

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GUITAR CENTER STORES, INC.

and

Case 02-CA-130443
02-CA-130838
13-CA-130446
13-CA-140542
13-CA-143904
13-CA-151847
13-CA-154977
28-CA-130447
28-CA-143323

RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION, RWDSU, UNITED FOOD AND
COMMERCIAL WORKERS

DECISION AND RECOMMENDED ORDER

CHARLES J. MUHL
Administrative Law Judge

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DECISION

CHARLES J. MUHL, Administrative Law Judge. Section 8(d) of the National Labor Relations Act defines the duty to bargain collectively as the mutual obligation of an employer and a union to:

5 [m]eet 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 thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

10 This language is somewhat conflicted. On the one hand, the statute imposes a duty to bargain in good faith. That duty presupposes a sincere purpose by parties to find a basis to reach agreement on a contract. A party cannot merely go through the motions during bargaining without a spirit of cooperation. On the other hand, the statute permits a party to refuse to make concessions, even though compromise typically is an essential component to reaching an agreement. Because of this inherent conflict, the Board looks to the totality of a party's conduct, both at and away from the bargaining table, to determine if bad faith bargaining has occurred. Isolated, seemingly harmless acts can take on an entirely new meaning when viewed in that entirety.

20 This case is a fine example of the tension presented by the statute. Guitar Center Stores, Inc. (the Respondent) is the world's largest retailer of musical instruments and related products. The Respondent operates in excess of 260 stores in the United States. From May to October 2013, employees at three of the Respondent's stores voted to unionize. They selected the Retail, Wholesale and Department Store Union, RWDSU, United Food and Commercial Workers (the Union) as their exclusive collective-bargaining representative. The Union was certified in that regard on June 3, 2013 for a store in New York, New York; on October 24, 2013 for a store in Chicago, Illinois; and on November 14, 2013 for a store in Las Vegas, Nevada. Thereafter, the Respondent and the Union engaged in bargaining for more than 2 years and 37 total bargaining sessions in three different physical locations. They agreed upon numerous, substantive provisions covering topics such as union security, management rights, grievance and arbitration, scheduling notification, and hours of work. But they never reached an overall agreement on a first contract.

35 The General Counsel's complaint in this case alleges numerous violations of Section 8(a)(5), (3), and (1) of the Act. The principal allegation is that Guitar Center violated Section 8(a)(5) by bargaining in bad faith with the Union from July 2013 until August 2015. The complaint also alleges that the Respondent unlawfully withdrew recognition from the Union in New York on June 10, 2014 and in Las Vegas on November 18, 2014. The Respondent denies the allegations and asserts it was engaged in hard, but lawful, bargaining.

45 Thus, this case requires an examination of the totality of the Respondent's conduct during negotiations. The examination reveals that the Respondent engaged in numerous tactics designed to delay negotiations. The measures included failing to provide comprehensive wage counterproposals for months, despite repeated commitments to do so. They included never making a counterproposal with respect to health insurance during the entirety of bargaining.

They included refusing to tentatively agree to individual contract provisions for a total period of 12 months. They included taking inconsistent positions concerning whether the negotiations for the three units were being “stair stepped,” or built off one another. Moreover, the Respondent routinely failed to provide the Union with legitimate, complete, or any explanations for its bargaining positions. This occurred with health insurance, work schedule notification, and two popular employee benefits—leave for musical “gigs” (GIG leave) and vendor discounts on employee purchases of musical products (the GAIN program). The Company also refused to discuss or provide relevant information to the Union about nonunionized employees’ working conditions, information that would have assisted the Union in negotiations. The Respondent repeatedly made proposals that sought to provide unionized employees with either the status quo or worse working conditions than their nonunionized counterparts. This occurred on holidays, GIG leave, and the GAIN program. The Respondent’s health insurance proposal would have required the Union to cede rights it had as the employees’ bargaining representative. The Company wanted the ability to unilaterally change employees’ health insurance. In the last six months of bargaining, the Respondent implemented a unilateral change to employees’ terms and conditions of employment that affected their wages. Then the Company’s store manager in Chicago solicited employee support for a Union decertification petition there.

The message the Respondent conveyed to unionized employees through the totality of this conduct was that they were worse off for choosing to be represented and that their Union was powerless to protect them. Therefore, I conclude that the Respondent violated Section 8(a)(5) by engaging in surface bargaining. I also find that the Respondent’s withdrawals of recognition in New York and Las Vegas were unlawful.

STATEMENT OF THE CASE

On June 10, 2014, the Union filed three unfair labor practice charges against the Respondent alleging violations of the National Labor Relations Act (the Act). The charges were filed in Regions 2 (New York), 13 (Chicago), and 28 (Las Vegas) of the National Labor Relations Board (the Board). Region 2 docketed its charge as Case 02–CA–130443. Region 13 docketed its charge as Case 13–CA–130446. Region 28 docketed its charge as Case 28–CA–130447. The Union filed an additional charge against the Respondent in Region 2 on June 16, 2014, docketed as Case 02–CA–130838. The General Counsel consolidated all of these charges for investigation by Region 13 via orders dated August 8 and 21, 2014.

The Union filed a new unfair labor practice charge against the Respondent on November 7, 2014, docketed by Region 13 as Case 13–CA–140542. The Union filed a new charge against the Respondent in Region 28 on December 22, 2014, docketed as Case 28–CA–143323. The General Counsel transferred that case to Region 13 via order dated December 31, 2014. On January 6, 2015, the Union filed a further charge against the Respondent in Region 13, docketed as Case 13–CA–143904.

The Union amended its charge in Case 13–CA–130446 on January 9, 2015 and June 15, 2015. It also amended its charge in Case 28–CA–130447 on January 12, 2015 and June 15, 2015. Finally, the Union amended its charge in Case 02–CA–130443 on January 9, 2015 and June 16, 2015.

The Union filed new charges in Region 13 against the Respondent on May 7, 2015, docketed as Case 13–CA–151847, and on June 25, 2015, docketed as Case 13–CA–154977.

5 On July 24, 2015 and following investigation of certain charges, the Board’s General
Counsel, through the Regional Director of Region 13, issued an order consolidating cases
02–CA–130443, 02–CA–130838, 13–CA–130446, 13–CA–140542, 13–CA–143904,
28–CA–130447, and 28–CA–143323. The General Counsel also issued a complaint and notice
10 of hearing on that same date, alleging the Respondent violated the Act in numerous manners.
Specifically, the complaint alleged the Respondent violated Section 8(a)(5) of the Act by
refusing to bargain in good faith with the Union for an initial contract for bargaining units in
Chicago, New York, and Las Vegas since July 2013. The complaint further alleged the
Respondent then unlawfully withdrew recognition from the Union in New York on June 10,
2014 and in Las Vegas on November 18, 2014. The complaint also claimed the Respondent
15 violated Section 8(a)(5), 8(a)(3), and 8(a)(1) by prohibiting Union-represented employees from
participating in company-wide contests on September 22, 2014. Finally, the complaint alleged
that the Respondent violated Section 8(a)(3) by denying Union-represented employees a new
compensation plan called “Phase 3,” that it had provided to certain nonunionized employees.

20 On July 27, 2015, the Union amended its charge in Case 13–CA–151847.

The Respondent filed a timely answer to the General Counsel’s consolidated complaint
on August 6, 2015, denying the substantive allegations and asserting numerous affirmative
defenses. On that same date, the Respondent filed a motion for a bill of particulars with the
NLRB Division of Judges. The General Counsel filed a written opposition to the motion on
25 August 14, 2015.

On August 14, 2015, the Deputy Chief Administrative Law Judge in Washington DC
granted the Respondent’s motion for a bill of particulars.

30 On August 18, 2015, the Union filed an amended charge in Case 13–CA–154977. On
that same date, the General Counsel amended the Section 8(a)(3) allegations in the complaint
regarding the Respondent’s Phase 3 compensation plan. The amended complaint alleged that the
Respondent refused to discuss with the Union or offer the Phase 3 compensation plan to any
employees represented by the Union. It further alleged that the Respondent discriminatorily
35 denied the Phase 3 compensation plan to Union employees and instead insisted on the continued
use of the existing compensation system, known as “fade.” The Respondent filed a timely
answer to this amendment on August 27, 2015, denying the allegations and again asserting
numerous affirmative defenses.

40 On August 28, 2015, the General Counsel issued an order further consolidating cases,
adding Case 13–CA–151847 and 13–CA–154977, as well as a second consolidated amended
complaint and notice of hearing. The second amended complaint added allegations that the
Respondent violated Section 8(a)(1) on June 24, 2015, by soliciting employee participation in
and support of union decertification; creating an impression that employees’ support for the
45 Union was under surveillance; interrogating employees about their support for the Union; and
implying to employees that union representation was futile. The amendment also added Section
8(a)(5) allegations claiming that the Respondent refused to bargain and unilaterally changed its

discount policy in all three bargaining units from February 2015 through May 5, 2015. The Respondent filed a timely answer to the second consolidated amended complaint on September 11, 2015. In the answer, the Respondent again denied the substantive allegations and raised numerous affirmative defenses.

5 Via order dated November 3, 2015, the Board denied the General Counsel's request for special permission to appeal the August 14, 2015 order of the Deputy Chief Administrative Law Judge granting the Respondent's request for a bill of particulars. On November 6, 2015, the General Counsel filed a bill of particulars for the complaint.

10 I conducted a trial in these cases on 8 days in December 2015 in Chicago, Illinois. On March 14, 2016, the General Counsel and the Respondent filed posthearing briefs. On the entire record, including my observation of the demeanor of witnesses and after considering those briefs, I make the following findings of fact and conclusions of law.

15 I. JURISDICTION

20 The Respondent is engaged in the retail sale of goods at locations throughout the United States, including at stores located at 2633 North Halsted Street in Chicago, Illinois (the Central Chicago store); Las Vegas, Nevada (the Las Vegas store); and 25 West 14th Street, New York, New York (the Manhattan Union Square store). In conducting its business operations in the last 12 months at those three stores, the Respondent derived gross revenues in excess of \$500,000. During the same time period, the Respondent also sold and shipped, from its Central Chicago store, products, goods, and materials valued in excess of \$5000 directly to points outside the State of Illinois. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer to the complaint. I also find, as the Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

30 II. THE ALLEGED UNFAIR LABOR PRACTICES FROM JULY 12, 2013 TO JUNE 10, 2014¹

FINDINGS OF FACT

35 The Respondent is the world's largest seller of musical instruments (including guitars) and related products. The business opened in 1964. The Respondent currently operates in excess of 260 stores throughout the United States. As of June 2013, the Respondent employed thousands of sales employees in a number of different job classifications. In hierarchical order, the job classifications included sales associate, department manager, assistant manager, and elite sales force employees. Sales associates comprise the bulk of the Respondent's sales employees. The Respondent also employs operations associates, who work in store warehouses.

¹ I have organized the findings of fact and conclusions of law in this decision into three distinct time periods during contract negotiations. The first is from July 12, 2013, the date of the parties' first negotiation session, to June 9, 2014, the date just prior to when the Respondent withdrew recognition for the Manhattan Union Square store. The second period is from June 10, 2014 to November 18, 2014, the latter date reflecting when the Respondent withdrew recognition for the Las Vegas store. The third period is from November 18, 2014 to August 11, 2015, or the date of the parties' last negotiation session.

A. The Respondent's Wages and Benefits as of June 2013

5 In June 2013, the Respondent compensated sales employees with a base rate of pay plus a
commission, subject to "fading." The base rate of pay was a standard hourly wage times the
number of hours worked. The commission on the sale of products was comprised of two
10 components. The first was a percentage of the dollar amount of the gross sales of products. The
second was a percentage of the profit margin for the products sold. A typical commission rate
was 10 percent of gross sales and 2 percent of profits. However, sales employees did not earn
commission unless and until they repaid their base rate of pay each month with commissions
15 earned. This was the fading component of the system. The Respondent instituted the fade
system when it first began selling musical instruments. As the construct indicates, the fade
system provided incentive to sales associates to sell more products and thus was self-policing.

15 To enhance the chances of selling a product, the Respondent also permitted sales
associates to offer discounts to customers, subject to supervisory approval. However,
department managers could discount any single item up to 20 percent on their own transactions
without supervisory approval. Assistant managers could approve discounts on their own sales
20 and on other employees' transactions. Certain assistant managers and elite sales force employees
had full discount rights. This included the ability to discount an item up to 100 percent, unless
otherwise restricted by contract with a vendor. While employees could not discount any item
below its cost, the Respondent did not otherwise require them to follow any policy or procedure
when discounting.

25 The Respondent paid operations associates an hourly rate of pay without commission.

The Respondent also provided health insurance to employees under one of two plans.
The first was a traditional, fee-for-service with both standard and preferred, or higher benefit,
30 options. The second was a high deductible plan with a health savings account (HSA). For the
latter plan, the Respondent made an annual contribution to the HSA that exceeded the premium
paid by employees. Annual wellness exams and generic prescriptions were fully covered. If an
employee did not need any health care beyond that, the employee retained the difference
between the HSA contribution and the premium paid.

35 The Respondent also offered sales employees and operations associates a number of other
benefits. First, employees had the opportunity to take "GIG Leave" and to participate in the
"GAIN Program." GIG Leave was personal, unpaid leave for employees to participate in
musical shows and other performance opportunities while retaining their jobs. The Respondent
40 provided up to 90 days off in a 12-month period, once employees had at least 6 months of
service. The GAIN Program provided employees with the opportunity to purchase products
directly from vendors at a discount. Second, the Respondent conducted periodic contests for
employees, awarding cash and other prizes to the contest winners. Third, the Respondent offered
two holidays to employees each year. They were Thanksgiving Day and Christmas Day.
45 Finally, the Respondent notified employees of what their weekly work schedule would be 72
hours in advance of the beginning of the work week.

B. Bargaining from July 12, 2013 to June 9, 2014

On June 3, 2013, the Board certified the Union as the exclusive collective-bargaining representative of sales associates, department managers, assistant managers, and certain other sales employees in the Manhattan Union Square store. For bargaining an initial contract, the Union's lead negotiator was Gene Allen Mayne, the Union's assistant to the president and director of collective bargaining. The Union's negotiating team also included, among others, union organizer Eric Dryburgh. The Respondent's negotiating team was comprised of Michael Pendleton, the Company's senior vice president and general counsel; Dennis Haffeman, senior vice president of human resources; Gina Villavicencio, vice president of human resources; and attorney Michael Cooper.²

1. The July 12, 2013 Initial Bargaining Session in New York City³

On July 12, 2013, bargaining began in New York City for the Manhattan Union Square unit. As would be expected, the parties first discussed ground rules. They agreed to address non-economic issues before addressing economics. However, the parties did not specify the time period during which non-economic issues would be discussed or when negotiations would commence on economic issues.

The parties also discussed, but could not agree upon, a process for recording tentative agreements (TAs) during negotiations. Mayne wanted the parties to mark each agreed provision with a "TA" as they progressed. Cooper rejected that idea. Instead, Cooper proposed the parties simply make notes of desired changes on proposals. Cooper said, when the parties stopped marking up a provision as it went back and forth, that would indicate a tentative agreement. In the end, each side indicated it would use its own method for keeping track of TAs.

Mayne also talked about the top three concerns for bargaining unit employees. The first was the elimination of the Respondent's fade compensation system. Mayne explained that employees took exception to their gross income not going up with an increase in base pay. Instead, the pay increase simply transferred from base to commission due to the fade. He also explained that employees were not being compensated for job duties on the store floor unrelated

² At the hearing, Mayne testified for the Union concerning the negotiations. Pendleton, Villavicencio, and Haffeman testified for the Respondent in that regard. Cooper, who represented the Respondent at the hearing and in negotiations, did not testify. By and large, the witness testimony concerning what occurred does not conflict; the dispute is over the meaning of the events. Overall, I found both Mayne and Pendleton to be generally credible witnesses, with different focuses to their testimonies. Mayne principally testified concerning what was said and done at numerous bargaining sessions. He displayed almost a photographic recall in that regard, despite the total number of sessions and the more than two years of bargaining. Pendleton primarily discussed the reasons for the Respondent's proposals and conduct during bargaining, without addressing specific bargaining sessions. Thus, much of Mayne's testimony concerning what occurred in bargaining sessions is uncontroverted. I address any needed, specific credibility determinations as they arise below.

³ At my request, the parties graciously entered a joint exhibit containing the dates of all bargaining sessions; the participants at each session; the dates when the Union and the Respondent submitted written bargaining proposals; and the dates when Board elections were conducted in New York, Chicago, and Las Vegas. (Jt. Exh. 1.)

to sales. This included tasks such as cleaning up the store, stocking shelves, and hanging up merchandise. Finally, Mayne conveyed that employees were skeptical over the validity of the profit component of commission. To address these concerns, Mayne indicated the Union would seek a compensation system with base pay plus commission. However, fading would be eliminated. In addition, the Union wanted the commission component to be based solely on gross sales figures. The profit portion of commission would be eliminated.

The second concern Mayne identified was health insurance. He communicated that the Respondent's health insurance plan provided insufficient benefits and was too expensive for employees. The Union wanted the level of benefits and costs addressed.

The third issue was the notification period in advance of an employee's weekly schedule. Mayne said that 72 hours was too short for employees to plan their personal lives.

At this session, the Union presented a full, 3-year contract proposal, containing economic and non-economic terms, to the Respondent. (GC Exh. 2.) The economic proposals included wages and health insurance. In Article 13, the Union proposed a detailed base pay plus commission system with no fading. The proposed base pay for sales associates was \$14.42 per hour; the proposed commission on gross sales was 2.5 percent. In Article 22, the Union proposed that bargaining unit employees be covered by its health insurance plan, a nationwide preferred provider organization. The Respondent would pay the monthly premiums for the insurance. However, employees had to make weekly contributions ranging from \$5 to \$35 depending on the level of coverage. Those contributions increased in years 2 and 3 of the contract.

The Union made non-economic proposals concerning scheduling, holidays, grievance and arbitration, and other benefits. In Article 16.9, the Union proposed that the Respondent post employee schedules for a 4-week period at least 1 week in advance. The Union also sought 8 paid holidays; a just cause standard for the suspension or discharge of an employee; and any other benefit offered to nonunion employees at stores in states near New York, which would include the GAIN Program. (GC Exh. 2, Arts. 8.1, 10, 13.17, 18.1.) The Union specifically proposed GIG leave not exceeding 12 months. (GC Exh. 2, Art. 6.8.)

2. The August 2, 2013 Bargaining Session in New York City

In late July 2013, the Respondent increased the number of paid holidays it provided to employees at stores nationwide from two to six. However, the Respondent did not increase holidays at the Manhattan Union Square store, which remained at two holidays.

On August 2, 2013, the parties had their next bargaining session. Mayne provided a rate quote for the Union's health insurance plan. (GC Exh. 4.) The Union offered the RWDSU 85 Plan, where the plan picked up 85 percent of all costs incurred for covered benefits and the Respondent paid the remaining 15 percent. Mayne noted that the quote was for 3 years and provided for a maximum annual cost increase of 6 percent. He also discussed how the plan had no deductible for employees. He said that such first dollar coverage was really important to low wage workers. Cooper stated the Respondent was open to considering the plan and would take a

look at it. In turn, the Respondent provided a description of the health insurance plans it offered to employees as of August 1, 2013. (GC Exh. 97.)

5 On August 9, 2013, the Union won an election to represent sales and operations employees at the Central Chicago store.

3. The September 24 and 25, 2013 Bargaining Sessions in New York City

10 On September 24, 2013, at the parties' fourth bargaining session, the Respondent presented its first written contract proposal. The proposal contained only non-economic terms. The Respondent wrote "TBD" in the articles dealing with wages and health insurance. The Respondent proposed to treat any benefit not expressly provided for in the agreement as a voluntary one, which could be changed or eliminated at the sole discretion of the Company. The Respondent also proposed to retain two holidays, rather than providing six, at the Manhattan
15 Union Square store. Finally, the Respondent did not offer GIG Leave or the GAIN Program to unit employees. (GC Exh. 6, Arts. 8.1, 10.1, 13, and 14.2.)

20 The Respondent's proposal did not contain any language regarding scheduling notification. Mayne raised the subject in negotiations that day. Cooper stated that a month was too long a period of time for advanced notification. Cooper added that it was unreasonable and excessive, and he did not think it would be workable. Mayne asked if 3 weeks would work. Cooper stated it might and he would go back and check.

25 On September 25, 2013, the Union provided a revised proposal, including changes on scheduling notification. (GC Exh. 7, Art. 11.7.) Consistent with the discussion the day before, the Union reduced the number of scheduled work weeks from 4 to 3 for which employees would receive advanced notification. Cooper objected to the requirement that changes to the posted schedule could not be made without employee approval. He also objected to language stating the company would schedule all known vacancies "properly." After Mayne suggested altering the
30 language to permit schedule changes due to unforeseen business or emergency conditions, Cooper said it might work. Pendleton ultimately stated that he thought he understood the issue and could address this with language that would be workable. Cooper added the company would respond with language.

35 In that same revised proposal, the Union modified its holiday request to 7 total. It also specifically proposed GIG leave of up to 6 months. As to the GAIN program, the Union modified its initial proposal about providing any other benefit offered to nonunion employees. The revised language stated that union employees would receive the same benefits provided at nonunion stores nationwide, instead of regionally. (GC Exh. 7, Art. 13.1, 13.2, 18.4.)
40

On October 1, 2013, the Union won an election to represent sales employees at the Las Vegas store.

4. The October 17, 2013 Bargaining Session in New York City

On October 14, 2013, the Respondent submitted a revised, non-economic contract proposal. The Respondent included the following language, in relevant part, as to schedule notification:

Work schedules shall be posted at least one week in advance, covering a three week period and including approved known vacancies. Other than for unforeseen circumstances (such as an employee calling in sick or employees swapping schedules) or a change in labor hour forecasts, changes will not be made in the schedule without the approval of the Employee.

(GC Exh. 8, Art. 11.7.) The Respondent's October 14, 2013 proposal also stated affirmatively for the first time that unionized employees at the Manhattan Union Square store were not eligible for GIG leave or the GAIN program. (GC Exh. 8, Art. 14.3 and 14.4.)

At the subsequent October 17, 2013 bargaining session, Mayne stated the scheduling notification language proposed by the Respondent was acceptable and the parties could TA the provision. (Tr. 240.) The Union's modified contract proposal dated October 17, 2013 contains the identical scheduling notification language as the Respondent's October 14, 2013 proposal. (GC Exh. 9, Art. 11.7.)

On October 24, 2013, the Board certified the Union as the exclusive collective-bargaining representative of sales and operations employees at the Central Chicago store.

5. The November 5, 2013 Bargaining Session in Chicago

On November 5, 2013 and following the Central Chicago store certification, the parties held their first bargaining session in Chicago. Mayne presented the Respondent with a revised union proposal. (GC Exh. 10.) Mayne stated that he had prepared the proposal with the idea of "stair stepping" the negotiations at each physical location. This stair stepping was reflected in the document. It contained provisions built from where the parties stood in their negotiations for the Manhattan Union Square store at that time.

Cooper initially responded that he did not think stair stepping was a good idea. He said he wanted two completely separate documents. Cooper then explained that his ability to agree to stair stepping was inhibited by outstanding unfair labor practice charges pending at the time. Mayne responded that Board charges had nothing to do with what they were discussing. Mayne then told Cooper that Mayne could go back and present his initial Manhattan proposal if Cooper preferred. He added the parties could respond back and forth in the exact same way as they already had, until they got to the present point in time. Cooper jokingly asked whether they could just play the tape of the negotiations, rather than sitting through all of the back and forth.

At that point, the parties agreed that stair stepping was the only way to proceed. Cooper made clear that two separate documents reflecting contracts for Manhattan and Chicago ultimately would exist. Mayne confirmed he was not proposing one contract for both locations.

The parties concurred upon the language in the two documents mirroring each other, except for those things that necessitated a difference. Cooper specifically mentioned that New York would have no references to operations associates, since those employees were not a part of that bargaining unit. The parties also discussed that differences in state and municipal laws between the two locations would have to be reflected. They also decided to work off of one document, with differences indicated either by an asterisk next to a provision or contained in a separate document. Pendleton specifically stated the use of two documents would be a waste of trees.

In this same union proposal, Mayne included the Respondent's exact language regarding GIG Leave from its employee handbook covering nonunion employees. Thus, the Union proposed 90 days off within a single 12-month period, for full-time employees with at least 6 months of service. (GC Exh. 10, Art. 18.4.)

On November 14, 2013, the Board certified the Union as the exclusive collective-bargaining representative of sales employees at the Las Vegas store.

On November 21, 2013, the Respondent and the Union entered into a settlement agreement to resolve unfair labor practice charges then pending with the Board in Chicago and New York. (GC Exh. 79.) The settlement of the New York charge included the following language in relevant part:

Contests. GC [Guitar Center] will allow unionized stores to be eligible to participate in vendor and company sponsored contests announced on or after December 1, 2013, whenever selling employees in a majority of the GC stores in the same GC region are eligible to participate in the contest.

Thereafter, Pendleton instructed Jeremy Cole, the employee in charge of monitoring and administering contests, that all associates at unionized stores were eligible to participate in company contests. Cole sent an email to employees who worked on contests advising them of the unionized employees' eligibility going forward.

6. The December 11, 2013 Bargaining Session in Chicago

On December 11, 2013, the parties held another negotiation session in Chicago. The Respondent submitted a modified contract proposal on that date.

For the first time, the Respondent included a written wage proposal.⁴ The Respondent offered the status quo on wages. The existing fade compensation system would remain, with base pay and commissions for each position based upon the then-existing rates. (GC Exh. 11, Art. 10.1.) The proposal also included what the parties later referred to as performance goal language. The Respondent proposed that employees who did not fade in any month would be subject to discipline. Moreover, employees who did not fade for 2 months in any 3-month

⁴ Although this proposal was made in Chicago, its cover page contains the address of the Manhattan Union Square store and the terms therein referred to the "Manhattan Store."

consecutive period were subject to immediate termination. Finally, the Respondent included a provision excluding the Manhattan Union Square store from having elite sales force employees.

5 Regarding health insurance, the Respondent likewise proposed the status quo. The provision stated that employees would be allowed to participate in the company's medical, dental, and vision plans on the same terms as other employees. However, the Respondent also included a provision under which it reserved the right to make changes to the health plans at its sole discretion. (GC 11, Art. 14.2.)

10 After the Respondent provided its economic proposal, the Union responded that it wanted to address non-economic issues prior to economic ones.

15 With respect to scheduling notification, the Respondent reverted to its original proposal of 72 hours notification for a 1-week period, the existing status quo at nonunionized stores. (GC Exh. 11, Art. 11.6.) Mayne wrote "regressive" on his copy of the Respondent's proposal at the session. Cooper stated that they had gone back and talked to operations. He added that the company was not sure its electronic scheduling system could accommodate a 3-week advance notice. Cooper said, as a result, the company was making the adjustment to the language. Mayne expressed disbelief that an electronic scheduling system would be unable to
20 accommodate such a notice. Pendleton then stated that the concern was coming from operations and asked for the Union's understanding. Pendleton added that he did not think it would be an insurmountable obstacle and that it could be worked out. Cooper then suggested that maybe 2 weeks would work if it was an operational issue. Mayne wrote "two weeks" above the "72 hours" in the revised language.⁵

25 7. The January 16, 2014 Bargaining Session in New York

30 On January 16, 2014, the parties held a bargaining session in New York. They agreed to move from each maintaining a separate proposed contract to one document with changes from both sides therein. The Respondent also finally agreed to TA provisions in that document. The parties designated Pendleton as the official who would do so. Thereafter, the Respondent typed "TA" next to non-economic provisions when the parties tentatively agreed to them.⁶

⁵ Witness testimony conflicted somewhat concerning the discussion of the Respondent's regressive proposal. Pendleton testified that he told Mayne the Company was not able to implement the agreed-upon procedure and also told Mayne, on multiple occasions, that he was speaking to the "store logistics team" about making it happen. (Tr. 1057–1062.) In contrast, Mayne testified that the Company claimed it did not have the technical expertise to provide the 3 weeks of advance notification, which he did not believe. (Tr. 617–618.) But Mayne also acknowledged that both Cooper and Pendleton advised him of "operations" expressing a concern about the ability to provide 3 weeks of advanced notification. (Tr. 242–247.) Whether the Respondent used "store logistics team" or "operations" is not relevant.

⁶ The record evidence is unclear as to the exact date when Pendleton began putting "TA" next to provisions in the Respondent's proposals. The first proposal from the Respondent that contained typed TAs was dated February 25, 2014. (GC 19(a).) However, a union proposal dated February 6, 2014 contains typed TAs in the margins that may have been placed there by Pendleton. (GC Exh. 16.) Mayne could not recall who put those TAs in. (Tr. 672–673.)

8. The February 5 and 6, 2014 Bargaining Sessions in Las Vegas

On February 5, 2014, the parties held their first bargaining session in Las Vegas. Mayne confirmed again for Cooper that the Union would be stair stepping their contract proposals there. Cooper said he understood what Mayne was doing. They confirmed that there would be a separate document for provisions specific to Las Vegas.

On February 6, 2014, the Union submitted wage proposals for the first time since its initial proposal, in an effort to begin negotiations on economics. The Union upped its base wage rate request to \$16.00 per hour for sales associates, from the prior \$14.42. (GC Exh. 18, Art. 10.) In Las Vegas, the starting hourly rate for sales associates at the time was \$9.25 per hour. The Union also proposed a commission on gross sales of 4 percent, up from 2.5 percent in its initial proposal.

In the same proposal, the Union also included for the first time a provision stating: “In the event the Employer converts other stores within the region to a base plus commission system then the store covered by this agreement shall be paid not less than (base plus commission) the highest paid store in the region.” (GC Exh. 18, Art. 10.8.) Mayne included this in response to hearing rumors that the Respondent was considering a new pay structure for its nonunion employees.

The Union also modified its holiday request to 6 days. The parties discussed this proposal on February 6. Cooper stated the Respondent would not agree to six holidays for the Manhattan Union Square store. Cooper said the Respondent’s position was that holidays would stay at two there, because that reflected the status quo when the Union filed the election petition there. He indicated the Respondent would agree to six holidays in Chicago and Las Vegas, because that was the status quo at the time the Union filed the election petitions in those two locations. Cooper acknowledged that the Respondent had planned for a long time to increase holidays from two to six. However, he stated the Respondent was not prepared at that time to agree to 6 holidays for Manhattan.

9. The February 25, 2014 Bargaining Session in Chicago

On February 25, 2014, bargaining continued in Chicago. The Respondent presented written proposals as to non-economics to the Union. Those proposals contained TAs next to the provisions the parties had tentatively agreed to. (GC Exh. 19(a).) The TAs included the following: recognition (Art. 1); union dues check off (Art. 2.2 to Art. 2.9); disciplinary procedure and discharge, except the period of time a disciplinary warning would be considered (Art. 4); probationary period (Art. 5); transfers (Art. 7); employee classification (Art. 9); hours of work, except for overtime pay and work schedule notification (Art. 11); report-in pay (Art. 15); rest and meal periods, except for breaks (Art. 16); bereavement leave (Art. 19); jury duty (Art. 20); drug testing (Art. 21); union visitation and posting of notices (Art. 23); the grievance and arbitration procedure (Art. 24); non-discrimination and available remedies (Art. 25); labor-management meetings (Art. 26); and the term of the agreement (Art. 30).

In the TA for the disciplinary procedure, the parties agreed to a just cause standard for the discharge or discipline of employees. They also agreed to a list of infractions that constituted

just cause for discharge. The provision stated that an arbitrator would have no authority to reinstate or award any other remedy to an employee found to have committed one of the infractions. In the TA for the grievance and arbitration procedure, the parties agreed that the Union eventually could bring alleged breaches of the contract to arbitration.

5

At that point, the non-economic provisions still being negotiated were: open vs. closed shop (Art. 2.1); management rights (Art. 3.2); subcontracting (Art. 3.5); elimination of job classifications (Art. 3.6); seniority (Art. 6.1 and 6.2); work schedule notification (Art. 11.6); GIG leave and the GAIN program (Art. 8 and 18); strikes, picketing, handbilling and lockouts (Art. 22); and successorship. (Art. 28.)

10

As to economics, the Respondent made no written counterproposal on this date. Rather, the Company simply struck through all of the text of the Union's prior economic proposal. This included article 10 as to wages and article 14 as to health insurance, except for provisions dealing with employee eligibility for 401(k) and long-term disability benefits. The proposal retained the language regarding unit employees being eligible to participate in the same contests, warranty bonus program, and profit sharing program as other employees in the same region. The Respondent also proposed that unit employees in Chicago receive six paid holidays.

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At the session, Cooper made a verbal proposal on wages. He offered a \$9.00 per hour base rate with a 1-percent increase in years 2 and 3 of the contract.⁷ No proposal was made concerning commissions. However, the Respondent's fading system would be retained. Mayne responded that the base rate in Las Vegas already was \$9.25 per hour. He also reiterated that the Union had no interest in maintaining the fade system and the employees' number one issue was to eliminate it. Cooper then stated the Union had been ridiculous with the economic demands contained in its February 6 proposal, so now the Respondent was going to be ridiculous. The two then argued about how to proceed. Mayne wanted the Respondent to provide a response to the Union's proposal. Cooper told Mayne to go back and rewrite his proposal.

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The parties also discussed health insurance on that date. Mayne asked for the Respondent's thoughts on the Union's proposal. Cooper responded that the plan had a good cost. Villavicencio stated that the Respondent offered a three-tiered plan (self, self plus one, and family), but the Union only offered two tiers. She said the company wanted to stay with a three-tiered system. Mayne said the Union could generate a three-tiered quote. Villavicencio stated the Respondent would be interested in looking at it. Mayne noted that the family rate would rise in a three-tiered structure.

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10. The March 20, 2014 Bargaining Session in New York City

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On March 20, 2014, in Manhattan, the Respondent submitted its second written wage proposal to the Union for the Manhattan Union Square unit. (GC Exh. 21, Art. 10.) The Respondent again offered the status quo as to wages. For the first time, the Company proposed possible commission rate increases for individual employees, but at the sole discretion of the employer. It also proposed 1-percent increases in base pay in years 2 and 3 of the contract. The

⁷ The record does not reflect what the existing base rate was for sales associates in Chicago on that date.

proposal retained the provision from the Company's December 2013 proposal subjecting employees who did not fade for 2 months in any 3-month period to termination.

5 The Union likewise presented the Respondent with a modified economic proposal. (GC Exh. 22.) In Article 10 on wages, Mayne retained the Union's language from the February 6 proposal that eliminated the fade system. However, Mayne zeroed out the numbers for base rate of pay and commissions. Mayne did so in an attempt to get the Respondent to provide a proposal with specific numbers.

10 At the bargaining session that day, Cooper stated he could not respond to the document. He said it was not the Respondent's job to do the Union's work for it. Mayne countered that he wanted a substantive response from the Company on what wage figures would work for it if the fade system were eliminated. Cooper said he was not going to bargain against himself. However, at the end of the discussion that day, Cooper stated that the Respondent would be able
15 to provide a "substantive" response at the next bargaining session. (Tr. 295.)

At the same session, Mayne also presented the three-tiered health insurance proposal the Respondent previously requested. (GC Exh. 77.) Prior to the session, Mayne also had provided the Respondent with a cost comparison of the Union and Respondent plans. (GC Exh. 78.)
20 After reviewing the three-tiered proposal, Villavicencio stated the quotes had gone up for single and family coverage. Cooper said that was what Mayne had told them would happen. The Respondent's representatives then took a 5- to 10-minute caucus. When they returned, Cooper stated he appreciated the quote, but the company was not interested in it. He added the company wanted to stay with its plan. Villavicencio commented that the company did not want to
25 administer two different health insurance plans. Mayne explained they would not have to administer the union plan but just cut a check. Then Cooper interceded and reiterated that the company wanted to remain with their plan. In its written proposal on the same date, the Respondent did not make any offer as to health insurance.

30 Cooper also stated at the March 20, 2014 bargaining session that the Respondent was still reviewing their scheduling notification process. He again said the Respondent was not sure the Union's proposal would work. Cooper indicated the Respondent had an operational concern. The Union's proposal of the same date sought 2, instead of 3, weeks of notification for a work schedule covering a 1-week period. (GC Exh. 23, Art. 11.6.)
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Finally, the Respondent's written proposal increased the offer on holidays from 2 to 3 for Manhattan Union Square employees. (GC Exh. 21, Art. 13.1.)

40 11. The Respondent's Decision to Implement Phase 3 for Nonunion Employees

As it turned out, the rumors Mayne heard about the Respondent developing a new compensation structure for its nonunionized employees were true. The new system was the brainchild of Michael Pratt, the Respondent's then chief executive officer. Pratt became CEO in April 2013. Pratt believed that the Respondent's customers would have a better overall shopping
45 experience if employees did not have commission pay. Eliminating commission pay also would address the issue of sales associates not wanting to perform other job duties unrelated to sales.

Thus, the Respondent created and developed a plan to change its compensation system and store structure. These changes were dubbed “Phase 3.”⁸

5 Phase 3 sought to switch the mix of compensation that sales employees received. The system eliminated almost all commission pay and replaced it with a higher, guaranteed base pay rate. The new base rate was determined by looking at each employee’s total compensation, including base pay and commissions, for both 2013 and for the trailing 12 months at the time of a store’s conversion to Phase 3. The total compensation was then divided by total hours worked for the period in question, to create an effective hourly rate. An employee received the higher
10 hourly rate from the two periods. Commissions on gross sales and profits, as well as fading, were eliminated. The only commission available to sales associates in Phase 3 was 5 percent of the gross on what the company called “pro coverage,” or warranty, sales.⁹

15 Because operations associates did not earn commissions, the pay conversion under Phase 3 differed for those employees. The Respondent provided each operations associate with a guaranteed base pay rate increase ranging from 0 to 10 percent, depending on their seniority.¹⁰

20 The hourly wage rates in the market zones for Chicago, Las Vegas, and Manhattan were as follows. (GC Exh. 101.) In Zone 1, sales associates could earn from \$10.80 to \$15.30 per hour. The Union Square Manhattan store was in this market zone. In Zone 2, sales and operations associates could earn from \$10.00 to \$14.15 per hour. The Central Chicago store was in this market zone. In Zone 3 which included Las Vegas, sales associates could earn from \$9.45 per hour to \$13.35 per hour.

25 The Respondent also changed the job classifications for certain sales and operations employees. As previously noted, the old structure had sales associates, department managers, assistant managers, and elite sales force employees. The Phase 3, tiered structure had sales associates, senior sales associates, and lead sales associates. Elite sales force employees were converted to sales specialists. As to operations, the new, tiered positions were operations
30 associate, operations lead, and operations senior. Each position had different hourly ranges of pay based upon the market zone the employee worked in. The pay ranges increased for each tier in the job classification structure.

⁸ The use of this term obviously suggests two prior phases. The record contains abbreviated testimony and limited documentary evidence regarding the earlier phases. The evidence establishes that the Respondent implemented different wage rates, or “market zones,” based upon geography in Phase 2. (Tr. 974–975; GC Exhs. 100, 101.) In addition, the increase in paid holidays for employees occurred in Phase 2. (GC Exh. 92, 100.) The record does not establish when the Respondent decided upon these changes, announced the changes to employees, or implemented Phase 2. However, the plan to increase holidays was a “longstanding” one. (Tr. 274–275.)

⁹ The only employees who retained a commission on the sale of products were elite sales force employees. Their commission became 3 percent of gross sales. (GC Exh. 94.) The Respondent had just 100 or so such employees nationwide.

¹⁰ Prior to Phase 3, it appears that some operations associates would receive annual merit pay increases. (Tr. 924–925, 1375–1378, 1383–1385, 1433–1434.) However, the testimony offered in this regard was limited. It does not establish specifically how many operations employees received merit increases each year or how many years back in time the increases were paid to operations employees.

On or about March 31, 2014, the Respondent held meetings at each store nationwide for all employees where it discussed the Phase 3 implementation. An agenda for the meetings detailed talking points for store managers. (GC Exh. 92.) The document noted the Respondent would begin rollout at stores within a southern California district, which had “all volumes and formats.” As to wages under the new system, the document stated that “Rule 1” was “[n]o associate will have their base rate reduced as an outcome of Phase III.” It also stated “[n]o one in our store will go backwards in pay from what they earned last year. Most will make more if they work the same hours.” As to sales associates, the document listed among its highlights “no fading for any position.”

At the time Phase 3 was developed, the Respondent intended to implement the new compensation structure nationwide. The agenda stated the Respondent planned to have every store converted to Phase 3 by September 2014. However, the stores were not to be converted all at once, but instead rolled out gradually.¹¹

In April 2014, the Respondent formed a team with responsibility for implementing Phase 3. The team included Haffeman, who was a part of the Respondent’s bargaining team, and Kevin Kazubowski, the Respondent’s senior vice president of sales. Haffeman and Kazubowski were responsible for choosing the stores where Phase 3 would be implemented.

12. The April 15 and 16, 2014 Bargaining Sessions in Las Vegas

On April 15 and 16, 2014, the parties held bargaining sessions in Las Vegas. Despite Cooper’s comment at the prior bargaining session, the Respondent did not provide a substantive response on wages. Instead, in the Respondent’s written contract proposal, the wages section reverted to stating (ECON-HOLD) next to the article title. (GC Exh. 25.) Again, the Respondent struck through the entire text of the Union’s proposal on wages. At the session on the 15th, Cooper stated that the company was reviewing and analyzing the Union’s proposals. He said the company was not prepared to give a response at that time.

The Respondent’s proposal reflected a “TA” next to Article 8.1, dealing with contests. The TA had the identical language to the provision in the parties’ settlement agreement back in November 2013. The language set forth that unionized employees were eligible to participate in the same contests that sales employees in a majority of the stores in the same region were eligible to participate in.

The Union’s proposal dated April 15 included reduced asks for base hourly wages. The Union sought \$10 per hour for sales associates, down from the \$16 per hour request in February. (GC Exh. 24, Art. 10.1.) The Union’s commission proposal for the first time was tiered. Sales

¹¹ The parties vigorously dispute whether Phase 3 was a “pilot” program or not. Whether “pilot” is the right word or not, the record evidence establishes that the Respondent, while intending to change to Phase 3 nationwide, implemented the new compensation system at a measured pace so that it could evaluate its effectiveness. In this regard, I credit Pendleton’s testimony that the Respondent intended to roll out Phase 3 gradually and evaluate it, before pulling the trigger on implementation at all of its stores. (Tr. 905.) His account was corroborated by contemporaneous documents, which stated, in late April or early May 2014, that the Respondent planned to assess the Phase 3 implementation for 60–90 days, then roll out Phase 3 to the rest of the country. (GC Exh. 93.)

associates would earn 2 percent commission on monthly gross sales from \$0 to \$30,000; 3 percent from \$30,001 to \$50,000; 4 percent from \$50,000 to \$70,000; and 5 percent above \$70,000. Cooper stated the Union's revised proposal still was too high as to numbers and the elimination of fade. Cooper added the numbers probably would not work, but they would review the proposal.

In addition to the Union's proposal, Mayne provided the Respondent with a document containing a comparison of wages under current rates and the Union's proposed new rates. (GC Exh. 71.) The document was broken out by job classification. The comparison showed that the Union's proposal had the greatest positive effect on the earnings of employees at the lower end of the pay range.

The parties also discussed work schedule notification and stair stepping at the April 15 session. Cooper stated to Mayne that the work schedule issue did not apply to the Las Vegas bargaining unit. Mayne responded that Cooper's statement was utter nonsense and the issue applied to all three bargaining units, as they had agreed through stair stepping. Cooper asked how Mayne figured that, since the representatives had not been bargaining in Las Vegas when the issue was discussed. Cooper said the language was only a Manhattan issue and did not apply to Chicago or Las Vegas. When Mayne stated there was no reason to single the issue out, Cooper disagreed. Cooper then added that, even if the company had been regressive bargaining on the issue, it would only apply to Manhattan. Cooper stated the company had not agreed to stair step and these were separate negotiations. Mayne said that was an utter crock and the proposals they had exchanged proved they had been stair stepping.

13. The April 29, 2014 Bargaining Session in Chicago

On April 29, 2014, the parties held a bargaining session in Chicago. In a proposal dated that day, the Respondent retained (ECON-HOLD) next to Article 10 on wages. (GC Exh. 27.) Cooper again stated the Respondent was still reviewing the Union's proposals and preparing a response. When Mayne expressed frustration, Cooper said they would have a complete, substantive response at the next bargaining session. Cooper stated they just needed a little bit more time.

The Respondent's proposal dated April 29, 2014 does not reflect that the parties had reached any additional TAs from those detailed above as of the session on February 25, 2014.

14. The May 1, 2014 First Implementation of Phase 3

The Respondent organizes its stores nationwide by region and district. The Respondent maintains six regions and has a total of 40 districts. Each region contains between six to eight districts. Most districts contain between six and eight stores.

On May 1, 2014, the Respondent implemented Phase 3 for the first time. The Company chose district 13 for the initial implementation. That district included eight stores in southern California near the Respondent's headquarters, enabling easy monitoring of the change.

Shortly thereafter at some point the same month, the Union obtained a copy of the Respondent's all-store meeting agenda for May 2014. (GC Exh. 72.) From this document, Mayne obtained a limited amount of information concerning Phase 3. The document confirmed that Phase 3 had been rolled out in district 13. The document also stated that all associates had been converted to their new roles and received an increase in their hourly rates. The document provided additional details on the wage increase. It stated that sales associates were converted by looking at total earnings for 2013 and the trailing 12 months, then receiving the higher of the two numbers. The document noted that sales associates would receive a 5-percent commission on their gross warranty sales. It did not say anything else regarding commissions. The document also indicated that operations associates were converted into updated market zone rates and given an additional percentage increase based upon tenure. Finally, the document stated that "[f]ading has been eliminated for all Sales Associates."

15. The May 22, 2014 Bargaining Session in New York City

The parties' next bargaining session was in New York City on May 22, 2014. Despite its prior representations, the Respondent once again did not submit a written proposal on that date. Instead, Cooper made a verbal wage proposal of \$8.50 per hour as a base pay rate for Manhattan Union Square sales associates. Wage increases were raised to 1.5 percent, from 1 percent, in years 2 and 3 of the contract. Cooper also indicated that the fade compensation system would be retained. Union representative Dryburgh objected and told Cooper the proposal was regressive, because the Respondent previously had offered \$9.00 per hour. Cooper responded that it was not the employer's intention to be regressive. Cooper stated he could not actually remember the previous wage proposal and would have to go back and check. Mayne said "this is absolutely asinine" and accused Cooper of "pencil whipping" his responses. (Tr. 330.) Mayne explained at the hearing what he meant by pencil whipping. Mayne used the term to describe Cooper making something up without giving it any thought, so he could say he passed a proposal across the table. Cooper again said he would go back and check. He added that if he found out the Union was correct, it would simply be a mistake on his part and it was not any problem.

At that point, the Respondent caucused. Its representatives determined from notes that a higher base wage rate had been offered for Manhattan Union Square sales associates at the March 20, 2014 negotiation session in New York. Pendleton was not pleased and told Cooper to fix it.

When the Respondent's representatives returned to the session, Cooper stated that he found out the previous proposal had been \$9.00 an hour. He said the Respondent was now amending its response to \$9.25 per hour with the rest the same, meaning 1.5 percent increases in years 2 and 3 of the contract and maintaining the current fade system.

During this same session, Mayne asked what Phase 3 was and why the parties were not discussing it. Cooper stated that Phase 3 was a "company program" applicable to nonunion stores and not applicable to union stores. (Tr. 332-334; 631-634.) Cooper indicated he was not going to provide information concerning a company program. Mayne noted his understanding that it gave employees a much higher base hourly wage based upon an evaluation of the prior 12 months. Cooper did not respond.

At that point, Mayne gave all of the Respondent's representatives copies of a letter Mayne had written detailing his allegations regarding the Respondent's bad faith bargaining. The Respondent representatives again caucused. When they returned this time, Cooper stated the company had been trying to bargain in good faith. As to wages, Cooper said the Respondent was very close, they were preparing their response, and they would have a substantive response at the next meeting.

16. The Respondent's June 1, 2014 Implementation of Phase 3

On June 1, 2014, the Respondent implemented Phase 3 in five additional districts, one in each of its remaining five regions excluding region 1. (R. Exh. 2.) The Respondent selected these districts for implementation in late April or early May.

In region 5, the Respondent implemented Phase 3 in district 82. That district included the Manhattan Union Square store, as well as stores in Brooklyn, Carle Place, Commack, and Queens, all in New York. At the Union Square store, only store management and operations employees were converted to Phase 3. Unionized sales employees were not.

In region 4, the Respondent implemented Phase 3 in district 45. At the time, that district included the Las Vegas store. Upon conversion, the district also included the Las Vegas Summerlin store, as well as stores in Avondale, Mesa, Phoenix, Scottsdale, and Tucson, Arizona and Salt Lake City, Utah. Like Manhattan, only store management and operations employees were converted to Phase 3 at the Las Vegas store. Unionized sales employees were not.

In region 2, the Respondent implemented Phase 3 in district 31. That district included stores in South Chicago, Villa Park, Country Club Hills, and Joliet, Illinois. It also included stores in South Bend and Hobart, Indiana. While not in the same district, the Central Chicago and South Chicago stores are "close together." (Tr. 984.)

In region 7, the Respondent implemented Phase 3 in district 71. This district included stores in Chattanooga, Knoxville, and Nashville, Tennessee, as well as Birmingham, Huntsville, and Montgomery, Alabama. Although Knoxville employees were not unionized, the Union had attempted to organize sales and operations associates there earlier in 2014. The Union filed a petition seeking to represent those Knoxville employees on February 27, 2014. The Union lost an election in Knoxville conducted by the Board on April 11, 2014. The Board certified the election results on April 21, 2014.¹²

Finally, in region 6, the Respondent implemented Phase 3 in district 77. That district included stores in Gainesville, Jacksonville, Pensacola, and Tallahassee, Florida, as well as Mobile, Alabama.

¹² I take judicial notice of the dates of the Knoxville petition filing, election, and tally of ballots from Board records. See *Metro Demolition Co.*, 348 NLRB 272 fn. 3 (2006).

*C. The Respondent's June 10, 2014 Withdrawal of Recognition
as to the Manhattan Union Square Bargaining Unit*

Prior to the parties' bargaining session on June 10, 2014 in Las Vegas, Mayne met with Cooper and Villavicencio in a hallway. Cooper stated to Mayne, "I'm sure that you've heard that there has been a petition circulating in the Manhattan store." (Tr. 345–346.) Mayne responded that he was not aware. Villavicencio then handed Mayne a letter. (GC Exh. 74.) The letter stated:

Union Square bargaining unit members have given management a petition signed by a majority of the bargaining unit employees in Union Square stating that they no longer wish to be represented by the RWDSU. Based on this objective evidence of the union's loss of majority support, Guitar Center is hereby withdrawing recognition from the union.

When the representatives moved to the bargaining room, Cooper stated the Respondent had withdrawn recognition from Manhattan and would only bargain for Chicago and Las Vegas.

ANALYSIS

A. Legal Framework for Section 8(a)(5) Surface Bargaining Cases

The duty to bargain in good faith under Section 8(d) of the Act requires both the employer and the union to negotiate with a "sincere purpose to find a basis of agreement," *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)). Although the statute cannot compel a party to make a concession, an employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all." *Ibid.* (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). (Emphasis in original.) Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. *Pease Co.*, 237 NLRB 1069, 1070 (1978).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, supra, at 1603. From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining

to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO* at 487.

5 The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, and withdrawal of already-agreed-upon provisions. *Atlanta Hilton & Tower*, supra, at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148
10 (2000).

“Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining.” *PSO*, supra at 487, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), aff'd in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). A contract proposal or set of proposals which would leave a union and its membership worse off than they would be if they continued to work without a contract is generally deemed to be a rejection of the collective-bargaining principle and solid evidence of bad faith. *Chevron Chemical Co.*, 261
15 NLRB 44, 55 (1982), citing to *Romo Paper Products Corp.*, 220 NLRB 519 (1975). This includes proposals that require a union to cede its representational functions. *Regency Service Carts*, 345 NLRB 671, 675 (2005).
20

Finally, conduct that is not an independent violation of the Act may nevertheless be an indicum of a course of bad-faith bargaining. *Houston County Electric Cooperative*, 285 NLRB
25 1213, 1216–1217 (1987).

*B. Did the Respondent Refuse to Bargain in Good Faith
From July 12, 2013 to June 9, 2014?*

30 To support its Section 8(a)(5) surface bargaining allegation, the General Counsel's complaint, associated bill of particulars, and posthearing brief allege that the Respondent committed specific acts of conduct indicative of bad-faith bargaining from July 12, 2013 to June 9, 2014. To analyze these allegations, I have grouped the negotiation subjects into the following categories: wages, health insurance, Phase 3, scheduling notification, and other benefits.
35

1. The Failure to Submit Wage Proposals

40 The General Counsel first alleges that the Respondent failed to submit written economic proposals to the Union from July 12, 2013 to July 10, 2014. On its face, this allegation does not entirely mesh with the record evidence. The Respondent did provide written wage proposals seeking to retain the status quo for Manhattan Union Square unit employees on December 11, 2013 and March 20, 2014. The Company also provided a written wage proposal for Las Vegas

unit employees on June 10, 2014, after withdrawing recognition from Manhattan.¹³ Moreover, the Union did not seek to resume bargaining over economic issues until February 6, 2014.

5 Nevertheless, I conclude that the Respondent engaged in dilatory tactics and other
 10 conduct in bargaining over wages from December 11, 2013 to June 9, 2014 that are indicative of
 bad faith. First, the Respondent made only two written wage proposals during this time period.
 The proposals applied only to the Manhattan Union Square bargaining unit. The Respondent
 never made a written wage proposal for the Central Chicago bargaining unit after receiving the
 Union's February 6, 2014 economic proposal.¹⁴ This was a period of more than 4 months total.
 15 It also never made a written or verbal wage proposal for the Las Vegas unit during the same time
 period. To combat this, the Respondent attempts to rely on verbal wage proposals it made for
 Central Chicago (February 25, 2014) and Manhattan Union Square (March 20 and May 22,
 2014). I find the reliance misplaced. Those proposals addressed only hourly wage rates, not
 commissions. They also only applied to sales associates, not all sales employees. Thus, none of
 the verbal proposals was comprehensive as to wages.

The failure to make comprehensive wage proposals is even more problematic in light of
 the Respondent's representations to the Union during negotiations. Cooper stated on two
 20 occasions (March 20 and April 29, 2014) that the Respondent would provide a "substantive"
 response to Union proposals at the next bargaining session. Then the Company failed to do so.
 The only explanation the Respondent provided for this delay of nearly 3 months over the course
 of 4 bargaining sessions was that it was reviewing and studying the Union's proposals. There
 simply is no legitimate reason a counterproposal could not be made more expeditiously. The
 Respondent had the Union's initial, thorough wage proposal in its possession from the very first
 25 bargaining session on July 12, 2013. The parties began bargaining on economics on February 6,
 2014. The fact that the Company did not come through on its commitment to provide a
 substantive response until after Phase 3 had been implemented and after the certification year
 had expired in Manhattan is particularly telling. Such conduct is not indicative of good faith.
Whisper Soft Mills, Inc., 267 NLRB 813, 813-815 (1983) (4-month delay in submitting wage

¹³ For purposes of this analysis, I conclude that the Respondent was not stair stepping its wage proposals at any point when bargaining for multiple units. At the hearing, none of the Respondent's witnesses specifically addressed whether the topic of wages was stair stepped or not. As for documents, from December 11, 2013 to November 13, 2014, the Respondent submitted written wage proposals that were labeled with or included specific references to only one physical location. (GC Exhs. 11, 21, 29, 30, 37, 39, 43, 49, and 53.) Certain economic proposals even stated "Las Vegas Store Only" or "Chicago Store Only." (GC Exh. 29 and 30; Tr. 1023-1024.) As will be discussed further herein, Cooper also stated at the June 10, 2014 bargaining session that the Respondent's wage proposal that day applied only to Las Vegas and the Company had not agreed to stair step negotiations. (Tr. 349.) Thereafter, from July 10 to November 13, 2014, the Respondent never changed a base rate and commission proposal for sales employees at consecutive bargaining sessions in different locations. Rather, it made the identical proposals once at each location. (GC Exhs. 37 and 39; GC Exhs. 43 and 49.) That approach is not indicative of stair stepping under the definition the parties discussed during negotiations. (Tr. 205-212.) Moreover, the Respondent already had established market zones in Phase 2, pursuant to which Chicago, Las Vegas, and New York all had different wage rate ranges. In contrast, the Union appears to have been stair stepping all of its economic proposals.

¹⁴ Although the Company's December 11, 2013 written proposal was made at a bargaining session held in Chicago, the wages article in that proposal references only the Manhattan Union Square store. (GC Exh. 11, Art. 10.)

counterproposal independently violated Section 8(a)(5), where employer gave no valid reason for the delay).

5 In *United Technologies Corp.*, 296 NLRB 571, 571–572 (1989), the Board found that an employer had engaged in surface bargaining and relied, in part, on the employer’s failure to make counterproposals for an extended period of time. The company there did not submit economic counterproposals for 1 year after receiving the union’s initial proposal. The employer also withdrew recognition from the union, before it had completed the drafting of its proposed contract language. As a result, the union could not have agreed to a contract prior to the
10 recognition withdrawal, even if it had capitulated to the company’s every demand. The situation here is analogous. The Respondent had the Union’s full economic proposal for 11 months. At the March 20 bargaining session, the Respondent first stated it would provide a substantive response on wages at the next session. Thereafter, all of its written proposals stated “ECON-HOLD” for wages, before it withdrew recognition from the Union at Manhattan Union Square.
15 Without any written wage proposal, the Union could not have agreed to a contract prior to that withdrawal, even if it capitulated to all of the Respondent’s demands.

In addition, the terms of the Respondent’s written proposals support a bad-faith finding. Both proposals sought to maintain the status quo as to wages, but added that employees could be
20 disciplined or discharged for not faking. In its December 11, 2013 proposal, the Respondent also sought to make Manhattan sales employees ineligible for the elite sales force program. In its March 20, 2014 proposal, the Company sought to remove the Union’s right to negotiate commission rate increases for employees, by including a provision giving the Company the sole discretion to increase those rates. These provisions would have made unionized employees at
25 Manhattan Union Square worse off than if they continued to operate without a contract or undermined the Union’s bargaining authority.

Wages obviously are a topic of critical importance to any contract negotiation. Here, I
30 conclude the totality of the Respondent’s conduct on wages from December 11, 2013 to June 9, 2014 supports a finding of bad-faith bargaining.

2. The Regressive Wage Proposals

35 The General Counsel also alleges that the Respondent’s wage rate proposals “since May 22, 2014” were regressive and demonstrate a lack of intent to reach an agreement.

A regressive bargaining proposal is defined, logically, as a change from a prior more favorable proposal. *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001). Such proposals include a party making an initial contract proposal that is less favorable to employees than the
40 status quo. Regressive proposals are not per se unlawful; they may be justified by changes in the economy of the industry and the relative strengths of the participants. *Rescar, Inc.*, 274 NLRB 1, 2 (1985). However, regressive proposals are indicative of bad faith if left unexplained or if the explanation appears dubious. *Mid-Continent Concrete* at 260. “What is important is whether they are ‘so illogical’ as to warrant the conclusion that the Respondent by offering them
45 demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement.” *Barry-Wehmiller Co.*, 271 NLRB 471, 473 (1984), quoting *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 103 (1981).

From May 22 to June 10, 2014, the Respondent made only one, verbal wage proposal. This actually occurred on May 22, 2014. On that date, Cooper offered Manhattan sales associates \$8.50 per hour, despite having offered \$9.00 per hour at the last New York bargaining session on March 20, 2014. When the Union noted the regressive nature of the proposal, the Respondent caucused, returned a few minutes later, and offered \$9.25 per hour.

The Respondent's initial proposal on May 22, 2014 obviously was regressive. The Company argues this was a "mistake" that was almost immediately corrected. However, even if it was a mistake, that does not settle the issue. As noted above, the Respondent previously stated on two occasions prior to this date that it would provide a substantive wage proposal. Instead, more than 2 months after making its last wage proposal for Manhattan, the Respondent's bargaining team showed up for the May 22 session with no idea what its previous wage proposal had been. This approach demonstrates a lack of due diligence on the Company's part. Moreover, in its brief, the Respondent even points out that it already had agreed to grandfather employees at their existing hourly base pay. That meant no employee making more than \$8.50 per hour would have been affected by the regressive proposal. This argument actually confirms the lack of substance the verbal wage proposal had. I agree with Mayne's assessment that the Respondent was "pencil whipping" its wage proposal to make it appear they were bargaining in good faith.

The General Counsel also contends that the Respondent made a regressive wage proposal on February 25, 2014. On that date at a bargaining session in Chicago, Cooper verbally proposed a base rate of pay for sales associates of \$9.00 per hour. The General Counsel's theory falls into the category of a party making an initial contract proposal less favorable to employees than the status quo. In particular, Las Vegas sales associates were making \$9.25 per hour at the time the Company made the proposal. I do not find the Respondent's conduct in this regard to be indicative of bad-faith bargaining. As previously noted, the Company's verbal wage proposals were specific to the location where bargaining occurred. Thus, the Respondent's proposal on February 25, 2014, was solely for sales associates in the Chicago store. Even if Las Vegas employees made \$9.25 per hour, the proposal did not apply to them and was not regressive.

3. The Refusal to Discuss or Provide Information on Phase 3

The General Counsel's complaint and posthearing brief allege the Respondent refused to discuss or provide information on Phase 3 to the Union during contract negotiations.

No question exists that Phase 3 made certain changes to sales associates' compensation that would be viewed by most employees and the Union as improvements. The most important one was the elimination of fading. Phase 3 also provided a higher, guaranteed hourly wage rate and created advancement opportunities for employees which had not previously existed. The Respondent implemented these improvements at the Manhattan Union Square and Las Vegas stores on June 1, 2014, except for the unionized sales associates at both stores, as contract

negotiations were ongoing.¹⁵ It also implemented Phase 3 on that same date at its South Chicago store, which is in close proximity to the unionized Central Chicago Store.

5 The Respondent admittedly refused to discuss Phase 3 with the Union during negotiations. At the May 22, 2014 bargaining session, Mayne asked Cooper what Phase 3 was and why they were not discussing it. Cooper responded it was a “company program” not applicable to union stores and he was not going to provide any information concerning a company program. What Cooper meant by “company program” and why that status made Phase 3 something the Respondent did not have to discuss or provide information on is anyone’s guess.

10 The complaint does not allege an independent Section 8(a)(5) refusal to provide information in this regard. Even so, evaluating the Respondent’s conduct on that basis provides insight into whether it is indicative of bad-faith bargaining. A union must demonstrate the relevance of a request for information concerning non-unit employees. *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010). The required showing is subject to a liberal, “discovery-type standard” and is not an exceptionally heavy one. The union need only show a probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. A request for information can be made in writing or orally. *Anheuser-Busch, Inc.*, 342 NLRB 560, 567 (2004).

20 Mayne’s oral request for information about Phase 3 meets this standard. Having a full understanding of Phase 3 would have enabled the Union to bargain intelligently in support of a demand for wage parity with other employees. The Respondent’s flat refusal to provide any information on Phase 3, or even an understandable explanation as to why it did not have to do so, leads to only one reasonable conclusion. The Company did not want to make it easier on the Union to bridge the gap on wages and reach an agreement on an initial contract. Certainly, a willingness to eliminate fading for unionized stores, as was being done at non-unionized stores, would have gone a long way in that regard. Similar conduct has been found to independently violate the Act. See, e.g., *Frito-Lay, Inc.*, 333 NLRB 1296 (2001) (employer’s refusal to provide average wage rate at other facilities violated Section 8(a)(5), because information “would allow the [u]nion to bargain intelligently for wages based on parity within the [r]espondent’s company . . .”); *Ironton Publications, Inc.*, 294 NLRB 853 (1989) (information concerning employer’s profit-sharing plan was relevant and employer’s refusal to provide information was a violation, where company had instituted plan for nonunion employees in the midst of negotiating a successor contract for union employees).

35 At the hearing, the Respondent offered no explanation as to why it was unwilling to discuss Phase 3 with the Union. However, Pendleton testified as to the reasons the Company did not implement Phase 3 for sales employees at the Manhattan Union Square store. (Tr. 968–969.) He stated the Company could not unilaterally change the compensation and organizational structure of the store without the Union’s consent. But the fact that implementation of Phase 3 was a mandatory subject of bargaining would not prevent the Respondent from proposing, or

¹⁵ In its bill of particulars, the General Counsel alleged that the Respondent implemented Phase 3 at the Las Vegas store about November 18, 2014. However, the record evidence establishes that the implementation at that store occurred on June 1, 2014. In fact, the last time the Respondent implemented Phase 3 at any store was on October 1, 2014.

discussing, Phase 3 with the Union during negotiations. The Company never gave the Union the chance to consent. Pendleton also said it did not make sense to implement Phase 3 at unionized stores, because the parties were in the middle of negotiating a different wage structure. The chronology of events belies this claim. At the point at which the Respondent implemented Phase 3 in these stores, the Respondent's only wage proposals to the Union had been to maintain the status quo.

For all these reasons, I find that the Respondent's refusal to discuss or provide information on Phase 3 to the Union during negotiations demonstrates a lack of good-faith bargaining.

4. The Failure to Submit Counterproposals on Health Insurance

The General Counsel's complaint and bill of particulars allege that the Respondent failed to make any counterproposals on health insurance since January 16, 2014.¹⁶

The Respondent's approach to bargaining on health insurance presents problems similar to its approach to wages. The Union made a comprehensive proposal on health insurance on July 12, 2013. The parties discussed that proposal in detail on August 2, 2013, with the Respondent indicating it was open to considering the Union's proposal. The Respondent's first written counterproposal, made on December 11, 2013, sought to maintain the status quo, but again with an added wrinkle. The Company included a provision giving it unilateral discretion to change the unit employees' health plans going forward. Thus, the Company was asking the Union to waive a critical right it had as the employees' bargaining representative—bargaining over any changes to health insurance.

When the parties began discussing health insurance again on February 25, 2014, the Respondent stuck to its position that it wanted to stay with its existing medical plans. But the Company provided either no justification or false justifications for this position. First, Villavicencio stated the Respondent wanted to have a three-tier plan, as it currently maintained for employees. Then, when the Union went through the trouble of preparing a three-tier quote, the Respondent evaluated it for 5–10 minutes and rejected it. Certainly, any evaluation that occurred in that limited timeframe could not have been serious. Then, Villavicencio justified the rejection by saying the Company did not want to administer two different plans. In fact, the Respondent did not have to do so, had it accepted the Union's health insurance proposal. Its only obligation would have been to pay its share of the costs. The Respondent had no answer when Mayne pointed this out. Moreover, if it had been true and the Company really did not want to administer two different plans, then its earlier request for a three-tier union plan was not genuine. The Respondent's conduct in this regard appears designed to cause delays.

¹⁶ Again, it is not clear why the date alleged is January 16, 2014, as opposed to February 6, 2014. The Union made proposals on health insurance on July 12, 2013 and February 6, 2014. In the interim, the Union proposals stated "ECON-HOLD" in the article dealing with health insurance. The Respondent proposed to maintain the status quo as to health insurance on December 11, 2013, then made no further proposal prior to withdrawing recognition in New York.

The refusal by a party to offer explanations for its bargaining proposals, beyond conclusory statements that that is what a party wants, and refusals to make any efforts at compromise in order to reach [a] common ground can constitute evidence of bad-faith bargaining. *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), citing to *John Ascuaga's Nuggett*, 298 NLRB 524, 527 (1990), enfd. in pertinent part sub nora. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992); see also *Regency Service Carts, Inc.*, 345 NLRB 671, 672–673 (2005). Advancing false reasons for rejecting proposals likewise is indicative of bad faith. *The Chester County Hospital*, 320 NLRB 604, 621 (1995). As detailed above, this is the exact approach the Respondent took here as to health insurance. The Respondent stated it wanted its existing medical plans and made no effort to compromise or find common ground. It provided no legitimate explanations for its position during bargaining.

At the hearing, the Respondent's witnesses did identify specific issues they had with the Union's health insurance proposal. These included the high percentage of costs the Company had to pay, compared with employees, as well as the lack of a high deductible plan offering. But the record does not reflect that the Respondent ever told the Union about these issues while bargaining during this time period. It simply is not possible to have meaningful bargaining on this topic, if these reasons for rejecting the Union's plan were not discussed. Without question, the cost split between an employer and its employees for health insurance, or any other benefit, is an issue well suited to be resolved through collective bargaining. Had the information been provided, the parties could have made efforts to compromise. Instead, the Respondent simply said it wanted its own plans and made no efforts to reach a common ground.¹⁷

Health insurance, like wages, is a topic of vital importance in most contract negotiations. The talks here were no different, since the Union identified the costs of and benefits provided by health insurance as one of the three most important issues to employees. I conclude the Respondent's conduct as to health insurance from December 11, 2013 to June 10, 2014 supports a finding of surface bargaining.

5. The Regressive Scheduling Notification Proposal

The General Counsel's complaint, bill of particulars, and posthearing brief allege that the Respondent made a regressive bargaining proposal as to scheduling notification on December 11, 2013 and thereafter engaged in conduct indicative of bad-faith bargaining on this topic.

The first question that needs to be resolved on this issue is whether the parties actually reached a tentative agreement on October 17, 2013 regarding scheduling notification. At that point, the Respondent considered a provision tentatively agreed to when its language passed between the parties without any written notes. The Respondent's October 14th proposal contained the identical language on this issue as the Union's October 17th proposal, with no mark ups. (GC Exh. 8, Art. 11.7; GC Exh. 9, Art. 11.7.) The provision stated that the Respondent would provide employees with their work schedules 3 weeks in advance. Thus, the parties reached a tentative agreement on that date based upon the Respondent's definition.

¹⁷ Indeed, after providing non-responsive answers when repeatedly asked why the Respondent did not make an alternative cost share proposal on the Union's health plan, Villavicencio ultimately stated: "Our proposal was to keep them on [our] plan with the cost share that we had at present." (Tr. 1349.)

At this point, it bears noting that the Respondent's refusal to agree to marking a tentative agreement with "TA" on its documents until at least January 16, 2014, some 6 months into bargaining, again could do nothing but delay reaching an overall agreement. The Respondent provided no explanation at the parties' initial bargaining session as to why it preferred to use this method for designating TAs. It also provided no explanation 6 months later as to why it changed course and agreed to the Union's method. At the hearing, the Company contended that marking a tentative agreement with a TA was cumbersome and not as effective as its preferred method. (Tr. 1044.) That explanation is illogical. Had the parties placed a "TA" on the scheduling notification provision on October 17, this dispute over whether they reached a tentative agreement on scheduling notification would not have arisen. In any event, the Respondent cannot delineate the procedure it wished to use to track TAs, then claim later that no TA was reached on scheduling notification when the negotiations on that provision met the Respondent's definition.

Having reached agreement on October 17, 2013 to 3 weeks of advance notification for schedules, the Respondent's reversion to 72 hours in its December 11, 2013 proposal is regressive. However, a party may withdraw from a tentative agreement, without demonstrating bad faith, where it has good cause. *Homestead Nursing Center*, 310 NLRB 678 (1993). At the hearing, Pendleton provided detailed testimony in this regard. He explained the cause as being the Respondent's inability to feed financial information, including store traffic data by hour and day, into the scheduling program. (Tr. 1057-1064.) He further stated that the finance department had to reschedule when it generated the necessary reports. He added that the finance and operations departments had to reschedule meeting dates, so the schedules could be posted further in advance. That testimony is reasonable and appears to reflect good cause.

The problem is that the record does not establish the Respondent ever communicated this detailed information to the Union during negotiations. Based upon the credited testimony above, the Company stated nothing more than that it had an "operational concern" with 3 weeks of advance notice. No further details were provided to the Union. It provided this justification nearly 2 months after reaching the tentative agreement. The Respondent said nothing further about this until March 20, 2014. At that point, Cooper simply repeated the same explanation, again with no further information. As with wages, health insurance, and Phase 3, the Respondent provided limited explanations not indicative of good-faith bargaining. If the Union contemporaneously received the full explanation, the issue could have been put to rest.

This conclusion is further solidified by a second, regressive proposal the Respondent made on scheduling notification on April 15, 2014. On the bargaining session on that date, Cooper attempted to limit the parties' scheduling notification negotiations to that point to the Manhattan Union Square store. This effectively was a withdrawal, as to that issue, to the previous agreement to stair step negotiations where it made sense. No logical reason exists for doing this, especially since the Respondent also stated at different times that it intended to implement whatever change it made to scheduling notification at all of its stores. (Tr. 1062.) The Respondent did not have good cause for making this regressive proposal.

For all these reasons, I conclude the Respondent made a regressive proposal on scheduling notification on December 11, 2013, without adequate explanation. I also find that the

Company did not have good cause for a regressive proposal on scheduling notification on April 15, 2014. These circumstances support a finding of bad-faith bargaining.

6. The Conduct as to Other Benefits

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The General Counsel argues that the Respondent engaged in dilatory tactics by discriminatorily denying Manhattan Union Square employees six paid holidays, after granting that benefit to all other employees.¹⁸ The General Counsel also contends that the Respondent's "fictitious" proposals on GIG leave and the GAIN program likewise were dilatory tactics.

10

The record evidence establishes that the Respondent increased holidays at all nonunion stores at some point in July 2013 to six total. This occurred shortly after the Union was certified on June 3, 2013, as the bargaining representative for the Manhattan Union Square unit. However, in its initial contract proposal dated September 24, 2013, the Respondent offered those employees only two holidays. The only justification was that two holidays was the status quo at the time of the Union's certification. On February 6, 2014, the Respondent offered six holidays to the Central Chicago and Las Vegas units. Again, the stated justification was that six holidays was the status quo at those locations when the Union was certified. Then on March 20, 2014, or 6 months after its initial Manhattan holiday proposal, the Respondent increased its offer to 3 holidays. The Company did not go beyond that during the remaining period prior to its withdrawal of recognition from the Union for that unit. Thus, had the Union accepted the Respondent's proposal prior to the June 10, 2014 withdrawal of recognition, the unionized employees again would have been worse off than their nonunion counterparts.

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When viewed in isolation, the Respondent's bargaining position on holidays is seemingly innocuous. Standing alone, a party obviously may make an initial proposal that a contract maintain the status quo. However, when combined with the other conduct already described, the Company's approach here is indicative of bad faith. The only reason the Manhattan employees did not receive the additional holidays is because they unionized. Over 11 months of bargaining, the Respondent never offered more than half of the total number of holidays that nonunion employees were enjoying. The message to employees is clear: they will be better off without a union. Indeed, the Company ultimately confirmed that message when it gave the Manhattan employees all six holidays shortly after the withdrawal of recognition.

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The same reasoning applies as to the Respondent's approach in bargaining regarding GIG leave and the GAIN discount program. The Company's initial proposal was to make unionized employees ineligible for these benefits, despite the fact that all nonunion employees enjoyed them. The Respondent did not alter this position at any point from September 24, 2013 to June 10, 2014. In fact, it did not end up including these benefits for unionized employees until its final contract proposal on August 11, 2015, for the Central Chicago unit. Once more, the Respondent's proposal made unionized employees worse off than if they had no union at all.

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¹⁸ The Respondent's granting of six paid holidays to all nonunionized employees, while withholding the increase from the unionized employees in Manhattan, is not alleged as an independent violation of the Act. The General Counsel acknowledges that the Union did not file a timely charge under Section 10(b) in that regard. Nonetheless, and as previously discussed, conduct that is not alleged as an independent unfair labor practice still may be used to support a bad-faith bargaining allegation.

Moreover, the Company's explanation for not including these benefits until more than 2 years into negotiations does not withstand close scrutiny. The Respondent tied inclusion of GIG and GAIN to an acceptable, overall economic package. (Tr. 1271–1272.) But neither benefit imposes a direct cost to the Respondent. One program was an unpaid leave benefit and the other program offered discounted merchandise directly from vendors. The Respondent tacitly acknowledged this in bargaining by originally proposing the benefit ineligibility when it made a non-economic proposal on October 24, 2013.

Therefore, I find the Respondent's bargaining as to holidays, as well as GIG and GAIN, to be indicative of bad-faith bargaining.

7. Conclusion

To summarize, the Respondent engaged in the following conduct supporting a finding that it did not bargain in good faith from July 12, 2013 to June 10, 2014: (1) never submitting a comprehensive wage proposal for the Central Chicago and Las Vegas bargaining units; (2) delaying for 3 months its submission of a counterproposal on wages for the Manhattan Union Square bargaining unit; (3) being unprepared for wage negotiations on May 22, 2014; (4) providing false or no explanations for its position on health insurance and proposing to eliminate the Union's right to negotiate over future health benefit changes; (5) refusing to discuss or provide information on Phase 3; (6) providing an inadequate explanation for a regressive proposal on scheduling notification, then attempting to limit stair-stepped negotiations on this topic to one location; (7) refusing to provide six holidays to Manhattan Union Square employees because they unionized and never increasing the proposal beyond three holidays; (8) proposing to eliminate GIG leave and the GAIN program for unionized employees without legitimate explanation; and (9) refusing to mark contract provisions with a "TA" for 6 months.

As this lengthy recitation makes clear, the totality of the circumstances here strongly supports the finding that the Respondent engaged in bad-faith bargaining during this time period. This overall conduct paints a picture of a party that took multiple steps to insure negotiations dragged on past the certification year expiration date in New York. It also repeatedly conveyed to unionized employees that they were worse off for having chosen to be represented. Finally, the conduct applied to wages, health insurance, and scheduling notification, the three areas of highest importance to unionized employees.

C. Did the Respondent's Conduct as to Phase 3 Violate Section 8(a)(3)?

With respect to Phase 3, the General Counsel's complaint also alleges multiple Section 8(a)(3) violations. The allegations include the refusal to discuss Phase 3 with the Union, as well as a refusal to offer Phase 3 to unionized employees. They also include that the Respondent discriminatorily denied Phase 3 to unionized employees and instead insisted on the continued use of the fade compensation system.

1. Are the General Counsel's Section 8(a)(3) Allegations
as to Phase 3 Barred by Section 10(b)?

5 Before analyzing the substantive allegations, a threshold issue must be addressed. The
Respondent contends that the Section 8(a)(3) allegations as to Phase 3 are time-barred by Section
10(b) of the Act. That section requires that any complaint issued by the General Counsel must
be based on an unfair labor practice occurring within 6 months prior to the filing of a charge with
the Board. The Union here did not file a charge alleging 8(a)(3) violations until June 15, 2015.
That date is well beyond 6 months since Mayne first learned of Phase 3 in April 2014 and the
10 Respondent's first implementation of Phase 3 in June 2014 at two unionized locations. To avert
this issue, the General Counsel argues that the 8(a)(3) allegations are closely related to the
Union's timely-filed 8(a)(5) charge alleging the Respondent's failure to bargain in good faith.

15 In determining whether untimely allegations in a complaint are closely related to
violations alleged in the charge, the Board examines (1) whether the charge and complaint
allegations involve the same legal theory; (2) whether they arise from the same factual situation
or sequence of events; and (3) whether a respondent would raise similar defenses to both
allegations. *Bryant and Stratton Business Institute*, 321 NLRB 1007, 1019 (1996); *Redd-I, Inc.*,
290 NLRB 1115 (1988). It is not necessary that the allegations are based on the same section of
20 the Act. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

Applying these principles here, the 8(a)(3) Phase 3 complaint allegations are closely
related to the timely charge alleging an 8(a)(5) refusal to bargain in good faith. The allegations
arise out of the identical factual situation, the Respondent's implementation of Phase 3 at
25 nonunion stores and its refusal to offer or discuss it with the Union during negotiations.
Although different sections of the Act are involved, "the legal theory underlying the allegation is
similar: that the Respondent sought to discourage support for the Union, create dissatisfaction
with union representation, and draw out and thwart the negotiating process all with the aim of
getting rid of the Union after the certification period expires." *Bryant and Stratton Institute*,
30 *supra*. Moreover, a significant component in evaluating the discriminatory motive component of
the Section 8(a)(3) allegations here is whether the Respondent engaged in bad-faith bargaining
over Phase 3. See *Chevron Oil Co.*, 182 NLRB 445, 449–450 (1970). Accordingly, the
Respondent would, and has, raised similar defenses to both allegations. Thus, the 8(a)(3)
allegations as to Phase 3 are not time-barred.

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2. Did the Respondent Discriminatorily Deny Unionized Employees a Wage Increase?

Regarding the substantive allegations, the first question is whether the Respondent denied
Phase 3 to unionized employees for legitimate business reasons or because they had unionized.
40 This brings me to the credibility of Haffeman's testimony as to why the Respondent picked the
stores it did for the June 1, 2014 Phase 3 implementation. (Tr. 1352–1355.)

At the hearing, Haffeman stated, generally, that the Company sought stores in
metropolitan areas with strong competition, geographically diverse areas, and districts where
45 new stores were opening. Haffeman stated specifically that the Respondent chose to implement
Phase 3 in District 31, including South Chicago, because Chicago was a big metropolitan area
and because the Respondent's number two competitor had a very large presence there.

Haffeman also testified that District 45, including Las Vegas, was selected because the Respondent had a new store opening in Tucson. He further stated the Respondent was relocating its Salt Lake City store, which in essence made it like a new store. Haffeman said the Respondent chose District 82, which included Manhattan Union Square, because it had a new
 5 flagship store opening in Times Square. Haffeman testified that the Respondent chose District 71, which included Knoxville, because Tennessee was an important market for really small stores and Nashville had a very large store.

10 Although this testimony was somewhat generalized and abbreviated, Haffeman appeared sincere on the stand when providing it. Moreover, at least one of the Respondent's store agendas corroborates that a district's store variety and formats played a role in the selection process. (GC Exh. 92.) Accordingly, I conclude that the stated reasons played at least some role in the district selections.

15 Even so, I find it is proper to infer the decision also was motivated by a desire to make unionized employees feel they were worse off than their nonunion counterparts. The location of the stores, the timing of the decision, and the Respondent's refusal to discuss Phase 3 in negotiations all support the conclusion. With respect to locations, the Respondent has 40
 20 districts nationwide. It picked five districts for the first major rollout of Phase 3, and four of the five had ties to the Union. Two districts had unionized stores; one district had just gone through an organizing campaign; and the fourth district contained a store that was in the closest proximity to another unionized store. Certainly the districts the Respondent chose were not the only ones which could have satisfied the generalized criteria Haffeman set forth. With respect to
 25 timing, the Respondent implemented Phase 3 in Manhattan Union Square just one day before the certification year expired there. Employees could begin signing petitions to support decertification after that expiration. Finally, prior to the implementation, the Respondent refused to discuss Phase 3 with the Union at the May 22, 2014 bargaining session. None of this could have been lost on Haffeman, because he was a member of the bargaining team and the team that
 30 chose the districts for Phase 3 implementation. Yet, at no point in his testimony did Haffeman deny that employees' union or organizing status played a role in the Respondent's decision.

35 For all these reasons, I conclude the Respondent's choice of Districts 31, 45, 71, and 82 to initially roll out Phase 3 was motivated, at least in part, by the unionized status or activities of employees in certain stores within those districts.

The remaining question is whether controlling Board precedent establishes that the Respondent's Phase 3 conduct was a Section 8(a)(3) violation. The General Counsel's claims are premised upon the Board's decisions in *Chevron Oil Co.*, 182 NLRB 445, 449-450 (1970) and *South Shore Hospital*, 245 NLRB 848, 860-861 (1979). In *Chevron Oil*, an employer, as a
 40 matter of normal policy, granted its nonunionized employees the same wages increases that had been negotiated in an industrywide contract. Pursuant to this practice, the employer implemented a 14-cent-per-hour wage increase for nonunion employees at all of its facilities. At the same time, the employer was negotiating an initial contract for production and maintenance employees at one of its plants. The employer offered the same wage increase to the union during
 45 negotiations, contingent upon agreement on an overall contract. After unlawfully refusing to bargain and declaring the parties had reached impasse, the employer then implemented the wage increase for the unit employees, but refused to make it effective as of the same date nonunion

employees received it. This resulted in a more than 5-month period where the employees were denied the increase. The employer also refused to grant the employees a second increase called for in the industrywide contract and provided to nonunion employees. The Board concluded that the company's actions violated Section 8(a)(3).

In *South Shore Hospital*, the Board adopted an administrative law judge's finding that an employer violated Section 8(a)(3) by unlawfully withholding a wage increase from bargaining unit employees. There, the employer offered the union, during negotiations, the same wage increase granted to nonunion employees 6 months earlier. However, the company refused to make the increase retroactive.

The Board has found similar violations in other cases. In *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 562–563 (1995), an employer's refusal to offer to unionized employees a 5.5-percent wage increase given to all nonunion employees violated Section 8(a)(3). The employer had a repeated prior practice of granting the same increases to union and nonunion employees. Similarly, in *Eastern Maine Medical Center*, 253 NLRB 224, 241–243 (1980), an employer that customarily granted annual wages increases violated Section 8(a)(3) by denying newly-unionized employees an increase. Furthermore, the increase had been announced prior to the union's certification. Finally, in *Thill, Inc.*, 298 NLRB 669, 670–671 (1990), an employer violated Section 8(a)(3) when it refused to restore a 15-percent pay cut for unionized employees, while restoring it for nonunion employees. When the company announced the pay cut in that case, the union had not yet been certified. An employer representative stated at that time that the pay cut would be paid back in full 6 months later if the employer remained in business.

Applying these holdings to the facts here, I find this case distinguishable. First and foremost, Phase 3 did not provide a wage increase for all nonunion employees. Although it mandated a higher hourly wage rate for sales employees, that change did not guarantee an increase in overall compensation compared to the fade system. In particular, commissions on sales were eliminated in Phase 3. Employees who increased their sales would no longer reap the benefits of doing so, because the increases sales had no effect on their compensation. Thus, Phase 3 was a benefit to some employees, but not to others. Second, Phase 3 was a one-time change, not a regular occurrence. The Respondent had no established past practice of providing annual wage increases to sales or operations employees. The Respondent also did not announce or schedule Phase 3 for implementation prior to the Union's certification in any of the three locations. Thus, Phase 3 was not an establish term and condition of employment at the time the Respondent refused to discuss it with the Union. Finally, the Respondent did not grant Phase 3 to all of its nonunion employees. Only 44 of the Respondent's 260+ stores operated under the new compensation system, before it was terminated. Under these circumstances, I conclude that *Chevron*, *South Shore Hospital*, and the other Board decisions discussed above are not

controlling. Thus, the Respondent's actions as to Phase 3, while indicative of bad-faith bargaining, do not establish an 8(a)(3) violation.¹⁹

D. Does the Respondent's Withdrawal of Recognition for the Manhattan Union Square Bargaining Unit Violate Section 8(a)(5)?

The General Counsel's complaint alleges that the Respondent unlawfully withdrew recognition of the Union as the exclusive collective-bargaining representative of the Manhattan Union Square bargaining unit on June 10, 2014.

1. The Failure to Prove Loss of Majority Support

The first basis upon which the General Counsel claims the withdrawal of recognition is unlawful is the Respondent's failure to prove at the hearing that the Union had lost majority

¹⁹ The design of Phase 3 alone makes clear that not all employees would receive a wage increase in the new system. Nonetheless, the parties spent a great deal of time presenting evidence and arguing in briefs about whether Phase 3 resulted in an actual wage increase for all employees. This included the General Counsel introducing a limited number of the Respondent's payroll records for employees in the Respondent's stores in Brooklyn, Manhattan Union Square, Las Vegas, and South Chicago. (GC 102–112.) Those records included only two 6-month periods of time comparing compensation before and after Phase 3 implementation.

Following my admission of these records at the hearing, the Respondent insisted that it be allowed to introduce payroll records for all Phase 3 stores in 2013, 2014, and 2015, totaling more than 4000 pages. At the time of this request, it was obvious to me that the General Counsel's exhibits, while relevant, were statistically insignificant and would not enable any decision maker to determine if Phase 3 actually provided a wage increase for all employees in all Phase 3 stores. This was so, given the limited number of stores presented and the lack of a comparison of 12-month periods of compensation. Therefore, I permitted the Respondent to enter its payroll records into evidence, but only in electronic format. (R. Exh. 12.) My hope was that a database of those records would enable all involved to conduct a complete, efficient analysis of the question. However, I also suggested to the Respondent that, if it had intended on introducing such a voluminous exhibit, the appropriate manner to do so was pursuant to Federal Rule of Evidence 1006. That rule enables a proponent to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined by a court.

After all this, the Respondent failed to address in its brief in any fashion the payroll records it claimed must be entered into the record. The Respondent likewise did not provide any summary or analysis of those records. Thus, the only conclusion I can reach is that the Respondent's insistence on burdening the record with the voluminous exhibit was disingenuous.

In any event, having now had the opportunity to review all of these records, I conclude my initial ruling was erroneous. First and foremost, the records are unnecessary to reaching a decision. But beyond that, any proper and thorough analysis of the meaning of these payroll records, in a judicial forum, would require the use of expert witnesses. No such testimony was sought or adduced by either party at the hearing. Federal Rule of Evidence 403 permits a court to exclude relevant evidence if its probative value is substantially outweighed by a danger of confusing the issues or causing undue delay. I conclude the Respondent's data dump has a minimal probative value substantially outweighed by these dangers. Accordingly, I now reject Respondent Exhibit 12 and exclude it from the record. In addition, because the General Counsel's exhibits do not present the full universe of information required to do a proper analysis, I also reject GC Exhibits 102 to 112.

support at the time it withdrew recognition. See *Latino Express, Inc.*, 360 NLRB No. 112, slip op. at 15–16 (2014).

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001), the Board set forth its current standard for evaluating claims that an employer has unlawfully withdrawn recognition from a union:

[A]n employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit . . .

We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

The General Counsel’s complaint allegation contests the Respondent’s withdrawal of recognition. In light of the broad language used in *Levitz*, the complaint is sufficient to put the Respondent on notice that it had the burden of rebutting the presumption of majority status.

This brings me to the most astounding part of the 8-day hearing in this case: the Respondent did not introduce any evidence to demonstrate the Union had lost majority support in either Manhattan or Las Vegas on the dates it withdrew recognition. Obviously, then, the Respondent cannot meet its *Levitz* burden.

To combat this conspicuous failure, the Respondent, posthearing, filed a motion to strike the portion of the General Counsel’s brief which argued that the Company failed to sustain its *Levitz* burden. The Respondent argues that the General Counsel waived this “theory of liability” at the hearing. On the 4th day of the hearing, counsel for the Respondent was cross-examining Mayne. The questioning concerned statements in Mayne’s pre-trial affidavit about the Respondent permitting employees to circulate decertification petitions during working time. Counsel for the General Counsel objected to the relevancy of the line of questioning and stated:

There’s no allegation that the Complaint – that the petition was improperly circulated or if – **It’s just simply the fact that the petition – the Employer withdrew recognition unlawfully because there were unremedied [ULPs].**²⁰

²⁰ The transcript incorrectly states “UOPs” instead of “ULPs.”

(Tr. 628–629, emphasis added.) The Respondent contends this statement created a “reasonable belief” that it would not be required to litigate any other bases for challenging its withdrawals of recognition. I do not find the Respondent’s approach reasonable at all.

5 To relieve a party of its burden of proof under this thin reed would render the burden
 meaningless. Counsel for the General Counsel uttered one, inconclusive statement during a line
 of questioning that had nothing to do with the Union’s majority status. When this occurred, the
 Respondent had not even begun its case-in-chief. The hearing lasted 4 additional days. The
 Respondent did not seek clarification of the General Counsel’s position when the objection was
 10 made. At no point thereafter did the Respondent raise the issue and seek to confirm its
 interpretation of its burden of proof going forward. The Respondent also never attempted to
 enter any evidence to satisfy its *Levitz* burden. Had that been done, the issue certainly would
 have been clarified. Any such attempt would have drawn a relevancy objection, if the General
 Counsel agreed that the Respondent was not required to enter such evidence. The Respondent
 15 either had to meet its burden or confirm that it had been waived. Having not done so, the
 Respondent’s *Levitz* burden remains unsatisfied.

In its posthearing motion, the Respondent sought in the alternative to reopen the record,
 presumably so it could introduce the missing substantive evidence. No sound basis for doing so
 20 exists in Board law. Section 102.35(a)(8) of the Board’s Rules and Regulations gives
 administrative law judges the power to order hearings reopened. That section does not address
 the circumstances in which it is appropriate for a judge to do so. However, Section 102.48(d)(1)
 sets forth the rule for a party, “because of extraordinary circumstances,” to seek reopening of the
 record after a Board decision or order. That rule provides guidance to judges, then, as to what
 25 evidence would warrant reopening the record. In that regard, the rule states: “Only newly
 discovered evidence, evidence which has become available since the close of the hearing, or
 evidence which the Board believes should have been taken at the hearing will be taken at any
 further hearing.” The last condition has been applied in situations where a party has failed to
 introduce evidence through inadvertence and the evidence in question merely supplemented or
 30 clarified what had already been received. *Lincoln Hills Nursing Home, Inc.*, 257 NLRB 1145,
 1154–1155 (1981).

None of the conditions for reopening a record are present here. Any evidence supporting
 recognition withdrawal could not be newly discovered or have become available since the close
 35 of the hearing. The Respondent must have had such evidence in June and November 2014 when
 it withdrew recognition, if those actions were lawful. The Respondent is not claiming that it did
 not introduce this evidence due to inadvertence. Even if it did, this evidence goes to the heart of
 the question of whether the recognition withdrawals violated the Act. It cannot be characterized
 as evidence that would supplement or clarify what has already been received, since nothing was
 40 received at the hearing.

Lincoln Hills Nursing Home, supra, involved a situation similar to the one here. That
 case also addressed a withdrawal of recognition by an employer, pursuant to an earlier standard
 than *Levitz*. The employer there supported its withdrawal with a letter from its attorney to the
 45 union. In the letter, the employer wrote that it received a petition signed by a majority of
 employees stating that they no longer wished to be represented by the union. The General
 Counsel entered the letter into evidence, but not the attachments to it which purportedly included

the petition. The employer likewise did not enter the petition or any further evidence supporting its withdrawal. Following the close of the hearing, the employer moved to reopen the record to introduce the petition. The judge denied the motion and the Board adopted that holding. In doing so, the judge found that the evidence the employer sought to introduce would not clarify existing evidence or rectify any inadvertence. The judge also concluded that the record did not indicate the employer had any intention of introducing the petition during the hearing. Finally, the judge rejected the employer's explanation for why it did not introduce the petition. The employer claimed the General Counsel's attorney said he would provide the employer with the petition at some point, but never did. The judge noted that, even if the attorney had said that, it did not relieve the employer of its burden of proof or obligation to raise the issue at the hearing.

Accordingly, I conclude that the Respondent has failed to prove, by any evidence, that the Union had, in fact, lost majority support at the Manhattan Union Square store at the time the Respondent withdrew recognition. The Respondent has not rebutted the presumption of majority status. Thus, the withdrawal violates Section 8(a)(5). I also deny the Respondent's motion to strike Section III(B) of the General Counsel's posthearing brief or, in the alternative, to reopen the record.

2. The Causal Relationship Between a General Refusal to Bargain and Any Employee Disaffection

The General Counsel also argues that the recognition withdrawal for Manhattan Union Square is unlawful, because the Respondent's own unfair labor practices caused or meaningfully contributed to employees' disaffection with the Union. For purposes of evaluating this argument, I assume, arguendo, that the representations made by the Respondent in its June 10, 2014 letter to the Union are true. (GC Exh. 74.) In that letter, Villavicencio stated "Union Square bargaining unit members have given management a petition signed by a majority of the bargaining unit employees in Union Square stating that they no longer wish to be represented by the RWDSU." As a result, I also assume that employee signatures on the petition were obtained from June 3 to June 10, 2014.²¹

In *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber II*), the Board reiterated its longstanding holding that when employee disaffection arises in the context of an unlawful general refusal to bargain with an incumbent union, the causal relationship between the unlawful act and the union's subsequent loss of majority support may be presumed. The reason for this is obvious: if an employer unlawfully deprives a union of the opportunity to represent its members, employees will soon become disenchanted with that union, because it apparently can do nothing for them. *Ibid.*, citing to *Caterair International*, 322 NLRB 64, 67 (1996).

²¹ The Union was certified as the bargaining representative in Manhattan on June 3, 2013. Thus, the Union is presumed to enjoy the support of a majority of unit employees for 1 year until June 2, 2014. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 176 (1996) (*Lee Lumber II*). In addition, the proof of loss of majority support justifying withdrawal of recognition may not be demonstrated after expiration of the certification year . . . on the basis of an antiunion petition circulated and presented to the employer during the certification year. *Chelsea Industries*, 331 NLRB 1648 (2000), *enfd.* 285 F.3d 1073 (D.C. Cir. 2002). Although exceptions do apply, the general rule is that employee signatures had to be obtained from June 3 to 10, 2014, in order to validly support a withdrawal of recognition.

As discussed above, I have concluded that the Respondent engaged in bad-faith bargaining from July 12, 2013 to June 9, 2014. Under *Lee Lumber II*, any employee petition received by the Respondent demonstrating a loss of majority support is presumed tainted by the Company's refusal to bargain. Accordingly, I find that the Respondent's withdrawal of recognition from the Union for the Manhattan Union Square store violates Section 8(a)(5) on this basis as well.

III. THE ALLEGED UNFAIR LABOR PRACTICES FROM JUNE 10, 2014 TO NOVEMBER 18, 2014

FINDINGS OF FACT

A. Bargaining from June 10, 2014 to November 18, 2014

1. The June 10, 2014 Bargaining Session in Las Vegas

After the Respondent's withdrawal of recognition as to Manhattan Union Square on June 10, 2014, the parties held a bargaining session in Las Vegas. The Respondent finally presented the Union with a written "economic outline" for the Las Vegas store. (GC Exh. 29.) The outline contained two options as to wages. Both options proposed a base pay rate of \$9.25 per hour, the then-existing status quo in Las Vegas. Both options also proposed a 1.5-percent annual increase in that rate. As to commissions, option A again reflected the status quo. The Respondent proposed to maintain the two existing components of commissions, gross profit and gross sales. The Company offered a 9-percent commission on gross profit and 1.5-percent on gross sales. For option B, the Respondent eliminated the gross profit portion of the commission. Instead, the Respondent offered a 2-percent commission on gross sales. Both of these written proposals maintained the fade component of the commission.

In response to the retention of fading, Mayne reiterated that the Union was not interested in a fade system and had made clear on day 1 of the negotiations that eliminating that system was its top concern. Mayne stated that the Respondent's proposal was simply the status quo. Mayne then said that the company now had a system, Phase 3, which eliminated fading. In response, Cooper reiterated that Phase 3 was a company program and they were there to negotiate a contract for the Las Vegas store. Pendleton then provided an extensive defense of the fade system. Pendleton stated that the fade system was a longstanding one with a lot of history at the company. He said the company really did not want to eliminate the system. He noted that the company felt the fade system created an incentive for sales. However, Pendleton ultimately stated that it was possible the Respondent would consider an alternative to Option B. He described a graduated tier system for commissions, with rates rising based upon the gross sales totals. Mayne also stated his belief that the most common existing commission rate for

employees was 10 percent of gross profit and 2 percent of gross sales. Mayne said the Respondent's proposal was less than that standard commission rate.²²

5 After the outline was presented, the bargaining representatives argued over several topics. The first was stair stepping. That dispute stemmed from the Respondent designating the proposal as applying only to the Las Vegas store. Cooper again stated that the Respondent had not agreed to stair step the negotiations.

10 In the same June 10, 2014 outline, the Respondent again proposed that employees would be covered under its existing benefits plans. However, unionized employees would not be eligible for GIG leave or the GAIN program.

2. The July 10, 2014 Bargaining Session in Chicago

15 On July 10, 2014, bargaining continued in Chicago. With regard to wages, the Respondent submitted an economic outline for the "Chicago Store Only." (GC Exh. 30.) Again, two options were proposed. Option A offered a base pay rate of \$9.35 per hour for sales associates and \$10.00 per hour for operations associates. All employees would receive a 1.5-percent increase in years 2 and 3 of the contract. Option B offered the same base pay rate, but a 20 1.5-percent increase for sales associates and a 2.0-percent increase for operations associates in years 2 and 3. As to commissions, option A offered the same rates as the June 10 proposal in Las Vegas. However, option B was modified to reflect the tiered, incremental commission approach that Pendleton discussed the prior month and the Union proposed on April 15, 2014. (GC Exh. 24.) No commission would be paid for the first \$30,000 in gross sales. Thereafter, 25 sales associates would earn 2 percent on gross sales between \$30,001 and \$50,000; 3 percent on gross sales between \$50,001 and \$70,000; and 4 percent of gross sales on all sales above \$70,000. Option B also removed the fading component contained in the Respondent's June 10, 2014 proposal.

30 At this same session, the parties discussed the Respondent's proposed performance goal language. Option A retained the Respondent's previous proposal that sales employees who did not fade for 2 months in any rolling 3-month period could be discharged. Option B subjected sales employees to termination if they did not earn a commission for a period of 2 months in any rolling 3-month period. Mayne objected to the provision, saying the parties already had

²² At the hearing, Mayne and Pendleton disagreed as to whether fading applied to both options. (Tr. 355–358, 1103–1105, 1239–1241, 1259–1261, 1437–1439.) Both options in the "Commissions Calculation" section of Respondent's written proposal state: "Base Rate wages for commissioned sales employees are a draw against commission. Employees will not earn commissions until such time as Base Rate wages are recouped against commissions, in accordance with the Employer's current "fade" commission plan." Pendleton testified that the inclusion of this language in option B was "a mistake that I made," the second by the Respondent in as many sessions. (Tr. 1240.) However, Pendleton did not testify about the specific discussion the parties had at the June 10, 2014 session, as Mayne did. He also did not deny Mayne's account that Pendleton defended the fade system on that date. (Tr. 362.) Moreover, the "Performance Goals" language in the June 10, 2014 proposal was identical in Option A and B and referenced the fade system. (GC Exh. 29; Tr. 355.) That language differed in the July 10, 2014 proposal and included fade in only one option. (GC Exh. 30.) I thus conclude that both options the Respondent presented on June 10, 2014 sought to retain the fade compensation system.

tentatively agreed to the list of termination offenses long ago. He also noted that being terminated after not meeting goals for only 2 months was extremely harsh. The Respondent's representatives replied that the proposal was about sales performance goals and they were taking a position to start the negotiations. Pendleton and Haffeman both noted the importance to the Company of being able to hold employees accountable. Mayne indicated a willingness on the Union's part to negotiate over the actual performance goals.

The Union also submitted a revised wage proposal on July 10. (GC Exh. 32.) The Union included language based upon its then understanding of the Phase 3 program. In Article 10.1, paragraph 2 and Article 10.4, the Union proposed an "hourly (Phase 3) wage evaluation" on the same basis as a majority of stores within the Guitar Center region in which the unionized store was located. This would apply to both sales and operations associates. The proposal also stated "Company to provide Union with the review criteria." At the session, Mayne also made a verbal request to the Respondent for the criteria/mathematics it was using in Phase 3 as to both sales and operations employees. Cooper responded that Phase 3 was a company program and did not apply to union stores. He added that the company had no intention of negotiating Phase 3 into the union contract.

3. Bargaining Sessions from August 1 to September 10, 2014

On August 7, 2014, the Respondent opened its Manhattan Times Square store in the Phase 3 format.

At the parties' August 21, 2014 bargaining session in Chicago, the Union made the same offer on Phase 3 that it had at the prior session. (GC Exh. 34, Arts. 10.1, Option B and 10.4, Option B.) The Respondent again said it was not interested. Cooper stated for the first time that Phase 3 was a trial program. (Tr. 395.)

The Respondent submitted a written response on non-economic issues at the parties' August 26, 2014 bargaining session in Las Vegas. (GC Exh. 35.) However, the Respondent did not submit a counterproposal on wages. Cooper said the company still was engaged in a review of the economic portions of a contract. Pendleton added that the company felt there was a need to do a full analysis on an individual employee basis looking back 12 months. Pendleton stated that the Respondent would share the economic analysis with the Union when it was completed.²³

On September 10, 2014, the parties held another bargaining session in Chicago. The Respondent submitted a modified wage proposal as to commissions on this date. (GC Exh. 37.) The revised tier structure offered 2.25 percent on gross sales between \$30,001 to \$45,000; 3.25 percent from \$45,001 to \$65,000; and 4.25 percent on sales above \$65,000. Thus, the Respondent added 0.25 percent to the commission rates for each tier above \$30,000, compared with its July 10, 2014 proposal in Chicago. However, at the same time, the Company eliminated employee eligibility for warranty bonus programs, while retaining the 5-percent warranty

²³ With respect to the Respondent's comments about its economic analysis, I credit Mayne's uncontroverted testimony, as neither Pendleton nor Haffeman addressed this when they testified. (Tr. 407-412, 435-436.) The Respondent made no argument with respect to the economic analysis in its brief.

commission. (GC Exh. 25, Art. 8.2; GC Exh. 37, “Replaces 8.3.”) The base pay rates of \$9.35 per hour for sales associates and \$10.00 per hour for operations employees remained the same. The proposal also retained a lack of commission payment on sales below \$30,000.

5 As to the Respondent’s economic analysis, Haffeman stated it had not been completed.

10 At the session, the parties agreed to the language contained in Article 10.8, which addressed the definition of gross sales. Mayne told Cooper they could TA the provision. Cooper responded that the Respondent could “conceptually” agree, but would not agree to the TA designation. Cooper stated it was the Respondent’s intention only to TA the economic aspects of the contract in their entirety.

4. The Respondent’s Implementation of Schedule Notification Changes in September 2014

15 On September 19, 2014, the Respondent modified its existing schedule notification procedure for employees at both union and nonunion stores. The Respondent changed the notification period from 72 hours prior to the scheduled work week to 10 days before the scheduled work week.

20 5. The Respondent’s Intranet Posting Regarding the 2014 Warehouse Contest

25 On September 22, 2014, the Respondent posted on its “Backstage” intranet page an announcement of its “2014 Warehouse Contest” for operations associates. (GC Exh. 80.²⁴) The contest awarded cash prizes for the “tightest” (apparently meaning most organized) warehouse in the chain. The first page of the announcement contained a heading entitled “Here is how it will work.” At the end of that section, the announcement stated: “**Attention: Associates represented by a union are ineligible for this contest.**” (Emphasis in the original.)

30 On September 25, 2014 prior to the scheduled bargaining session, Villavicencio received an email message from Doug Reaves, the then store manager for the Central Chicago store. (R. Exh. 13.) Reaves noted that a contest announcement on Backstage stated union stores were not eligible. He stated that he thought they were eligible based on the settlement agreement reached in November 2013. He included the relevant settlement language on contests.

35 Pendleton and Villavicencio looked into the situation. Pendleton spoke to the team which had posted the announcement. He learned that they had taken the contest notice from a year ago, prior to the November 2013 settlement agreement, and had used the same language. The Respondent then corrected the September 22, 2014 announcement on Backstage by reposting it with the aforementioned sentence deleted. (GC Exh. 117.) No language was included in the amended announcement to explain why the sentence had been deleted. The Respondent also did not communicate with employees in any other manner concerning the deleted language.

²⁴ The official transcript indicates that GC Exh. 80 was identified, but not offered into evidence. The transcript is incorrect in that regard. (Tr. 109–111.) The transcript is corrected to reflect the exhibit was entered into evidence.

The parties discussed this issue prior to bargaining on the 25th. Mayne advised the Respondent representatives that certain employees were being denied the right to participate in the contest. Villavicencio told Mayne she already had taken care of the situation. Mayne asked if the associates were eligible to participate and Villavicencio said yes, of course.²⁵

5

6. The September 25, 2014 Bargaining Session in Las Vegas

At the bargaining session that same date, the Respondent submitted a written economic proposal as to the Las Vegas store. (GC Exh. 39.) The proposal contained the exact same base pay rate and commission tiered structure for sales associates as the Respondent's September 10 proposal in Chicago. (GC Exh. 37.)

10

At this point, Mayne had received information from Manhattan Union Square employees that Phase 3 was going to be implemented at the now nonunion store. His understanding was the new hire rate there was going to be \$10.80 per hour. The Respondent again refused to discuss Phase 3 at this session. Pendleton also changed course and stated that the Respondent had not agreed to give the Union its economic analysis. Mayne looked at Haffeman and stated that the Company said it was going to provide the analysis to the Union. Haffeman responded "yes, but," then was interrupted by Cooper and Pendleton who denied saying that.

15

20

The Respondent also modified its proposal regarding performance goals in Article 10.10. Pursuant to that proposal, employees employed for less than a year would be subject to discharge when they did not earn a commission in any month. Thereafter, the Respondent could terminate employees at its discretion, if they did not earn a commission for a period of 3 months in any rolling 5-month period. In the Company's prior proposal, all sales associates could be discharged if they did not earn commissions for 2 months in a 3-month period.

25

7. Bargaining Sessions and Other Developments from October 1 to November 18, 2014

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On October 1, 2014, the Respondent implemented Phase 3, at certain of its stores, for the last time. One of those stores was the now nonunion Manhattan Union Square store.

35

On October 13, 2014, and despite the earlier issue related to the Warehouse Contest eligibility announcement, the Respondent again posted on Backstage an announcement which stated that union associates were ineligible for the contest. (GC Exh. 118.) The Respondent again corrected the posting by deleting the sentence the next day. (R. Exh. 11.)

²⁵ Witness testimony conflicted at the hearing as to the discussion the parties had about contests that day. In this regard, I credit Villavicencio's testimony, which Pendleton corroborated. (Tr. 1048–1050; 1314–1317.) Mayne denied Villavicencio's account. (Tr. 539–543; 721–725.) Mayne testified that, after looking at the announcement, Cooper told him the text was a reflection that the Company was maintaining the status quo. Given the prior settlement agreement the parties reached on contests, I find it unlikely that Cooper would make this statement. The witnesses also disputed whether Mayne provided the Respondent's team a letter protesting the change and threatening to file an unfair labor practice. (GC Exh. 81.) As discussed further herein, I ultimately find that irrelevant to the complaint allegations. The Respondent did not deny any operations employees the opportunity to participate in the contest.

On October 14, 2014 at a bargaining session in Chicago, the Respondent presented another written economic proposal. (GC Exh. 43.) With regard to the base pay rate, the proposal was identical to the one submitted in Chicago on September 10, 2014. (GC Exh. 37.)
 5 However, the Respondent changed its commissions' proposal. First, the commission for sales associates on gross sales from \$30,001 to \$40,000 was raised from 2.25 to 2.4 percent. Second, the top rate commission of 4.25 percent now applied to sales above \$60,000, instead of above \$65,000 as in the prior proposal. Mayne was "pissed" at the lack of movement on the base pay rate and lack of commissions under \$30,000. As a result, he submitted a revised union proposal
 10 which increased the asked-for base rates of pay. (GC Exh. 45, Art. 10.1.)

Also in mid-October 2014, the Respondent increased the number of holidays for employees at the now nonunion Manhattan Union Square store to six. The Respondent's last proposal on holidays during bargaining for that unit was three. (GC Exh. 21, Art. 13.1.)
 15

On October 28, 2014, the Respondent submitted a written economic proposal for Las Vegas, revising its September 25, 2014 proposal. (GC Exhs. 49, 39.) The Respondent made the same proposal for sales associates' base rate and commission pay that it made in Chicago on October 14, 2014. (GC Exh. 43.)
 20

At the bargaining session that day, the parties again discussed the agreed-upon provision defining gross sales. Mayne told Cooper that the provision already had been TA'ed and should be marked as such. Cooper responded that the Respondent was not going to TA items until they had reached a total agreement on economics. Cooper said they would TA all the economics together. He stated the economic items were interrelated and they could not TA any one thing until all of them had been TA'ed. Haffeman then said if they could not TA it, perhaps they could "TAP" it. When Mayne asked him what that meant, Haffeman said "Tentative Agreement Pending."
 25

Regarding health insurance, Mayne asked the Respondent about its willingness to discuss the cost split between the company and employees if the Union agreed to keep employees in the Respondent's health insurance plan. Cooper stated that the Respondent wanted to keep its plan at the discretion of the employer and was not willing to negotiate the cost split.
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35 *B. The Respondent's November 18, 2014 Withdrawal of Recognition as to the Las Vegas Bargaining Unit*

In a letter dated November 18, 2014, the Respondent withdrew recognition from the Union as to the Las Vegas bargaining unit. The Respondent again stated as the justification that it had received a petition signed by a majority of unit employees stating they no longer wished to
 40 be represented by the Union. (GC Exh. 76.)

ANALYSIS

*A. Did the Respondent Refuse to Bargain in Good Faith
from June 10, 2014 to November 18, 2014?*

5

1. Wages, Health Insurance, and Phase 3

10 The General Counsel claims that the Respondent continued to engage in bad-faith bargaining from June 10, 2014 to November 18, 2014, by making regressive wage proposals, failing to make any health insurance counterproposals, and refusing to discuss Phase 3 in negotiations.

15 During this time period, the Respondent continued to refuse to discuss or provide any information to the Union regarding Phase 3. At the June 10, 2014 bargaining session, Cooper again stated only that Phase 3 was a company program. Interestingly, Pendleton then provided an extensive defense of the fade system and the Respondent's desire to maintain the system. However, at the very same time, the Respondent already had implemented Phase 3 and eliminated fading at certain of its stores, including Manhattan and Las Vegas, and planned to do so nationally. At the July 10, 2014 session, Mayne requested that the Respondent provide the
20 Union with information regarding how Phase 3 wages were computed for sales and operations employees. The Respondent again responded that Phase 3 did not apply at union stores and refused to provide the information. The Respondent also refused to discuss Phase 3 at the September 25, 2014 session.

25 Regarding health insurance, the only further discussion between the parties occurred at the October 28, 2014 bargaining session. There, the Respondent stated it was not willing to discuss with the Union the cost split between employees and the Company under its existing health insurance plan. Instead, the Respondent stuck to its prior position that it would keep its plan, the ability to unilaterally change the plan, and the existing cost split.

30

For the same reasons as discussed above, I conclude that the Respondent's continuing conduct as to Phase 3 and health insurance are indicative of bad-faith bargaining.

35 The evidence regarding wage negotiations during this time period is somewhat mixed. On the one hand, the Respondent offered multiple, written wage proposals, beginning on June 10, 2014. Four proposals were made for Chicago and three for Las Vegas. Its July 10, 2014 proposal in Chicago also included for the first time the elimination of fading and a tiered commission system with rates rising based upon gross sales. That structure was something the Union previously had sought. The Respondent then slightly improved its commission proposals,
40 increasing rates and modifying earnings tiers, on September 10, 2014, and October 14, 2014 for Chicago and September 25, 2014 for Las Vegas. Although the movement was minimal, it reflects the typical back-and-forth with a party that is engaged in hard bargaining.

45 On the other hand, several factors support a finding of delaying tactics as to wages. The first is the actual wage proposal the Respondent made on June 10, 2014 following a nearly 3-month delay. The proposal for the Las Vegas unit included one option of maintaining the status quo, the same proposal the Company had made 6 months earlier. The second option

5 proposed commissions of 2 percent on gross sales—a structure the Union had set forth 11 months earlier in its initial proposal, but at a higher rate. A proposal of this simplicity does not justify the amount of time the Respondent took to provide it. In addition, it bears repeating that the proposal was not submitted until after the certification year for Manhattan Union Square had expired.

10 As to the wage proposals thereafter, the Respondent provided its first comprehensive, written wage proposal for Central Chicago on July 10, 2014. This was more than 5 months after the Union's economic proposal submission on February 6, 2014 that sought to start discussion of economics. From July 10 to September 10, 2014, the Company made no wage proposals. From July 10 to November 13, 2014, the Respondent offered no changes to base rate pay for all job classifications. On September 10, 2014, the Respondent also sought to restrict unionized employees from participating in warranty bonus programs. Finally, and as previously discussed, the Respondent was not stair stepping its wage proposals. Despite this, the Company submitted 15 identical proposals as to base pay and commissions in Chicago and Las Vegas on September 10 and 25, 2014, then again on October 14 and 28. This approach could do nothing but delay reaching an agreement.

20 Moreover, and as it had with non-economics, the Respondent refused to TA any economic provision, this time short of a complete agreement. The Respondent's stated reason for the refusal was that all of the economic provisions were interrelated. That reason is illogical. Even if a party agrees tentatively to one economic proposal, it still can horse trade any gains it has provided later on and avoid regressive bargaining, so long as it makes corresponding improvements elsewhere. In any event, the Respondent itself acknowledged the lack of validity 25 of its justification. As will be discussed later, the Company ultimately abandoned its refusal to TA individual economic provisions on March 24, 2015. The Respondent's repeated refusal to TA individual contract provisions only served to prolong the already extended negotiations.

30 Finally, based upon Mayne's uncontroverted testimony, the Respondent also offered, but ultimately refused to provide, its economic analysis of the Union's wage proposal. That analysis would have examined individual employee wages under the proposal going back 12 months. The Union sought this information to determine how much of employees' compensation was due to the commission on profits, which the Union had proposed eliminating. (Tr. 410.) The information again would have assisted the Union in fulfilling its bargaining obligation for the 35 employees.

On balance, then, I conclude the Respondent's conduct as to wages during this time period likewise is indicative of bad-faith bargaining.

40 2. Regressive Bargaining as to the Disciplinary and Grievance & Arbitration Procedures

45 In the bill of particulars, the General Counsel contends the Respondent engaged in regressive bargaining with respect to the Disciplinary Procedure and Grievance and Arbitration Procedure since July 10, 2014. Specifically, the General Counsel argues that the Respondent attempted to add performance goals to the list of already agreed-upon terminable offenses.

The problem with this allegation is that it does not mesh with the timeline here. In its first written wage proposal submitted December 10, 2013, the Respondent included that employees who did not fade in any month would be subject to discipline pursuant to Article 4's disciplinary procedure. (GC Exh. 11, Art. 10.2.) It also proposed that employees who did not fade for 2 months in any 3-month consecutive period were subject to immediate termination. This provision was included in the "Wages" section of the contract. According to Mayne, the Union did not want to begin discussion of economic issues at that point. The parties did not reach a TA on the non-economic disciplinary procedure, as well as the grievance and arbitration procedure, until February 25, 2014. (GC Exh. 19(a), Art. 4.1 and 24.) The document containing that TA had no economic proposals in it. The Respondent's next written wage proposal dated March 20, 2014, included the same termination provision for failing to fade in 2 out of 3 months that was a part of its December 11, 2013 proposal. (GC Exh. 21, Art. 10.4.) The proposal on that date specifically sought to include such a failure in the list of offenses that constituted just cause for discharges. Then in its written wage proposals dated June 10, 2014 and July 10, 2014, the Respondent again included the same termination provision language. (GC Exhs. 29 and 30.)

Given that timeline, the Respondent's July 10, 2014 proposal cannot be classified as regressive. As of that date, the Company actually had proposed this language on three prior occasions going back 7 months. The initial proposal was prior to when the parties agreed to the disciplinary procedure and grievance and arbitration procedure. That the Union did not notice the provision until July 2014 does not render the proposal regressive.

From July 10, 2014 to March 5, 2015, the parties engaged in a more typical back-and-forth in bargaining until they reached a tentative agreement on performance goals.

Accordingly, I do not find that the Respondent's proposals regarding performance goals support the General Counsel's overall claim of bad-faith bargaining.

3. Conclusion

The Respondent's conduct during this period does not present the laundry list of bad-faith indicators that the first year of bargaining did. Nonetheless, I find that its continuing conduct as to wages, health insurance, and Phase 3, as described above, presents a totality of circumstances establishing continued bad-faith bargaining.

B. Did the Respondent's Conduct as to Contests Violate Section 8(a)(5), (3), and (1)?

The General Counsel's complaint and bill of particulars allege that the Respondent violated the Act in multiple ways, as a result of its conduct related to the Warehouse Contest in September 2014. Specifically, the complaint alleges the Respondent unlawfully threatened employees with reduced benefits because of their union membership, in violation of Section 8(a)(1).²⁶ The complaint also claims the Respondent violated Section 8(a)(3) by denying union employees the opportunity to participate in company-wide contests. Finally, the bill of

²⁶ The General Counsel alleges no Section 8(a)(1) violation premised on the Respondent's October 2014 posting.

particulars alleges the Respondent unilaterally changed employees' ability to participate in contests in violation of Section 8(a)(5).

5 An employer violates Section 8(a)(1) when it announces to employees that it is restricting a benefit to nonunion employees, because such an announcement places a penalty on employees choosing to be represented by a union. See, e.g., *Alaska Pulp Corp.*, 300 NLRB 232, 243–244 (1990); *GTE Automatic Electric Inc.*, 240 NLRB 297, 298 (1979). The lack of any unlawful motivation in making the announcement is irrelevant; the communication and continued existence of such an exclusionary eligibility requirement necessarily exert a coercive impact on
10 the employees. *Niagara Wires*, 240 NLRB 1326, 1328 (1979).

Applying these principles here, the Respondent's contest posting on September 22 violates Section 8(a)(1). The Respondent posted on its intranet site, in bold, that associates represented by a union could not participate in the Warehouse Contest for operations employees.
15 The site is available for all employees nationwide to access. Thus, the announcement conveyed to the entire workforce that employees who chose to be represented by a union were being penalized. Even if the posting was an inadvertent mistake, the absence of an unlawful motivation is irrelevant. Similarly, that the posting was up only for 3 days does not relieve the Respondent of liability. Other than deleting the offending sentence, the Company took no
20 further measures to repudiate or disavow its coercive conduct. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

However, the Respondent's conduct as to contests following the posting does not violate Section 8(a)(5) or 8(a)(3). A Section 8(a)(3) violation requires the General Counsel to prove some sort of adverse action. *Colburn Electric Co.*, 334 NLRB 532, 540 (2001). But no Chicago operations employee was denied the ability to participate in the contest. Similarly, because no actual change in employees' terms and conditions occurred, the posting does not constitute an unlawful unilateral change. *Eagle Transport Corp.*, 338 NLRB 489, 489–490 (2002).

30 *C. Did the Respondent's Withdrawal of Recognition for the Las Vegas Bargaining Unit Violate Section 8(a)(5)?*

The Union's certification year for the Las Vegas unit ran from November 14, 2013 to November 13, 2014. During this time period, the Respondent engaged in an unlawful general refusal to bargain. It also failed to prove the Union's loss of majority support in that unit at the hearing. Accordingly, and for the same reasons discussed in detail above, I find the Respondent's withdrawal of recognition as to the Las Vegas bargaining unit on November 18, 2014 violated Section 8(a)(5).
35

40 IV. THE ALLEGED UNFAIR LABOR PRACTICES FROM NOVEMBER 18, 2014 TO AUGUST 11, 2015

FINDINGS OF FACT

45 *A. Bargaining in Chicago from November 18, 2014 to August 11, 2015*

After the withdrawal of recognition from Las Vegas, the Respondent and the Union held 9 additional bargaining sessions as to the Central Chicago unit. The sessions occurred from

December 19, 2014 to August 11, 2015. However, the parties never entered into a collective bargaining agreement covering that unit.

1. The December 19, 2014 Bargaining Session

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On December 2, 2014, the City of Chicago amended its municipal code to increase the minimum wage paid to employees to \$10 per hour effective July 1, 2015, \$10.50 on July 1, 2016, and \$11.00 on July 1, 2017. Chicago, IL, Municipal Code, § 1-24-020 (2014). The increase applied to sales and operations employees at the Central Chicago store.

10

At the bargaining session on December 19, 2014, the Respondent provided written proposals for both economics and non-economics. (GC Exhs. 54 and 55.) The Respondent's base pay rate proposal was below the minimum wage set to take effect in Chicago on July 1, 2015. The Respondent also held to its position that no commissions would be paid until sales associates hit \$30,000 in monthly gross sales.²⁷

15

The Respondent did modify its proposal on performance goals. (GC Exh. 55, Art. 10.11(a).) The proposal offered for the first time coaching to employees that failed to meet sales targets in any month. Employees in their first year of employment were subject to termination for failing to meet goals in 2 months out of any 3-month rolling period. Thereafter, employees were subject to termination if they did not meet goals in any 3 months out of a rolling 5-month period. However, the Respondent also added language prohibiting discharges for failing to meet performance goals from being challenged by the Union in arbitration. As to this addition, the Respondent again stated at this session that they had to hold people accountable and would use their discretion in terminations while looking at mitigating factors. The Respondent indicated the provision was something they felt they needed to add to the proposal.

20

25

The Respondent also proposed to modify a provision regarding employees' ability to discount products, which the parties already TA'ed. (GC 52 and 54, Art. 27.1.) The provision previously stated: "Employees are eligible to qualify for increased discount approval authority on the same basis as employees at other stores." The revised provision stated: "Employees will receive discount approval authority based on the recommendation of the Store/General Manager and as approved by the District Manager and Regional Vice President." Pendleton explained that he did not think the language as written was detailed enough or reflected the discussions the parties had about discount approval authority. Mayne agreed to this language change.

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2. The January 14, 2015 Bargaining Session

In January 2015, the Respondent decided to eliminate Phase 3 after examining how stores with that operating structure had performed during the prior holiday season. It appears the

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²⁷ The record inadvertently excludes from the Respondent's written economic proposal the page containing proposed base pay rates and commissions. Thus, the facts in this paragraph are based on Mayne's uncontroverted testimony. (Tr. 447.)

decision was based upon the stores not seeing the desired improvement in sales, profit margin, or customer satisfaction.²⁸

At this session, the Union brought along a number of Chicago bargaining unit members. Certain of them told the Respondent's representatives that the Chicago store manager said employees could no longer discount. Haffeman responded that there had been no change to employee discount authority at that point. The employees indicated that was not the message they were receiving from store management. Haffeman then stated the company's position was that no actual change had taken place. He added that the company was in the process of reviewing and considering an amendment to the discount policy.²⁹

3. The February 5, 2015 Bargaining Session

At this bargaining session, the Respondent submitted a revised written economic proposal. (GC Exh. 59.) The proposal retained the same base pay rate for sales associates of \$9.35 per hour. However, the Respondent included a new provision, Article 10.4, which acknowledged that sales employees' base pay rates would rise in 2015, 2016, and 2017, pursuant to the new minimum wage in Chicago. The Respondent also proposed excluding employees whose base pay rate would rise because of the law from the 2-percent annual increases set forth in Article 10.3. The Respondent's economic proposal continued to maintain that no commission would be paid on monthly gross sales between \$0 and \$30,000.

4. The March 5, 2015 Bargaining Session

During the bargaining session on March 5, 2015, the Union presented a number of written proposals with modifications as to wages and health insurance. (GC Exhs. 61–63.) On wages, the Union offered that no commission would be paid on gross sales up to \$5001 per month.

The Union also proposed, for the first time in writing, that unit employees could be covered by the Respondent's standard health insurance plan. (GC Exh. 63.) The Union sought a zero deductible for employees under that plan. The proposal also offered a split in the cost of medical coverage between the employee and the Respondent. Employees would contribute 15 to 20 percent and the Respondent 80 to 85 percent, depending on the type of coverage obtained. The Union also agreed that the Company could implement changes to health insurance without

²⁸ Although I found Haffeman to be somewhat vague and evasive when testifying about the reasons why the Respondent ended Phase 3, the sequence of events suggests a reason for the reluctance to be clear. (Tr. 1359–1360, 1409–1413.) The Respondent changed CEOs prior to its elimination of Phase 3. The timing of that change, coupled with the fact that Phase 3 was the brainchild of the ousted CEO, suggests that having new leadership played some role in the decision.

²⁹ As to what the Respondent said at this session on discounts, I credit Mayne's testimony. (Tr. 563–564.) Chicago employee Michael Barry testified that he attended the bargaining session and one of the Respondent's representatives assured Mayne that discount rights would not be changed or taken away. (Tr. 71–72.) However, Mayne did not contend this happened. Given his status as the Union's chief negotiator and the detailed recollection Mayne displayed of the negotiations at the hearing, I find it likely that his recollection of what was said was accurate.

full-fledged bargaining. Instead, the Respondent would be required to provide 90 days notice of the change and “to discuss” it with the Union.

5 The parties also reached a tentative agreement on performance goals in Article 10.11. In subsection (c), the Union agreed that the Respondent could discipline or discharge, at its discretion, any employee employed less than 1 year who did not meet performance goals for 2 months in any 3-month rolling period. Employees in this category could not challenge the discipline or termination in arbitration. Employees with over a year of service were subject to discipline, up to and including termination, in accordance with Article 4.2 governing discipline.

10 In addition, the Union requested, as to scheduling notification, that the Company repost the prior week’s schedule at the same time as a new work week was posted. Thus, Chicago unit employees would receive notice of their schedules 10 days in advance and again 72 hours in advance.

15 At the session, the Respondent’s representatives stated they would go back and review the new union proposals. As to health insurance, Pendleton asked why the Union chose the standard plan. He said the standard plan was a nonstarter and probably would not work. Pendleton asked if the Union would consider the high deductible plan with modifications. Cooper conceded that the Union had made major movement.

20 In addition, the Respondent notified the Union at this session that it was going forward with a change to its discount policy at nonunion stores. A Respondent representative indicated that they were still considering whether the change would apply to the Chicago bargaining unit.

25 5. The March 24, 2015 Bargaining Session

30 At the March 24, 2015 bargaining session, the Respondent made a unified contract proposal, including both economic and non-economic terms. (GC Exh. 64.) The Respondent also, for the first time, marked “TA” next to individual provisions that addressed economic terms. Cooper stated that the Respondent was submitting its “final” offer on economics. The only change to the base and commission pay of sales associates from the Respondent’s prior proposal was to create a new tier of commissions for sales above \$72,000 where employees would earn 5 percent. The Respondent offered either that or the 5-percent commission on warranty sales.

35 Regarding health insurance, the Respondent made no counteroffer to the Union’s proposed adoption of the Company’s medical plan. The Respondent’s proposal on that date contained the exact same language first proposed on December 11, 2013. The Respondent offered to cover unit employees with the same medical, dental, and vision plans that its nonunion employees received. The Respondent also sought to retain discretion to unilaterally change the plans.

After reviewing the proposals, Mayne became upset with the lack of movement by the Respondent. In response, the Union pulled its concessionary proposals made at the March 5, 2015 session.³⁰

5 The parties also discussed the Respondent’s discount policy at this session. Cooper stated the company was going forward with the discount policy change at the Central Chicago store on April 1, 2015. Pendleton said the Respondent was rolling out a national policy. He further explained that they had done a review and felt the change would result in increased wages for employees. He further added that employees were giving out too many discounts and selling
10 items at prices that were too low. Cooper then stated that the policy was a pricing issue and not a mandatory subject of bargaining. He said the company was within its rights to make the change on April 1.

15 On April 1, 2015, the Respondent implemented the changes to its discount policy at all of its nonunion stores. However, the Company did not, as it previously indicated it would, change the discount policy for sales associates at the Central Chicago store then.

20 On that same date, the Respondent also eliminated Phase 3 at all of the stores where it previously had been implemented. At nonunion stores, the Respondent implemented a new compensation system called “G-com.” This system, like Phase 3, eliminated fading.

6. The Respondent’s Implementation of a Revised Discount Policy

25 On April 23, 2015, Cooper sent an email to Mayne and attached the Respondent’s new discount policy. (GC Exh. 83.) Cooper stated that the program would go into effect at the Central Chicago store following the parties’ April 28, 2015 bargaining session. Mayne responded via email the next day. He objected to the Respondent’s implementation of the new policy on multiple grounds. Among these were that the Respondent was making a unilateral change to employees’ terms and conditions of employment. Mayne also stated the parties
30 already had agreed to contract language on discounts, but the new policy violated that language. Cooper responded via email on April 27. He stated the change in the discount policy was a change in pricing, not a term and condition of employment. Cooper also questioned why the Union would oppose a change that would “dramatically” increase sales profitability and thus the existing commission payments to employees on profits. Cooper also noted that the Respondent
35 was treating union and nonunion employees the same.

³⁰ The testimony of Pendleton and Mayne regarding the health insurance discussion on that date is not entirely clear or consistent. (Tr. 472–473, 1284–1286, 1444–1445.) Mayne asserted that the Respondent rejected the Union’s health insurance proposal. Pendleton testified that the Respondent never made a counterproposal to the Union’s March 5, 2015 offer to retain the Respondent’s medical plan, because the Union pulled the offer before the Company could do so. But that is not entirely accurate, since the Respondent made no counter in its March 24, 2015 proposal before the Union pulled its offer. (GC Exh. 64, Art. 14.) What appears to have happened is that the Union pulled all of its concessionary proposals of March 5, 2015, after reviewing the Respondent’s March 24, 2015 revised proposal. In any event, the fact that the Union pulled its proposal did not, in any way, prevent the Respondent from making further health insurance proposals thereafter along the same lines.

The Respondent's revised discount policy made several changes to the status quo at the Central Chicago store. (GC Exh. 84.) The new policy eliminated the ability of department managers to discount their own products without management approval. It also eliminated the ability of assistant managers to discount their own and other sales associates' products. The new policy required that a discount offered by any sales employee had to be authorized by the "MIC holder," or manager in charge on the floor. Only supervisory employees regularly served as MIC holders. In addition, the policy imposed limits on the amount of a discount that could be offered to customers. The price of a product had to be more than \$500. On those items, discounts could be offered in three stages with supervisory approval. The first involved offering the customer a free accessory item; the second was a 5-percent discount on the product; and the third and maximum was a 10-percent discount on the product, but only in "highly unusual cases." An employee's failure to adhere to the policy subjected the employee to corrective action, including discharge. The record contains no indication that employees previously were subject to discipline for conduct related to discounts.

7. The April 28, 2015 Bargaining Session

In its written economic proposal dated April 28, 2015, the Respondent increased its offer for the base pay rate for department and platinum room managers by 10 cents to \$9.60 per hour and for assistant managers by 5 cents to \$9.85 per hour. (GC Exh. 66.) The rates for sales and operations associates remained the same, \$9.35 and \$10.00 per hour respectively. The proposed rates below \$10.00 per hour would be valid only until July 1, 2015, when the Chicago minimum wage law went into effect. The Respondent also modified its proposal on the tiered commissions. The level of sales for which no commission would be paid was reduced from \$30,000 to \$27,500. A new tier offering 0.5 percent on sales from \$27,501 to \$30,000 was created. Other commission rates remained the same. However, the Respondent rescinded the 5-percent commission on sales above \$72,000. No commissions were to be paid above \$72,000. Warranty commissions were returned to all sales employees at 5 percent of gross sales.

The Respondent retained its original offer on health insurance. It also continued to propose that unit employees were ineligible for GIG leave and the GAIN program.

At the bargaining session held on the same date, the Union made a proposal to the Respondent concerning its discount policy. (GC Exh. 67.) Through the proposal, Mayne attempted to set forth the then-status quo on discounts. Mayne also made a demand to bargain at the session. Cooper stated the company was not going to bargain over the policy. He reiterated the Respondent's position that it was a pricing issue and not a mandatory subject of bargaining.

In the end, the Respondent implemented the new discount policy at the Central Chicago store on May 1, 2015.

After the April 28, 2015 session, the Union put the Respondent's proposal of the same date up for a ratification vote. The members of the Central Chicago store bargaining unit voted the contract down.

8. The May 27, 2015 Bargaining Session

As of May 27, 2015, the parties had four remaining issues to resolve in order to reach a collective-bargaining agreement: wages, health insurance, GIG leave, and the GAIN program. The Union made a written counterproposal on that date. With respect to tiered commissions, the Union proposed that no commission would be paid on sales up to \$7600. The Union also sought the return of a 5-percent commission on sales above \$72,000, while retaining the 5-percent warranty commission. The Union continued to include GIG and GAIN in its proposal. In response, the Respondent stated it was not willing to move off of its April 28, 2015 offer.

9. The Respondent's Last Contract Offer on August 11, 2015

The parties held their last bargaining session for the Central Chicago unit on August 11, 2015. As of this session, the parties had reached tentative agreements on the following provisions: recognition; union security and checkoff; management rights; disciplinary procedure and discharge; probationary period; seniority; employee classification; work hours and overtime; vacations; holidays; report-in pay; rest and meal periods; sick leave; FMLA and personal leave; bereavement leave; jury duty; drug testing; no strikes, picketing and handbilling or lockouts; union visitation and posting of notices; grievance and arbitration; non-discrimination; labor-management meetings; successors and assigns; and a 3-year contract term.

The Respondent presented its last contract proposal on that date. (GC Exhs. 68A and 69.³¹) For the first time, the Respondent offered to include GIG leave and the GAIN program as benefits. (GC Exh. 69, Art. 8.4.) The Union accepted the offer.

The Respondent also finally agreed to TA the work schedule notification provision in Article 11.6. The provision reflected the policy implemented back in September 2014, with the addition sought by the Union to have schedules posted 10 days and again at 72 hours prior to their start. Prior to this date, the Respondent refused to TA the provision until the Union withdrew its ULP charge allegation related to scheduling notification. Although the Union had not agreed to do so, the Respondent abandoned its earlier position.

With those agreements, the only remaining issues were wages and health insurance. As to wages, the parties did not agree on base pay rates, wage increases, or commission rates. The Respondent's base rate proposal remained the same as the one in its April 28, 2015 proposal. On commissions, the Respondent reverted back to the same proposal it made on February 5, 2015, except for the 0.50 percent commission on sales from \$27,500 to \$30,000 it had offered on April 28, 2015.

Regarding medical insurance, the Respondent retained the same, original proposal it had made on December 11, 2013.

At the hearing, Mayne testified that no further negotiations have taken place, because Cooper said the Respondent is unwilling to modify its positions on wages and health insurance.

³¹ GC Exh. 68A is a clean proposal and GC Exh. 69 reflected redlines/changes as a result of the parties' discussions at the August 11, 2015 bargaining session.

B. The June 24, 2015 Conversation Between Chicago Store Manager Michael Wuchter and Elite Sales Force Employee Thomas Kennedy

5 Michael Wuchter became the Respondent's store manager at the Central Chicago location on April 1, 2015.³² At that time, Thomas Kennedy worked at the store and was one of the Respondent's elite sales force employees. The bargaining unit then totaled between 35 and 40 employees.

10 On June 24, 2015, Kennedy and Wuchter had a conversation in Wuchter's office without anyone else present. The conversation began with a discussion of the latest profit and loss statement for their unionized store. The two then reviewed the same statement for the nonunionized South Chicago store. Kennedy observed that the salary payouts were higher at that location, despite it having fewer sales than Central Chicago. Wuchter explained that the south Chicago store was on a new pay system (the "G.com" pay system referenced earlier). He said
15 the system provided employees with a higher base rate of pay and the continued ability to earn commissions. Kennedy initially responded that he liked the new system. After further discussion, Kennedy stated that the new pay system sounded great, but there was nothing he could do about it.

20 Wuchter then told Kennedy that there was something he could do about it. When Kennedy asked what, Wuchter responded that he could not comment on that. However, Wuchter did say that if Kennedy asked the right questions, Wuchter probably could give him the right answers. Wuchter added that he might be able to give Kennedy his opinion if Kennedy asked him for it. After Kennedy did so, Wuchter stated that hypothetically, if he was someone like
25 Kennedy, he would probably try to get all of his coworkers to want the new pay system as well.

The conversation then moved into new territory. Wuchter told Kennedy that 11 was a really good number for the store, but 18 was an even better number. Kennedy asked Wuchter if 11 was the amount of people Kennedy needed to obtain a vote to get rid of the Union. He also
30 asked Wuchter if 18 was the number Kennedy needed to bypass the vote entirely. Wuchter smirked at Kennedy, but did not respond verbally.

35 Wuchter then suggested to Kennedy that Kennedy take a look at Wuchter's computer screen. Kennedy did and observed a spreadsheet with a list of the Central Chicago store's employees. Next to each name were three columns, one red, one yellow, and one green. For each employee, the number "1" was contained in only one of the three columns. Kennedy asked Wuchter what the document was. Wuchter told Kennedy to think about what the colors represented. Kennedy responded that the red must be union supporters. He said yellow must be the people who Wuchter thought could be swayed one way or the other. He finished by saying
40 green was the employees who Wuchter thought would give Kennedy a signature right now. Again, Wuchter did not respond verbally. Instead he smiled and gave Kennedy a slight nod.

Wuchter took the mouse for his computer and moved the arrow over the 1 in the yellow column beside Kennedy's name. Wuchter asked Kennedy, does this look right then? After

³² The parties stipulated to Wuchter's 2(11) supervisory status at the hearing. (Jt. Exh. 1, paragraph VII.)

Kennedy told him yes, Wuchter said that was what he figured. Wuchter then asked Kennedy to look at the names and see if there was anyone whom Kennedy thought was incorrectly marked. Kennedy provided Wuchter with the name of one employee and said the employee was very much a union supporter. Wuchter deleted the 1 out of the employee's yellow column and placed a 1 in the red column.

At some point in this conversation, Kennedy also raised his concern that he would lose money with a union contract the way talks were going. Wuchter stated that he did not understand why Kennedy would gamble with a union contract. Wuchter noted that he could be at a store with the new pay system and be guaranteed not to lose any money. At that point, a coworker walked into Wuchter's office to remove the trash. Wuchter asked the employee if she liked to gamble. The employee responded no. Wuchter then turned to Kennedy and said see, she doesn't like to gamble.

Finally, Wuchter also told Kennedy that he wished people would come to him with problems they have, like Kennedy did. Wuchter stated he was annoyed that a third party was involved that was preventing employees from coming to him with concerns.

The conversation ended with Wuchter asking Kennedy if everything they discussed in the office would stay in the office. Kennedy said that was fine. Wuchter told him he loved his job and wanted to keep it.

Despite not previously being certain about supporting the Union, Kennedy nonetheless reported the conversation to the Union almost immediately. The Union filed an unfair labor practice charge the next day. Wuchter ceased being friends with Kennedy on Facebook and on gaming sites after the charge was filed.³³

ANALYSIS

A. Was the Respondent's Implementation of a New Discount Policy an Unlawful Unilateral Change to Employees' Terms and Conditions of Employment?

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union concerning the new discount policy in February, March, and April 2015. The complaint also alleges that the Respondent unilaterally changed the policy in the Manhattan Union Square and Las Vegas stores on April 1, 2015, as well as in the Central Chicago store on May 5, 2015.

The law is well-settled that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment

³³ This account of the conversation between Wuchter and Kennedy is based upon Kennedy's testimony, which I credit. (Tr. 121–143.) Wuchter did not testify. Thus, Kennedy's testimony is uncontroverted. In any event, I found Kennedy to be an entirely believable witness. His demeanor was indicative of reliable testimony. He was candid when testifying about not being a union supporter, but immediately reporting the conversation to the Union because he did not agree with what Wuchter was doing. He also genuinely described how he felt regret over telling Wuchter about his coworker who was a strong union supporter.

without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (2015), citing to *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. Rather, it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991).

The parties disagree as to whether the discount policy was a term and condition of employment subject to mandatory bargaining. The General Counsel argues that the bargaining was mandatory, because the changes altered the commissions of sales employees and thereby their wages. *Register-Guard*, 339 NLRB 353, 354 (2003); *Lamont’s Apparel, Inc.*, 268 NLRB 1332, 1334 (1984). The Respondent counters that its changes were nothing more than a pricing decision on its products. It argues that pricing changes constitute a managerial decision at the core of entrepreneurial control. *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB 1206 (2013), reaffirmed 362 NLRB No. 120 (2015).

The reality here is that the Respondent’s change falls somewhere in between a pure commission and a pure pricing decision. The Board’s decision in *Nickey Chevrolet Sales*, 180 NLRB 1079, 1086–1088 (1970) is instructive, because it involved a factual situation that mirrors the one here. In that case, the employer’s unionized car salespersons were paid a commission on the sale of new and used cars pursuant to a compensation plan agreed to by the company and union. The commission was computed by taking the sales price of the car and subtracting the sum of the invoice cost of the car to the dealership plus the delivery and handling fee charged to the customer. That amount then was multiplied by a percentage to obtain the commission. The dealership unilaterally raised its price for delivery and handling. The change had the effect of raising the base cost used to determine the commission and thereby reducing the ultimate commission amount. The Board adopted the judge’s conclusion that the pricing change to the delivery and handling fee was a mandatory subject of bargaining and the company’s unilateral change to the fee violated Section 8(a)(5). See also *Goya Foods of Florida*, 351 NLRB 94, 96–97 (2007) (implementation of new driver routing software was mandatory subject of bargaining, because the change to driver’s routes altered their ability to earn commissions).³⁴

In this case, the Respondent also made changes that affected the ability of its employees to earn commissions. The new policy eliminated the authority of certain sales employees to offer discounts on their own without management approval. It also imposed new maximums on the amount of a discount employees could offer and required that discounts be offered in stages. Because these changes impacted employees’ commissions, they were a mandatory subject of

³⁴ The *Goya* decision was limited to effects bargaining only, because the employer’s decision to use the new routing software occurred prior to the union’s certification there. In this case, the decision to change the discount policy and its implementation occurred well after the Union’s certifications.

bargaining.³⁵ Although some discussion of the changes occurred during bargaining, the Respondent does not contend that the parties reached overall impasse in negotiations before it implemented the discount policy changes.

5 Although the Respondent contends its changes to the discount policy were a management prerogative, no case law supports this proposition. Certain, fundamental business decisions at the core of entrepreneurial control have been exempted from bargaining. These include a change in the scope or direction of an employer's business, including a decision to go out of business; adopting labor-saving machinery; advertising and promotion; product type and design; and
10 financing arrangements. *Olean General Hospital*, 363 NLRB No. 62 (2015); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 (1981). The discount policy here does not fall into any of these categories. The Respondent changed the discount policy, because 2014 was its worst earnings year in a decade. One of the culprits was associates providing excessively high discounts on products. Like other earnings and cost-related topics, this subject matter is
15 amenable to resolution within the collective bargaining framework.

 The Respondent's reliance on *PCMC/Pacific Crane Maintenance Co.*, supra, is misplaced. The case did not involve employees who earned commissions or a change to a policy affecting their earnings. The Board's decision there dealt exclusively with the issue of whether
20 the single employer had to bargain over layoffs and reemployment of unit employees, when a third party awarded a contract to a different entity of the employer. The judge, in dicta, concluded the employer's decision on how much to bid for the contract was akin to a pricing decision and not a mandatory subject of bargaining. Under these circumstances, I am not persuaded that the case controls the outcome here.

25 Finally, the Respondent also argues that, even assuming its discount policy is a mandatory subject of bargaining, the unilateral changes were lawful pursuant to the Board's decision in *Fieldcrest Cannon*, 318 NLRB 470 (1995), discussed above. I find the argument unsupported by the record evidence. Witness testimony was insufficient to establish either that
30 the Respondent had a past practice of regularly changing its discount policy or that the discount policy changes resulted in a wage increase for every nonunion sales employee.

 Accordingly, I conclude the Respondent's unilateral implementation of the revised discount policy violated Section 8(a)(5).
35

B. Did the Respondent Violate Section 8(a)(1) Through Wuchter's Statements to Kennedy During Their June 24, 2015 Conversation?

40 The General Counsel's complaint alleges that Chicago Store Manager Mike Wuchter violated Section 8(a)(1) in several manners during his June 24, 2015 discussion with employee Tom Kennedy. The allegations included that Wuchter solicited employee participation in and

³⁵ At the hearing, the parties disputed whether the change in the discount policy benefitted or harmed sales associates' earnings. That answer to that question is irrelevant. A unilateral change violates the Act, even where it results in an increase to employees' wages or benefits. *Daily News of Los Angeles*, 304 NLRB 511 (1991).

support of union decertification; created the impression of surveillance; and interrogated Kennedy about his support for the Union.

As to the solicitation allegation, the law is well-settled that an employer violates Section 8(a)(1) of the Act by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative. *Mickeys Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007). In determining whether an employer's assistance is unlawful, the appropriate inquiry is whether the Respondent's conduct constitutes more than ministerial aid. *Wire Products Mfg. Corp.*, 326 NLRB 625, 640 (1998), enfd. sub nom. mem. *NLRB v R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in the activity either to instigate or to facilitate it. *Harding Glass Co.*, 316 NLRB 985, 991 (1995).

During his discussion with Kennedy on June 24, 2015, Wuchter sought to instigate the circulation of a petition through Kennedy. After discussing the pay system at a nonunion store, Wuchter told Kennedy "there is something you can do" to get that system and invited him to ask questions. He then told Kennedy he should try to get himself and his coworkers on board. Wuchter mentioned two numbers, 11 and 18. Based on the size of the unit, that reflected the number of employees who would have to sign cards to support a decertification petition filing with the Board, as well as the number of employees' signatures needed on a petition to enable the Respondent to withdraw recognition. When Kennedy specifically sought to confirm this information, Wuchter failed to disabuse him of the notion. Later, Wuchter also asked Kennedy why he would gamble with a union contract where Kennedy could lose money, when Kennedy could just be a "G.com," or nonunion store, and be guaranteed not to lose any money. Wuchter's statements went well beyond providing general information in response to an unsolicited inquiry and violated the Act.³⁶

The Respondent mounts a minimal, unconvincing defense to this allegation. First, it contends Wuchter's comments were ambiguous. I reject this argument. What Kennedy's testimony reveals is that Wuchter was being cagey in an attempt to avoid violating the law. Cagey or not, Wuchter's message to Kennedy was clear. Second, the Respondent argues that no evidence suggests Wuchter was carrying out a scheme orchestrated by the Company. Rogue or not, Wuchter is a statutory supervisor and his conduct is attributable to the Respondent.

With respect to the surveillance and interrogation allegations, the Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statements in question that the employee's union or protected concerted activities had been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *United Charter Service*, 306 NLRB 150 (1992). An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act,

³⁶ The General Counsel's complaint also alleged that Wuchter implied to Kennedy that union representation was futile. This allegation was premised on Wuchter telling Kennedy he would lose money if they got a union contract, but could guarantee he would not lose money if he was at a nonunion store. I find Wuchter's statements to more appropriately be categorized as further solicitation of decertification, in light of the comparison to pay at nonunion stores.

under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000).

5 Here, Wuchter showed Kennedy a spreadsheet with information on Wuchter’s beliefs as to whether Central Chicago store employees supported the Union, opposed the Union, or were on the fence. Wuchter sought to confirm Kennedy’s position by hovering a computer mouse over the 1 by Kennedy’s name in the column indicating he was on the fence. Wuchter asked Kennedy “does this look right?” After Kennedy said yes, Wuchter then asked him to review the
10 spreadsheet and advise if Wuchter had anyone incorrectly marked. The only reasonable assumption from Wuchter’s statements is that he had placed employees’ support for the union under surveillance. Given his high-level position at the Central Chicago store and the nature of the information he was seeking, his questioning of Kennedy about his and other employees’ support of the Union also constitute an unlawful interrogation.

15 Accordingly, I find the Respondent has violated Section 8(a)(1) in these manners.

*C. Did the Respondent Refuse to Bargain in Good Faith
from November 18, 2014 to August 11, 2015?*

20 The Respondent’s away-from-the-table conduct during this time period provides significant support for a finding of bad-faith bargaining. As discussed above, the Respondent refused to bargain, then made a unilateral change to its discount policy for employees in the three bargaining units on April 1 and May 5, 2015. It is well-settled law that unilateral changes may be an indicia of a lack of good-faith bargaining. *Whitesell Corp.*, 357 NLRB 1119, 1123; *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996).

25 In addition, the Respondent’s top manager at its only remaining unionized location solicited support for the Union’s decertification there. Such illicit support is an indicia of bad-faith bargaining, because a decertification effort has a “foreseeable effect of obstructing the bargaining process.” *Latino Express*, 360 NLRB No. 112, slip op. at 12 (2014), quoting *Wahoo Packing Co.*, 161 NLRB 174, 179 (1966).

30 Regarding health insurance, the Union capitulated to the Respondent’s position and offered to keep employees in the Company’s health insurance plan on March 5, 2015. In exchange, the Union requested that employees pay no deductible in the standard insurance plan. 35 The Union also sought 90 days notice from the Respondent for any changes to the plan, so the parties could discuss, not bargain, over the changes. Despite acknowledging the major movement the Union made, the Respondent’s immediate response was that the proposal was a “non-starter.” The Respondent offered no counterproposal in its “final” offer on March 24, 2015 or at any time thereafter. Thus, the Respondent’s conduct in this regard was a continuation of its
40 refusal to engage on this issue and indicative of bad-faith bargaining.

45 As to wages, the Respondent’s conduct as to the base hourly wage in light of the mandated increase in the Chicago minimum wage is enlightening. Over the course of nine Chicago bargaining sessions and 13 months, the Respondent never increased its initial \$9.35 per hour base pay rate proposal for sales associates in Chicago, originally made on July 10, 2014.

The city passed the minimum wage increase to \$10 per hour on December 2, 2014, effective on July 1, 2015. The Respondent's wage proposal on February 5, 2015 acknowledged the increase by including a new article setting forth the \$10 per hour wage rate for sales and operations associates effective July 1, 2015. (GC Exh. 59, Art. 10.4.) Yet the Respondent maintained its base rate proposal of \$9.35 per hour for sales associates in article 10.1 throughout negotiations.

The Respondent appears to contend that no need existed to change the numbers, because of the provision acknowledging the applicability of the higher minimum wage. But the Company's actions contradict that contention. It actually did modify its base rate proposal in the interim. The Respondent's April 28, 2015, proposal increased the base rate of pay to \$9.60 per hour for department and platinum room managers, and to \$9.85 for assistant managers. Even if the Union had accepted the contract proposal on that date, the increased rate offered only would have applied for 2 months from April 28 to June 30, 2015, before increasing to \$10 per hour. The picture painted here is that the Company offered an increase for the sake of being able to say later that it had offered an increase.

On commissions, the Company's only movement from November 19, 2014 to August 11, 2015 was to add an 0.5 percent commission on sales between \$27,500 to \$30,000 in its proposal dated April 28, 2015 (GC Exh. 66.) Otherwise, the final commission proposal made on August 11, 2015 was identical to the proposal made on February 5, 2015.

The Respondent also made a regressive proposal as to performance goals without any stated good cause. On December 19, 2014, the Company sought to remove discharges for failure to meet those goals from arbitral review. The Respondent again stated only generally it needed the goals for accountability. It offered no explanation for why this new provision needed to be added some 2 years after the Company first proposed this language.

Other changes the Respondent made to its third "final" proposal on August 11, 2015, also support the conclusion of a lack of good-faith bargaining. (GC Exh. 69.) The General Counsel issued the original complaint in this case on July 24, 2015. (GC Exh. 1(mm).) Thereafter, the Respondent finally offered GIG leave and the GAIN program in article 8.4 of its contract proposal. But the parties had not reached a full economic agreement as of August 11, 2015, the only reason the Respondent previously cited for not offering these benefits. This certainly undermines the validity of the original explanation. It suggests the timing of their inclusion was a response to the complaint allegation of bad-faith bargaining. The same can be said for the Respondent finally agreeing to TA the scheduling notification provision contained in article 11.6. This came almost a year after the Company had implemented the change in all of its stores. These actions appear designed to do nothing more than prepare the case for litigation.

For all these reasons, I also conclude the Respondent's bad-faith bargaining continued from November 19, 2014 to August 11, 2015.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
5
2. The Union is a Section 2(5) labor organization and the designated exclusive collective-bargaining representative of the following appropriate units of the Respondent's employees:
 - 10 a. All full-time and regular part-time operations employees, commissioned sales employees in the guitar, drum, hi-tech, and accessories departments, department managers, assistant managers, Elite sales employees and the Platinum Room Manager employed at the Employer's facility currently located at 2633 North Halsted,
15 Chicago, IL 60614; but excluding all other employees, G.C. Pro sales employees, sales training managers, operations managers, store managers, professional employees, guards and supervisors as defined by the Act.
 - 20 b. All full-time and regular part-time commissioned sales employees in the guitar, drum, hi-tech, and accessories departments, department managers, assistant managers, assistant to manager and platinum room manager employed by the Employer at its facility located at 25 West 14th Street, New
25 York, NY; but excluding all other employees including the G.C. pro, employees in the operations and support departments, sales training managers, operations managers, store managers, store merchandisers, and guards, and professional employees and supervisors as defined in the Act.
 - 30 c. All full-time and regular part-time commissioned sales associates, department managers, assistant managers, and platinum room managers employed by the Employer at its Las Vegas, Nevada, facility; but excluding all other
35 employees, including the G.C. professional employees, sales managers, operations managers, general manager, employees in the operations and support departments, sales training managers, operations associates, guards, and supervisors as defined in the Act.
3. The Respondent violated Section 8(a)(1), on September 22, 2014, by threatening employees with reduced benefits because of their union membership or affiliation.
- 40 4. The Respondent violated Section 8(a)(1), on June 24, 2015, by:

- (a) Soliciting employee participation in and support of Union decertification;
- (b) Creating the impression that employee support for the Union was under surveillance; and
- (c) Interrogating employees about their support for the Union.

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5. The Respondent violated Section 8(a)(5) by failing to bargain in good faith with the Union through its overall conduct from July 12, 2013 to August 11, 2015.
 6. The Respondent violated Section 8(a)(5) by unilaterally changing its discount policy on April 1, 2015 at the Manhattan Union Square and Las Vegas stores and May 5, 2015 at the Central Chicago store, without providing the Union an opportunity to bargain and without bargaining first to an overall impasse in contract negotiations.
 7. The Respondent violated Section 8(a)(5) by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the Manhattan Union Square unit on June 10, 2014.
 8. The Respondent violated Section 8(a)(5) by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the Las Vegas unit on November 18, 2014.
 9. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 10. The Respondent has not violated the Act in any of the other manners alleged in the complaint.

REMEDY

35

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

40

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

45

Because the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its discount policy, the Respondent shall be ordered, upon the Union's request, to rescind that change at the Central Chicago, Las Vegas, and Manhattan Union Square stores and restore the status quo ante. The Respondent will be required to make whole any bargaining unit employees who suffered losses as a result of this unilateral change. The make-whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest

at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 13 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In addition to the standard remedy of a cease-and-desist and affirmative bargaining order, the General Counsel requests a 1-year extension to the Union’s certification year in each bargaining unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962). In *Mar-Jac*, the Board held that the certification year can be extended where employer unfair labor practices impacted bargaining. In determining the length of any extension, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations. *American Medical Response*, 346 NLRB 1004, 1005 (2006). I have found herein that the Respondent engaged in surface bargaining for a period exceeding two years. Thus, despite the fact that the parties met for numerous bargaining sessions and reached a significant number of tentative agreements, the Union was not afforded a full opportunity to bargain during the certification years. Under these circumstances, I conclude that a 12-month extension to the certification year in each bargaining unit is appropriate. *HTH Corp.*, 356 NLRB 1397, 1403 (2011).

I also find that the extension of the certification years is a special remedy sufficient to address the level of severity of the Respondent’s unfair labor practices here. Therefore, I decline the General Counsel’s request that the Union be reimbursed for its bargaining expenses. In the “vast majority” of bad-faith bargaining violations, a bargaining order accompanied by the usual cease-and-desist order and posting of notice will be sufficient. *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). An award of bargaining expenses is only justified “[i]n cases of unusually aggravated misconduct...where it may fairly be said that respondent’s substantial unfair labor practices have infected the core of a bargaining process to such an extent that their ‘effects cannot be eliminated by the application of traditional remedies.’” *Ibid.*, quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969). Although it engaged in surface bargaining, the Respondent’s conduct in this case was not so egregious or ubiquitous as to justify an award of bargaining expenses. *Contra Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 2–3 (2014); *HTH Corp.*, supra, at 1403–1404. A return to the bargaining table for good-faith negotiations with a one-year certification extension will neutralize the effects of the Respondent’s unfair labor practices. For the same reasons, I also decline the Union’s request that the Respondent be ordered to pay its litigation expenses.

With respect to the notice, I conclude that the current, standard methods of posting are an adequate remedy for the unfair labor practices committed by the Respondent. Accordingly, I decline the General Counsel’s request that the notice be physically posted in all Guitar Center

stores nationwide. I also reject the request that a copy of any Board order and notice be sent to all supervisors at the Central Chicago, Las Vegas, and Manhattan Union Square stores. I find the General Counsel's request that the Respondent post the notice electronically on its Backstage intranet page premature. In *J. Picini Flooring*, 356 NLRB 11, 13–14 (2010), the Board explicitly
 5 stated that the question of whether an employer customarily disseminates information to employees by electronic means should be addressed at the compliance stage of a case.

Finally, I decline the Union's request that the Respondent be required to offer the Union the opportunity to agree to implementing Phase 3 at the three unionized stores. The complaint
 10 does not allege the Respondent's withholding of Phase 3 as a Section 8(a)(5) unilateral change. Thus, no basis exists for awarding such a remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁷
 15

ORDER

The Respondent, Guitar Center Stores, Inc., Chicago, Illinois, Las Vegas, Nevada, and New York, New York, its officers, agents, successors, and assigns, shall
 20

1. Cease and desist from

- (a) Threatening employees with reduced benefits because of their union membership or affiliation.
 25
- (b) Soliciting employee participation in and support of the Union's decertification.
- (c) Creating the impression that employee support for the Union is under surveillance.
 30
- (d) Interrogating employees about their support for the Union.
- (e) Failing to bargain in good faith with the Union and withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units:
 35

All full-time and regular part-time commissioned sales associates, department managers, assistant managers, and platinum room managers employed by the Employer at its Las Vegas, Nevada, facility; but excluding all other employees, including the G.C. professional employees, sales managers, operations managers, general manager, employees in the operations and support
 40

³⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

departments, sales training managers, operations associates, guards, and supervisors as defined in the Act.

5 All full-time and regular part-time commissioned sales employees in the guitar, drum, hi-tech, and accessories departments, department managers, assistant managers, assistant to manager and platinum room manager employed by the Employer at its facility located at 25 West 14th Street, New York, NY; but excluding all other employees including the G.C. pro, employees in the operations and support departments, sales training managers, operations managers, store managers, store merchandisers, and guards, and professional employees and supervisors as defined in the Act.

- 15 (f) Failing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

20 All full-time and regular part-time operations employees, commissioned sales employees in the guitar, drum, hi-tech, and accessories departments, department managers, assistant managers, Elite sales employees and the Platinum Room Manager employed at the Employer's facility currently located at 2633 North Halsted, Chicago, IL 60614; but excluding all other employees, G.C. Pro sales employees, sales training managers, operations managers, store managers, professional employees, guards and supervisors as defined by the Act.

- 30 (g) Failing and refusing to bargain with the Union by unilaterally changing its discount policy on April 1, 2015 at the Manhattan Union Square and Las Vegas stores and May 5, 2015 at the Central Chicago store, without providing the Union an opportunity to bargain and without bargaining first to an overall impasse in contract negotiations.

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

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

- 40 (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification is extended for each bargaining unit by 12 months from the date the Respondent begins to comply with this Order.
- 45

(b) Make any employees whole for any loss of earnings suffered as a result of the unilateral change to the discount policy, in the manner set forth in the remedy section of this decision.

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

15 (d) Within 14 days after service by the Region, post at its Central Chicago, Las
Vegas, and Manhattan Union Square stores, copies of the attached notice
marked "Appendix."³⁸ Copies of the notice, on forms provided by the
Regional Director for Region 13, after being signed by the Respondent's
authorized representative, shall be posted by the Respondent and maintained
20 for 60 days in conspicuous places including all places where notices to
employees are customarily posted. In addition to physical posting of paper
notices, notices shall be distributed electronically, such as by email, posting
on an intranet or internet site, and/or other electronic means, if the Respondent
customarily communicates with its employees by such means. Reasonable
steps shall be taken by the Respondent to ensure that the notices are not
25 altered, defaced, or covered by any other material. In the event that, during
the pendency of these proceedings, the Respondent has gone out of business
or closed the facilities involved in these proceedings, the Respondent shall
duplicate and mail, at its own expense, a copy of the notice to all current
employees and former employees employed by the Respondent at any time
30 since July 12, 2013.

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

Dated, Washington, D.C., November 7, 2016.

Charles J. Muhl
Administrative Law Judge

³⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten you with reduced benefits because of your union membership or affiliation.

WE WILL NOT solicit employee participation in and support of the decertification of the Retail, Wholesale and Department Store Union, RWDSU, United Food and Commercial Workers (the Union).

WE WILL NOT create the impression that employee support for the Union is under surveillance.

WE WILL NOT interrogate employees about their support for the Union.

WE WILL NOT fail to bargain in good faith with the Union and withdraw recognition from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units:

All full-time and regular part-time commissioned sales associates, department managers, assistant managers, and platinum room managers employed by the Employer at its Las Vegas, Nevada, facility; but excluding all other employees, including the G.C. professional employees, sales managers, operations managers, general manager, employees in the operations and support departments, sales training managers, operations associates, guards, and supervisors as defined in the Act.

All full-time and regular part-time commissioned sales employees in the guitar, drum, hi-tech, and accessories departments, department managers, assistant managers, assistant to manager and platinum room manager employed by the Employer at its facility located at 25 West 14th Street, New York, NY; but excluding all other employees including the G.C. pro, employees in the operations and support departments, sales training managers, operations managers, store

managers, store merchandisers, and guards, and professional employees and supervisors as defined in the Act.

WE WILL NOT fail to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time operations employees, commissioned sales employees in the guitar, drum, hi-tech, and accessories departments, department managers, assistant managers, Elite sales employees and the Platinum Room Manager employed at the Employer's facility currently located at 2633 North Halsted, Chicago, IL 60614; but excluding all other employees, G.C. Pro sales employees, sales training managers, operations managers, store managers, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT fail and refuse to bargain with the Union by unilaterally changing our discount policy without first giving the Union an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification is extended for all three bargaining units for 12 months from the date that we begin to comply with this Order.

WE WILL make employees whole for any loss of earnings suffered as a result of our unilateral change to the discount policy.

GUITAR CENTER STORES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Dirksen Federal Building, 219 S. Dearborn Street, Suite 808, Chicago, IL 60604-5208
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

The Administrative Law Judge's decision can be found at www.nlr.gov/case/02-CA-130443 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.