ was correct not to award litigation expenses in this case.

Similarly, Cablevision’s choice of evidence in refuting the Darryl Gaines allegations does not entitle the Charging Party to litigation costs. According to the Charging Party, Cablevision’s choice not to call Gaines as a witness was a “frivolous” defense. (Charging Party’s Br. in Support of Exceptions 94-95.) But again, this was an evidentiary decision, not a “defense”—let alone a “frivolous” defense requiring payment of litigation expenses. As Cablevision has previously explained, even without testimony from Gaines, there were still legitimate issues of credibility and sufficiency regarding the evidence in support of this allegation. (Cablevision’s Br. in Support of Exceptions 86-89.) Among other things, as detailed in Cablevision’s exceptions and exceptions brief, the testimony of the two eyewitnesses as to what Gaines said

was inconsistent, and neither of them could explain how—given the distance and travel time between the two facilities—the employees would have arrived on time for mandatory employee training (in which Cablevision had a compelling interest to ensure their participation as scheduled), if they had not acceded to Gaines’ instructions. (*Id.*)

Thus, the ALJ properly rejected the Charging Party’s request for litigation expenses.

IV. Respondents CSC Holdings, Inc. and Cablevision Systems New York City Corporation Are A Single Employer Based On Their Admission For Purposes Of This Proceeding (GC’s Exception 1)

The ALJ correctly revoked Requests 1 through 13 of the GC’s subpoena *duces tecum* based on his factual finding that Cablevision had admitted, for the purposes of this proceeding, that “CSC Holdings and Cablevision System constitute a single integrated business enterprise and a single employer within the meaning of the Act.”⁵⁶ (ALJ Op. 2.) Despite entering into a stipulation with Cablevision as to the Company’s single-employer status, the GC now bizarrely argues—without legal basis—that the Board should make specific factual findings underlying a finding of single-employer status. This exception is nothing more than an attempt by the GC to harass Cablevision with prolonged litigation to establish a fact which has already been admitted by Cablevision for purposes of this litigation. (ALJ Op. 2; GC’s Br. in Support of Exceptions 5.)

According to the GC, the ALJ’s finding of fact based on Cablevision’s admission and the parties’ stipulation should be reversed because “the [ALJ] failed to make specific findings on the underlying facts that support the legal conclusion of single employer.” (GC’s Br. in Support of

⁵⁶ Cablevision admitted in Paragraph 2(d) of its Answer “for the purposes of this proceeding that [CSC] Holdings and Cablevision are a single employer within the meaning of the National Labor Relations Act.” In addition, the General Counsel entered into the Stipulation at trial, which states that: “Solely for the purposes of this proceeding, Holdings and Cablevision admit that they are a single employer within the meaning of the National Labor Relations Act, and that they are jointly and severally liable for any remedy ordered in [this] case.” (JX 1, ¶ 4.) The Stipulation was received in evidence (Tr. Vol 1, p. 32), and plainly was intended to end any dispute about the General Counsel’s subpoena seeking evidence about the Respondents’ single employer status. The General Counsel’s Stipulation precludes his current Exception 1 relating to single employer issues.

Exceptions 5.) None of the cases relied upon by the GC support such a novel position, because in each case, the respondent employer *denied* the single employer allegation. *See, e.g., NLRB v. Palmer Donavin Mfg., Co.*, 369 F.3d 954, 956 (6th Cir. 2004); *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 238 (D.C. Cir. 2003); *Cimato Bros., Inc.*, 352 NLRB 797 (2008). In fact, stipulated findings that separate entities are a single employer for the purposes of a Board proceeding based solely on the relevant admission are both common and entirely acceptable. *See, e.g., CL Frank Mgmt., LLC*, 358 NLRB No. 111, slip op. at *2 (2012) (“admittedly a single employer”); *Beach Lane Mgmt., Inc.*, 357 NLRB No. 30, slip op. at *3 (2011) (“Respondent further admits for the purpose of this case . . . that they constitute a single-integrated business enterprise and a single employer”); *AM Prop. Holding Corp.*, 350 NLRB 998, 1017 (2007) (“They admit and I find that they constitute a single integrated business enterprise and a single employer within the meaning of the Act.”); *State College Elec. & Mech., Inc.* 348 NLRB 1189, 1190 (2006) (“The Respondent admits that the business entities identified above are a single employer within the meaning of the Act.”); *Cleveland Cinemas Mgmt. Co., Ltd.*, 346 NLRB 785, 787 (2006) (“For purposes of this litigation only Respondent admits that the four entities listed above constitute a single employer.”)

The GC is therefore not entitled to reopen the subpoena to engage in a fishing expedition on this undisputed fact. For a subpoena to be valid, it must “relate to any matter under investigation or in question in the proceedings.” 29 C.F.R. § 102.31. Because Cablevision’s status as a single employer for the purpose of this proceeding is not disputed by Cablevision—indeed, it is stipulated by all parties—the fact is not “under investigation.” The single employer status of Cablevision is thus a non-issue in this case, and to reverse the revocation of the subpoena would waste the time and resources of Respondent and of the Government. *MJ*

Mechanical Servs., Inc., 324 NLRB 812, 833 (1997) (quashing of a subpoena because the information sought had been “substantially admitted [to].”); *Edward C. Woltkamp*, 301 NLRB 1155, 1156 n.2 (1991) (employer’s admission of legal conclusion rendered moot its denial of material fact underlying that conclusion). The GC’s exception seeking to remand this matter for trial of the single employer issue should be denied.

* * *

For all these reasons, Cablevision respectfully requests that the Board dismiss the charges against the Company in their entirety.

Dated: April 24, 2015, at New York, New York.

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CERTIFICATION OF SERVICE BY ELECTRONIC MAIL

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that, on April 24, 2015, he caused a true and correct copy of the attached Brief in Opposition to the Charging Party's Exceptions to the Administrative Law ALJ's Decision on Behalf of Cablevision Systems New York City Corporation and CSC Holdings, LLC to be served upon counsel for the General Counsel and counsel for the Charging Party by electronic mail, pursuant to the Board's e-filing rules at the following addresses designated by each attorney for this purpose, respectively:

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