

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

Mayo Clinic Health System,

NLRB Case Nos.: 18-CA-168834 and
18-CA-174200

Respondent,

and

**CHARGING PARTY'S POST-TRIAL
BRIEF TO THE ADMINISTRATIVE
LAW JUDGE**

SEIU Healthcare Minnesota,

Charging Party.

Dated: May 17, 2017

CUMMINS & CUMMINS, LLP

/s/ Justin D. Cummins

Justin D. Cummins, #276248

1245 International Centre

920 Second Avenue South

Minneapolis, MN 55402

612.465.0108

justin@cummins-law.com

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INTRODUCTION

Respondent has engaged in bad-faith bargaining in several distinct ways, each of which separately proves that Respondent's course of conduct violates the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, et seq. First, Respondent conditions any further bargaining over wages or any other terms on Charging Party first accepting what Respondent has long recognized Charging Party will never accept: a comprehensive bargaining waiver. Second, Respondent adheres to a take-it-or-leave-it approach and, in furtherance of that "bargaining" tactic, has denigrated Charging Party and the collective bargaining process more generally. Third, Respondent insists to impasse concerning the waiver – that is, a permissive subject. Even if the waiver were purportedly a mandatory subject, moreover, Respondent's rigid and extreme course of conduct would still constitute bad-faith bargaining under the NLRA.

Accordingly, the National Labor Relations Board ("NLRB") General Counsel directed issuance of the Complaint herein against Respondent under the NLRA. Significantly, most of the facts in the case are not in dispute. To the extent Respondent's witnesses purport to dispute the General Counsel's and Charging Party's evidence, the testimony of Respondent's witnesses conflicts with Respondent's business records or otherwise lacks credibility.

Even if the testimony of Respondent's witnesses were to be fully credited – despite the evidence that such testimony is not credible – Respondent's core conduct would still violate Section 8(a)(5) of the NLRA. In particular, Respondent has admittedly and unequivocally insisted that Charging Party first acquiesce to Respondent's demand for a comprehensive bargaining waiver before there will be any more bargaining and, thus, any agreement on a successor contract. Allowing Respondent's insistence on a Hobson's choice for Charging Party to stand would eviscerate the collective bargaining process here and, indeed, well beyond this case. Therefore, Respondent should be found to have engaged in bad-faith bargaining.

ESTABLISHED FACTS

I. RESPONDENT IS THE LARGEST EMPLOYER IN MINNESOTA AS WELL AS ONE OF THE MOST HIGH PROFILE HEALTH SYSTEMS IN THE NATION, AND CHARGING PARTY REPRESENTS NUMEROUS EMPLOYEES WORKING FOR RESPONDENT IN MINNESOTA

Respondent is the biggest employer in Minnesota, and one of the best known healthcare providers around the country. *Trial Transcript* (“*Tr.*”), p. 68. Charging Party represents many thousands of employees working at healthcare facilities in Minnesota, including those operated by Respondent. *Tr.*, p. 29. Charging Party has represented such employees for decades. *Tr.*, p. 68.

II. RESPONDENT AND CHARGING PARTY HAD A LONG AND COLLABORATIVE COLLECTIVE BARGAINING RELATIONSHIP UNTIL RESPONDENT’S CONDUCT THAT IS SUBJECT TO THE COMPLAINT ISSUED AT THE DIRECTION OF THE NLRB GENERAL COUNSEL

Respondent and Charging Party have maintained a collective bargaining relationship for several decades. *Tr.*, p. 151. Throughout that time, and until the recent events that prompted the NLRB General Counsel to direct issuance of the Complaint herein against Respondent, the parties had a productive and collegial relationship. *Id.*; *Tr.*, p. 239. Consequently, Respondent and Charging Party typically reached agreement on a successor contract within only a few bargaining sessions over a couple of months. *Tr.*, p. 68. In the rare instance where the parties did not reach agreement before expiration of the existing contract, Respondent agreed to extend the existing contract until agreement on a successor contract. *Tr.*, pp. 145, 151, 206.

III. DURING THE LIFE OF THE RECENTLY EXPIRED CONTRACT, RESPONDENT SOUGHT TO MODIFY THE CONTRACT TO INCLUDE A COMPREHENSIVE BARGAINING WAIVER THAT WOULD PUT CHARGING PARTY IN A WORSE POSITION THAN IF WITHOUT A CONTRACT

In 2014, and long before the contract at issue in this case expired on September 30, 2015, Respondent proposed to insert into the contract a comprehensive bargaining waiver covering

virtually every term other than wages and discipline. *Tr.*, pp. 68-69. If adopted, the waiver would enable Respondent to change all employee benefits unilaterally whenever Respondent so desires in the future. *Id.*; *Tr.*, pp. 295-96, 478-79, 486-87. As confirmed by Respondent's Senior Labor Relations Specialist, Mr. Jeffrey Vomhof, the value of employee benefits under the contract would be unknown going forward due to the waiver provision. *Tr.*, pp. 295-96, 486-87; *see also Tr.*, pp. 478-79.

In other words, Charging Party and the bargaining unit would be worse off with the modified contract, as proposed by Respondent, than with no contract at all. With the waiver included in the contract, Respondent would not have to bargain over virtually any employment terms – and Charging Party would not be able to strike. *Tr.*, pp. 69-68, 79; *General Counsel Exhibit (“GC Ex.”) 2, Art. VI, p. 3.* By contrast, if there ceased to be a contract, Respondent would still have to bargain with Charging Party over any changes to employment terms pursuant to Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB, 501 U.S. 190, 198 (1991) and related precedent – and Charging Party would now have the right to strike. *See generally GC Ex. 2.*

IV. DESPITE THE FLAT REJECTION OF RESPONDENT'S MID-TERM CONTRACT PROPOSAL FOR A COMPREHENSIVE BARGAINING WAIVER IN 2014, RESPONDENT OPENED THE BARGAINING FOR A SUCCESSOR CONTRACT IN 2015 BY DEMANDING THE WAIVER AGAIN

Charging Party rejected Respondent's proposal to modify the existing contract mid-term in 2014 to include a comprehensive bargaining waiver from. *Tr.*, pp. 68-70. The bargaining unit opposed the waiver because of, among other things, what happened in 2003 when they agreed to a limited waiver as to medical benefits. *Tr.*, pp. 137-40. Shortly after agreement on waiver language solely for medical benefits, which was based on the promise of a better benefits package, Respondent dramatically increased premiums and reduced coverage – putting

bargaining-unit members in a worse position than before the agreement on the waiver language. *Tr.*, pp. 137-40.

In the wake of Charging Party's clear rejection of a comprehensive bargaining waiver in 2014, Respondent nonetheless included the waiver yet again as part of Respondent's first proposal in 2015 for a successor contract with Charging Party. *Tr.*, pp. 163-64; *Respondent Exhibit* ("R Ex.") 102.

V. CHARGING PARTY'S EXECUTIVE BOARD ADOPTED A STRIKE-SUPPORT RESOLUTION BACKING THE BARGAINING UNIT'S OPPOSITION TO THE COMPREHENSIVE BARGAINING WAIVER, THE UNIT VOTED 3 TIMES AGAINST THE WAIVER, AND CHARGING PARTY'S PRESIDENT REITERATED THAT THEY WILL NEVER AGREE TO THE WAIVER

At the outset of bargaining for a successor contract, in August 27, 2015, Charging Party reiterated its opposition to a comprehensive bargaining waiver. *Tr.*, pp. 163-64. On September 17, 2015, moreover, Charging Party's Executive Board adopted a written strike-support resolution to bolster the bargaining unit's opposition to the waiver; an Executive Vice President of the Union, Ms. Lisa Weed, personally delivered that resolution to Respondent across the bargaining table. *Tr.*, pp. 101, 338-39; *GC Ex.* 31. In addition, between the Fall of 2015 and the Spring of 2016, the bargaining unit voted 3 separate times to reject the waiver proposal due to, among other reasons, the adverse impact of agreeing to a waiver concerning medical benefits in 2003. *Tr.*, pp. 58, 72, 137-40, 477-78; *GC Ex.* 22. Furthermore, Charging Party's President, Mr. Jamie Gulley, emphatically reiterated to Respondent across the bargaining table that Charging Party has never agreed to a comprehensive waiver before and will never so agree now. *Tr.*, pp. 32-33, 71, 266-67, 298-99, 338. Indeed, the agreement by another union (UNITE-HERE) to a broad bargaining waiver with Respondent caused that union's members to seek representation by Charging Party instead, albeit with the waiver remaining intact up to the present because

Respondent evidently does not agree to rescission of a waiver like this once in a contract. *Tr.*, pp. 92-93.

VI. DESPITE KNOWING THAT CHARGING PARTY WILL REACH AGREEMENT ON ALL TERMS BUT A COMPREHENSIVE BARGAINING WAIVER, RESPONDENT STILL INSISTS THAT CHARGING PARTY FIRST AGREE TO THAT WAIVER BEFORE RESPONDENT WILL BARGAIN ANY FURTHER

The strength and consistency of Charging Party's opposition to a comprehensive bargaining waiver made it clear to Respondent by September 24, 2015 that the waiver was a deal-breaker, as acknowledged by Respondent's Human Resources Service Partner at the time, Ms. Kylene Schaefer, under cross examination. *Tr.*, pp. 310-11, 338-39. Also by the Fall of 2015, Respondent understood that Charging Party would reach agreement on all terms for a successor contract so long as Respondent withdraws its demand for the waiver. *Tr.*, pp. 131-32, 301-02, 404-07; *GC Ex. 11* ("It is readily apparent that the parties can reach agreement on a contract without further delay once the employer stops making bargaining contingent on something the Union cannot do and the employer cannot impose in any event.").

Yet Respondent has persisted up to the present with its demand that Charging Party agree to the waiver or there will be no further bargaining about wages or any other terms:

- While refusing to come to the bargaining table, Respondent repeatedly declares to Charging Party in writing as follows: "***If the Union is unwilling to accept our [bargaining waiver] proposals, we have no further room for movement on wages or any other open proposals*** that we might be prepared to otherwise move on." (*GC Exs. 41-43; see also Tr.*, pp. 187, 191-93) (*emphasis added*);
- While refusing to come to the bargaining table, Respondent also reiterates in writing that Respondent is "***willing to discuss wages, all contingent [on] acceptance of the . . . full [bargaining waiver] language.***" (*GC Ex. 34; see also Tr.*, pp. 113-15) (*emphasis added*); and
- When ultimately coming to the bargaining table to avoid an unfair labor practice charge, Respondent again confirms that it is conditioning any further bargaining on Charging Party first agreeing to a comprehensive bargaining waiver:

Q: [W]hat terms must have [bargaining waiver] language agreed to by the Union before the Employer will bargain over wages?

A: Paid Time Off, Short Term Disability, Pension, [and] Health/Welfare [benefits].

Q: Anything else?

A: *Need to get acceptance on all these benefits with [bargaining waiver language] before we can move on wages.*

Q: Does that mean you will not agree to any terms related to Paid Time Off, Short Term Disability, Pension, [and] Health/Welfare [benefits] absent [bargaining waiver] language?

A: That is correct. (*GC Ex 25, p. 2; see also Tr., pp. 51-57, 179, 406-07, 477; R Ex. 114, p. 1*) (*emphasis added*).

Respondent has maintained this position – refusing to move on wages since December 14, 2015 – even though Respondent admittedly cannot tell Charging Party what the value of the employee benefits will be after execution of a successor contract because those benefits could be changed at any time by Respondent at its discretion. *Tr., pp. 45-46, 340, 467-68, 478-79, 486-87*. Respondent also persists in refusing to say what wage increase Respondent could provide even if Charging Party were to agree to the waiver. *Tr., pp. 78, 477-78*.

VII. WHILE INSISTING ON CHARGING PARTY FIRST ACCEPTING A COMPREHENSIVE BARGAINING WAIVER, RESPONDENT HAS REFUSED TO COME TO THE BARGAINING TABLE OR, WHEN COMING TO THE TABLE, RESPONDENT HAS ENGAGED IN THREATENING BEHAVIOR

Respondent has chosen not to come to the bargaining table, electing simply to send an identical written note to Charging Party multiple times: “If the Union is unwilling to accept our [bargaining waiver] proposals, we have no further room for movement on wages or any other open proposals that we might be prepared to otherwise move on.” *GC Exs. 41-43; see also Tr., pp. 187, 191-93; GC Exs. 34-35*. Respondent’s Human Resources Service Partner at the time, initially testified that Charging Party rather than Respondent refused to come to the bargaining table except to discuss the “superior privileges” language in the contract. *Tr., pp. 325-26*.

Under cross examination, and contrary to her testimony under direct examination, Respondent's Human Resources Service Partner at the time conceded it was Respondent rather than Charging Party that would not come to the bargaining table except to discuss the "superior privileges" language. *Tr.*, p. 341. Notably, the "superior privileges" language is a maintenance-of-benefits term that operates counter to the comprehensive bargaining waiver Respondent continues to demand. *GC Ex. 2, Art. XVI, p. 7.*

When ultimately coming to the bargaining table to avoid an unfair labor practice charge, Respondent has engaged in physically aggressive behavior toward Charging Party's bargaining representatives, referred to decertification of Charging Party when Charging Party continued to oppose Respondent's waiver demand, and refused to state what wage increase Respondent could provide if Charging Party were to agree to the waiver. *Tr.*, pp. 57, 197, 477-78; *GC Ex 25, p. 2; GC Ex. 45.* Respondent's Senior Employee and Labor Relations Consultant, Mr. Jeffrey Zahnle, most insistently denied during the trial that Respondent's bargaining representatives stood up together and shouted at Charging Party's President across the bargaining table and otherwise made threats. Tellingly, and while testifying about his assertion that he and the other Respondent representatives did not yell at Charging Party's President, Respondent's Senior Employee and Labor Relations Consultant raised his voice significantly while under calm questioning by counsel. *Tr.*, pp. 421-23.

VIII. WHILE INSISTING ON A COMPREHENSIVE BARGAINING WAIVER – AND ALSO CONTRARY TO PAST PRACTICE – RESPONDENT HAS REFUSED TO EXTEND THE EXPIRED CONTRACT DURING BARGAINING AND THEN DISPARAGED CHARGING PARTY TO THE BARGAINING UNIT

Respondent has refused to extend the expired contract even though Respondent has historically extended an expiring contract with Charging Party during bargaining for a successor

contract. *Tr.*, pp. 145, 151; *Charging Party Exhibit* (“*U Ex.*”), 1. Respondent has also refused to extend another contract with Charging Party when that contract recently expired. *Tr.*, p. 131.

In addition, Respondent has dealt directly with bargaining unit members to blame Charging Party falsely for the absence of a successor contract and to urge bargaining unit members to act in their “individual best interest” rather than collectively through Charging Party. *GC Ex. 21*, p. 1; *see also Tr.*, pp. 145-46. The lead bargaining unit member on Charging Party’s bargaining committee, Mr. Nathaniel Johnson, testified these “bargaining” tactics communicated to the bargaining unit that Charging Party was supposedly incapable of representing the bargaining unit’s interests. *Tr.*, pp. 145-46; *see also GC Ex. 21*, p. 1; *GC Exs. 34-35, 41-43*.

IX. DESPITE RESPONDENT’S RATIONALES FOR DEMANDING A COMPREHENSIVE BARGAINING WAIVER HAVING NO SUPPORT IN THE RECORD, RESPONDENT STILL CONDITIONS ANY FURTHER BARGAINING ON CHARGING PARTY FIRST ACCEPTING THE WAIVER

Respondent persists with the demand for a comprehensive bargaining waiver – allegedly for flexibility needed concerning the bargaining unit’s benefits levels – while admittedly not anticipating any change to the benefits levels during the life of the successor contract and, moreover, while rejecting Charging Party’s compromise proposal that would allow Respondent to change benefits levels unilaterally so long as they remain substantially similar to the levels at the time of executing the successor contract. *Tr.*, pp. 126-29, 163-64, 207-08; *GC Ex. 38*.

Respondent also still insists on a comprehensive bargaining waiver – purportedly due to the need for no variation in benefits and other employment terms across the entire system – while not even seeking to have the same benefits levels or grievance procedures for all employees represented by Charging Party, much less across the entire system. *Tr.*, pp. 402; *GC Exs. 46-53*.

Furthermore, Respondent still insists on a comprehensive bargaining waiver – supposedly to achieve cost savings – while not being able to estimate what the cost savings would be if

Charging Party were to agree to the waiver and, in any event, while rejecting Charging Party's compromise proposal that would allow Respondent to put the bargaining unit into an existing benefits plan to enhance efficiency. *Tr.*, pp. 407-08, 476-77.

LEGAL ANALYSIS

Respondent has engaged in bad-faith bargaining in 3 separate ways, each of which – standing alone – establishes that Respondent's course of conduct violates the NLRA. First, Respondent indisputably conditions any more bargaining concerning wages or other terms on Charging Party first accepting what Respondent clearly knows Charging Party will not accept: a comprehensive bargaining waiver that would preclude bargaining over virtually all terms except wages and discipline. Second, Respondent persists with insisting on a take-it-or-leave-it approach and, to that end, has disparaged Charging Party as a bargaining representative in the eyes of the bargaining unit. Third, Respondent insists to impose as to a permissive subject – the waiver. Even if the waiver were somehow a mandatory subject, however, Respondent would still be engaging in bad-faith bargaining given the rigid and extreme nature of Respondent's course of conduct.

In short, Respondent's course of conduct seeks to impose a catch-22: either Charging Party agrees to waive virtually all bargaining rights before Respondent will "bargain" with Charging Party or Respondent will simply not bargain with Charging Party. This is quintessential bad-faith bargaining.

I. RESPONDENT ENGAGES IN BAD-FAITH BARGAINING BY REFUSING TO BARGAIN ANY FURTHER UNLESS CHARGING PARTY FIRST ACQUIESCES TO RESPONDENT'S DEMAND FOR A COMPREHENSIVE BARGAINING WAIVER GOING FORWARD

Drawing on clearly established precedent, the NLRB has ruled that an employer engages in bad-faith bargaining by conditioning further bargaining on a union agreeing to certain terms

proposed by that employer. Carey Salt Co., 358 NLRB No. 124, 1142, 1163, n.7 (2012) (affirming the employer engaged in bad-faith bargaining by “*conditioning bargaining over mandatory subjects of bargaining on the Union’s concessions to the Respondent’s bargaining demands. . .*”), enf’d 736 F.3d 405, 428-30 (5th Cir. 2013) (reaffirming the employer engaged in bad-faith bargaining because the employer “maintained its position of *refusing to discuss wages and other issues until the Union acquiesced to [the employer’s] core demands.*”) (emphasis added); see also Architectural Fiberglass Co., 165 NLRB 238, 240 (1967) (ruling the employer’s proposal that the union waive its right to bargain as a condition of further bargaining violated the NLRA because the employer “could not have proposed it in the good-faith expectation that such a proposal might afford a basis for the advancement of negotiations.”), overruled on other grounds Latrobe Steel Co. v. NLRB, 630 F.2d 171, 176 (3d Cir. 1980).

The undisputed record clearly establishes that Respondent explicitly makes Charging Party’s acquiescence to Respondent’s demand for a comprehensive bargaining waiver a precondition of any further bargaining about wages or other terms:

- While refusing to come to the bargaining table, Respondent repeatedly declares to Charging Party in writing as follows: “*If the Union is unwilling to accept our [bargaining waiver] proposals, we have no further room for movement on wages or any other open proposals that we might be prepared to otherwise move one.*” (*GC Exs. 41-43; see also Tr., pp. 187, 191-93*) (emphasis added);
- While refusing to come to the bargaining table, Respondent also reiterates in writing that Respondent is “*willing to discuss wages, all contingent [on] acceptance of the . . . full [bargaining waiver] language.*” (*GC Ex. 34; see also Tr., pp. 113-15*) (emphasis added); and
- When ultimately coming to the bargaining table to avoid an unfair labor practice charge, Respondent again confirms that it is conditioning any further bargaining on Charging Party first agreeing to a comprehensive bargaining waiver:

Q: [W]hat terms must have [bargaining waiver] language agreed to by the Union before the Employer will bargain over wages?

A: Paid Time Off, Short Term Disability, Pension, [and] Health/Welfare [benefits].

Q: Anything else?

A: ***Need to get acceptance on all these benefits with [bargaining waiver language] before we can move on wages.***

Q: Does that mean you will not agree to any terms related to Paid Time Off, Short Term Disability, Pension, [and] Health/Welfare [benefits] absent [bargaining waiver] language?

A: That is correct. (*GC Ex 25, p. 2; see also Tr., pp. 51-57, 179, 406-07, 477; R Ex. 114, p. 1*) (*emphasis added*).

Even if Respondent were to have taken a more flexible and conciliatory approach with Charging Party about a comprehensive bargaining waiver than Respondent actually does, Respondent would still be engaging in bad-faith bargaining. While enforcing the NLRB's ruling in Carey Salt, the Fifth Circuit addressed whether a change in tone or approach could transform bad-faith bargaining into good-faith bargaining. In that highly analogous case, the Fifth Circuit ruled the employer violated the NLRA – despite a comparatively more flexible and conciliatory approach – because the employer still “maintained its position of refusing to discuss wages and other issues until the Union acquiesced to [the employer’s] core demands.” Carey Salt, 736 F.3d at 428.

Respondent, like the employer in Carey Salt, has “maintained its position of refusing to discuss wages and other issues until the Union acquiesced to [the employer’s] core demands.” *Tr., pp. 113-15, 179, 187, 191-93, 406-07, 467-68, 477; R Ex. 114, p. 1; GC Ex. 25, p. 2; GC Exs. 34, 41-43.* If the employer engaged in bad-faith bargaining through such conduct in Carey Salt, then Respondent has similarly violated the NLRA. In fact, Respondent’s conduct is actually more egregious than that of the employer in Carey Salt. Unlike the employer’s proposal in Carey Salt, Respondent’s core demand directly concerns the waiver of the statutory right to bargain and, thus, seeks to eviscerate the collective bargaining process. *Id.*

On these grounds alone, Respondent should be found to have engaged in bad-faith bargaining. To decide otherwise would contravene the NLRA's "*fundamental purpose of protecting and promoting the practice of collective bargaining* and the rights of employees to fully engage in that practice through their chosen representative." E.I. Du Pont De Nemours, 364 NLRB No. 113, *1 (2016) (emphasis added).

II. RESPONDENT ENGAGES IN BAD-FAITH BARGAINING BY USING A TAKE-IT-OR-LEAVE-IT APPROACH PREDICATED ON THE DEMAND FOR A COMPREHENSIVE BARGAINING WAIVER AS WELL AS DENIGRATING CHARGING PARTY AND THE COLLECTIVE BARGAINING PROCESS

Consistent with settled Supreme Court precedent, the NLRB has long held that an employer engages in bad-faith bargaining by refusing to do meaningful give-and-take with a union or otherwise seeking to subvert that union and impede agreement on a contract. General Electric Co., 150 NLRB 192, 196 (1964) (affirming the employer engaged in bad-faith bargaining because its "position is akin to that of a party who enters into negotiations 'with a predetermined resolve not to budge from an initial position,' an attitude inconsistent with good-faith bargaining."), enfd. 418 F.2d 736, 756-57 (2d Cir. 1969) (reaffirming the employer engaged in bad-faith bargaining because the employer used "a *take-it-or-leave-it approach* . . . and . . . a communications program that pictured the [employer] as the true defender of the employees' interests, further *denigrating the Union*. . . ." and reiterating that "*acts not in themselves unfair labor practices may support an inference that a party is acting in bad faith*."), cert. denied 397 U.S. 965 (1970), rhrg. denied 397 U.S. 1059 (1970) (emphasis added); see also NLRB v. Insurance Agents' Union, 361 U.S. 477, 485 (1960) (explaining that a "take it or leave it" approach is mutually exclusive of a good-faith bargaining "to reach ultimate agreement."); Safeway Trails, Inc. v. NLRB, 641 F.2d 930, 932 (D.C. Cir. 1979), cert. denied 444 U.S. 1072 (1980) (holding the employer engaged in bad-faith bargaining by "disparaging and discrediting

the [union] in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests.”).

As explained more fully above in Part I, Respondent has explicitly declared in writing multiple times to Charging Party that Respondent will not bargain any further unless Charging Party first agrees to a comprehensive bargaining waiver. *GC Exs. 34, 41-43; see also R Ex. 114, p. 1; GC Ex. 25, p. 2; Tr., pp. 1 Tr., pp. 113-15, 179, 187, 191-93, 406-07, 467-68, 477.* This “bargaining” tactic by Respondent is a textbook example of the take-it-or-leave-it approach plainly prohibited by the NLRB since General Electric.

In the face of this direct evidence of bad-faith bargaining, Respondent now appears to allege that Charging Party purportedly waived its right to the requisite give and take of collective bargaining. To that end, and while referring to General Counsel Exhibit 3, Respondent witnesses testified about Charging Party agreeing to a bargaining waiver regarding dental benefits for the bargaining unit.

In truth, Respondent extracted the agreement to a waiver about dental benefits only after giving the bargaining unit an ultimatum: either have dental benefits subject to a bargaining waiver or have no dental benefits under the contract. *Tr., pp. 470-71.* Consequently, the matter of dental benefits provides additional evidence of Respondent's take-it-or-leave-it approach in violation of the NLRA. Insurance Agents' Union, 361 U.S. at 485; General Electric Co., 150 NLRB at 196.

In any event, and to the extent Respondent's witnesses testified that Respondent somehow did not use a take-it-or-leave-it approach, they – and, in particular, Respondent's Senior Employee and Labor Relations Consultant and Human Resources Service Partner at the

time – have no credibility within the meaning of In re Double D. Const. Grp., Inc., 339 NLRB 303, 305 (2003) and related precedent. Besides using a take-it-or-leave-it approach, Respondent has engaged in bad-faith bargaining by seeking to discredit Charging Party and otherwise attempting to create the impression that Respondent rather than Charging Party protects the interests of bargaining unit members. Respondent has used this “bargaining” tactic in a number of ways:

- Respondent has dealt directly with bargaining unit members to blame Charging Party falsely for the absence of a successor contract and to urge bargaining unit members to act in their “individual best interest” rather than collectively through Charging Party (*GC Ex. 21, p. 1; see also Tr., pp. 145-46*);
- Respondent has refused to come to the bargaining table, instead repeatedly sending an identical written note to Charging Party during several bargaining sessions to declare as follows: “If the Union is unwilling to accept our [bargaining waiver] proposals, we have no further room for movement on wages or any other open proposals that we might be prepared to otherwise move on.” (*GC Exs. 41-43; see also Tr., pp. 113-15, 187, 191-93, 431-33; GC Exs. 34-35*); and
- When ultimately coming to the bargaining table to avoid an unfair labor practice charge, Respondent has engaged in highly aggressive behavior toward Charging Party’s bargaining representatives, made thinly veiled threats about decertification of Charging Party when Charging Party continued to oppose Respondent’s waiver demand, and refused to state what wage increase Respondent could provide if Charging Party were to agree to the waiver (*Tr., pp. 57, 179, 197, 477-78; GC Ex 25, p. 2; GC Ex. 45*).

Standing alone, the evidence outlined above establishes bad-faith bargaining within the meaning of the District of Columbia’s ruling in Safeway Trails, 641 F.2d at 932. As the lead bargaining unit member on Charging Party’s bargaining committee testified, these “bargaining” tactics communicated to the bargaining unit that Charging Party was somehow incapable of representing the bargaining unit’s interests. *Tr., pp. 145-46; see also GC Ex. 21, p. 1; GC Exs. 34-35, 41-43*. When considering Respondent’s entire course of conduct, as summarized below in bullet-point form in Part III.A., these violations of the NLRA become even more evident.

Respondent should be found to have engaged in bad-faith bargaining for these reasons as well because, to rule to the contrary, would flout the NLRA's "*fundamental purpose of protecting and promoting* the practice of collective bargaining and *the rights of employees to fully engage* in that practice *through their chosen representative.*" E.I. Du Pont De Nemours, 364 NLRB No. 113 at *1 (emphasis added).

III. RESPONDENT ENGAGES IN BAD-FAITH BARGAINING BY INSISTING TO IMPASSE ON A PERMISSIVE SUBJECT – A COMPREHENSIVE BARGAINING WAIVER – AS A CONDITION PRECEDENT OF ENTERING INTO A SUCCESSOR CONTRACT

Respondent's demand for a comprehensive bargaining waiver is a permissive subject under the NLRA, yet Respondent insists to impasse on that subject – in violation of Supreme Court and NLRB precedent. Even if the waiver were supposedly a mandatory subject, Respondent's insistence to impasse would still be bad-faith bargaining given the array of closely connected conduct clearly designed to preclude agreement on a successor contract.

A. Both The Supreme Court And The NLRB Have Ruled That Insisting To Impasse Concerning A Permissive Subject Constitutes Bad-Faith Bargaining

The Supreme Court has long held that an employer violates Section 8(a)(5) of the NLRA by insisting, even in good faith, on a permissive subject as a prerequisite for reaching agreement with a union on a mandatory subject:

[G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (emphasis added). The NLRB has ruled similarly. See, e.g., Tennessee Const. Co., 308 NLRB 763, 763 (1992)

(determining that the employer violated Section 8(a)(5) of the NLRA by, inter alia, insisting on a permissive subject as a precursor to reaching agreement with the union on a mandatory subject).

The facts set forth in the Supreme Court's decision in Borg-Warner closely resemble the facts in the present case. In Borg-Warner, the employer insisted on the union's acceptance regarding permissive subjects – a recognition provision that excluded the union's international entity and a pre-strike ballot provision – before entering into a contract with the union. 356 U.S. at 343-44. Like the employer in Borg-Warner, Respondent insists on acceptance as to a permissive subject – a comprehensive bargaining waiver – as a prerequisite for reaching agreement on a successor contract with Charging Party. *Tr., pp. Tr., pp. 113-15, 179, 187, 191-93, 406-07, 467-68, 477; GC Ex. 25, p. 2; GC Exs. 34, 41-43.*

If the employer engaged in bad-faith bargaining in Borg-Warner, then Respondent certainly engaged in bad-faith bargaining in this case. In fact, the circumstances surrounding Respondent's insistence on a comprehensive bargaining waiver confirm that Respondent's conduct is even more rigid and extreme than that of the employer in Borg-Warner:

- Respondent still insists on a comprehensive bargaining waiver while knowing Charging Party will not agree to that waiver because (1) Charging Party rejected Respondent's mid-contract attempt to obtain the waiver in 2014, (2) Charging Party's Executive Board adopted a written strike-support resolution in 2015 to bolster the bargaining unit's opposition to the waiver, (3) the bargaining unit voted 3 separate times between the Fall of 2015 and the Spring of 2016 to reject the waiver proposal, and (4) Charging Party's President emphatically reiterated to Respondent across the bargaining table that Charging Party will never agree to the waiver (*Tr., pp. 58, 68-73, 137-40, 266-67, 338-39; R Ex. 108, p. 3; R Ex. 114, p. 1; GC Exs. 22, 31*);
- Respondent still insists on a comprehensive bargaining waiver while knowing Charging Party and the bargaining unit would be better off without a contract than with a successor contract that has the waiver because, in the absence of a new contract, Respondent would still have a duty to bargain over changes to any employment terms pursuant to Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB, 501 U.S. 190, 198 (1991) and related precedent and Charging Party could strike (*Tr., pp. 68-69; GC Ex. 2, Art. VI, p. 3*);

- Respondent still insists on a comprehensive bargaining waiver while knowing the waiver is the only obstacle to reaching agreement on a successor contract with Charging Party because, among other reasons, the value of employee benefits under a successor contract would be unknown as a result of the waiver (*Tr.*, pp. 131-32, 295-96, 301-02, 310-11, 338-39, 404-07; *see also GC Ex. 11* (“It is readily apparent that the parties can reach agreement on a contract without further delay once the employer stops making bargaining contingent on something the Union cannot do and the employer cannot impose in any event.”));
- Respondent still insists on a comprehensive bargaining waiver – supposedly to have flexibility regarding the bargaining unit’s benefits levels – while admittedly not anticipating any change to the benefits levels during the life of the successor contract and, moreover, while summarily rejecting Charging Party’s compromise proposal that would allow Respondent to change benefits levels unilaterally so long as they remain substantially similar to the levels at the time of executing the successor contract (*Tr.*, pp. 126-29, 163-64, 207-08; *GC Ex. 38*);
- Respondent still insists on a comprehensive bargaining waiver – allegedly due to the need for no variation in benefits and other employment terms across the entire system – while not even seeking to have the same benefits levels or grievance procedures for all employees represented by Charging Party, much less across the entire system (*Tr.*, pp. 402; *GC Exs. 46-53*);
- Respondent still insists on a comprehensive bargaining waiver – purportedly to achieve cost savings – while admittedly not being able even to estimate what the cost savings would be if Charging Party were to agree to the waiver and, furthermore, while summarily rejecting Charging Party’s compromise proposal that would allow Respondent to put the bargaining unit into an existing benefits plan to enhance efficiency (*Tr.*, pp. 77, 407-08, 476-77, 486-87);
- Respondent has refused to come to the bargaining table, instead repeatedly sending an identical written note to Charging Party during several bargaining sessions to declare as follows: “If the Union is unwilling to accept our [bargaining waiver] proposals, we have no further room for movement on wages or any other open proposals that we might be prepared to otherwise move on.” (*GC Exs. 41-43*; *see also Tr.*, pp. 113-15, 187, 191-93; *GC Exs. 34-35*);
- When ultimately coming to the bargaining table to avoid an unfair labor practice charge, Respondent has engaged in physically aggressive behavior toward Charging Party’s bargaining representatives, made thinly veiled threats about decertification of Charging Party when Charging Party continued to oppose Respondent’s comprehensive bargaining waiver demand, and refused to state what wage increase Respondent could provide if Charging Party were to agree to the waiver (*Tr.*, pp. 51-57, 179, 197, 406-07, 477-78; *GC Ex 25*, p. 2; *GC Ex. 45*);

- Respondent has refused to extend the expired contract at issue and, subsequently, another contract with Charging Party that recently expired even though Respondent has historically extended expired contracts with Charging Party during bargaining for a successor contract (*Tr.*, pp. 131, 145, 151, 282-83; *U Ex. 1*); and
- While refusing to move on wages since December 14, 2015, Respondent has dealt directly with bargaining unit members to blame Charging Party falsely for the absence of a successor contract and to urge bargaining unit members to act in their “individual best interest” rather than collectively through Charging Party (*GC Ex. 21*, p. 1; *see also Tr.*, pp. 145-46).

B. Proposals Involving A Bargaining Waiver Like Respondent Insists To Impasse Are A Permissive Rather Than Mandatory Subject, So Any Attempt By Respondent To Distinguish The Supreme Court’s Precedent In Borg-Warner Would Fail As A Matter Of Law

Given the binding Supreme Court precedent in Borg-Warner, Respondent will likely attempt to argue that the demand for a comprehensive bargaining waiver is supposedly a mandatory subject. To support its argument, Respondent will attempt to rely on McClatchy Newspapers, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998) and KSM Industries, Inc., 336 NLRB 133 (2001).

As a threshold matter, a bargaining waiver of the sort demanded by Respondent has long been recognized as a permissive rather than mandatory subject. Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220, 1224 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991); see also In re ServiceNet, Inc., 340 NLRB 1245, 1247 (2003). Therefore, Respondent’s attempt to distinguish Borg-Warner has no merit.

In any event, neither McClatchy nor KSM expressly determined that the waiver of statutory bargaining rights is a mandatory rather than permissive subject. The issue in both cases was whether the employer violated the NLRA by unilaterally implementing a proposal involving a limited bargaining waiver. Importantly, and while ruling that employers violate the NLRA by unilaterally implementing a proposal with a bargaining waiver, the NLRB emphasized that

barring unilateral implementation of such a proposal is “necessary to prevent the gutting of the collective-bargaining process.” McClatchy, 321 NLRB at 1390.

In sum, the holding of McClatchy and KSM do not support Respondent’s position.¹ Instead, the NLRB recognized in those cases that a forced bargaining waiver disregards the statutorily protected collective bargaining process that the NLRB General Counsel and Charging Party seek to uphold through prosecution of the present case. McClatchy, 321 NLRB at 1391; KSM, 336 NLRB at 135.

C. Regardless Of Whether Respondent’s Comprehensive Bargaining Waiver Proposal Is A Permissive Or Mandatory Subject, Respondent’s Rigid And Extreme Demand For The Waiver Is Compelling Evidence Of Bad-Faith Bargaining

Even if Respondent’s demand for a comprehensive bargaining waiver were a mandatory subject, it would still represent bad-faith bargaining. The NLRB has long held in analogous cases that insistence to impasse on a mandatory subject can be evidence of bad-faith bargaining. See, e.g., Vanderbilt Prods. 129 NLRB 1323, 1329 (1961), enfd. 297 F.2d 833 (2d Cir. 1961) (ruling the employer’s insistence to impasse that the union agree to the employer’s right to discharge bargaining-unit members without restriction and other highly objectionable terms was bad-faith bargaining because “[i]t is difficult to believe that the Company with a straight face and

¹ Although not required to rule in favor of the NLRB General Counsel and Charging Party here, the NLRB could and should reconsider McClatchy and KSM to extent those cases are read to allow an employer to insist to impasse regarding any sort of bargaining waiver because such a waiver contravenes the compelling public policy codified by the NLRA. See, e.g., 29 U.S.C. § 151 (“*It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*”) (emphasis added). The NLRB should not allow employer’s like Respondent to insist on a Hobson’s choice for unions like Charging Party.

in good faith would have supposed that this proposal . . . might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.”).

More to the point, Respondent’s waiver demand – if adopted – would effectively nullify the ability of Charging Party to carry out its statutory function; accordingly, as explained more fully below, Respondent’s conduct violates the NLRA whether or not the waiver demand is a permissive subject:

[Employer] *proposals that seek to secure the employer’s right to act in a unilateral and unrestricted fashion* on key terms and conditions of employment, such as establishing total employer discretion over wages[], create a fundamental shift in the bargaining relationship and may *effectively nullify the union’s ability to carry out its statutory function* as the employees’ bargaining representative.

In re Liquor Indus. Bargaining Grp., 333 NLRB 1219, 1220 (2001) (citation omitted) (emphasis added); see also McClatchy, 131 F.3d at 1033 (reiterating that a proposed “management functions” provision could be evidence of per se bad faith bargaining if the provision enables an employer to evade its duty to bargain); Reichold Chemicals, 288 NLRB 69, 70 (1988), enfd. in relevant part sub nom. Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990) (reiterating that an employer’s proposal is evidence of bad faith bargaining when it demonstrates clear intent not to reach an agreement with a union).

As summarized in bullet-point form above in Part III.A., the circumstances surrounding Respondent’s waiver demand further confirm this is not merely a case of lawful “hard” bargaining beyond the reach of the above-cited precedent. Respondent’s rigid and extreme demand for a comprehensive bargaining waiver underlies a course of conduct that is plainly bad-faith bargaining in violation of the NLRA – regardless of whether the waiver is a mandatory or permissive subject and regardless of whether Respondent’s purported rationales for its fixed

position have any basis in fact. In re Liquor Indus. Bargaining Grp., 333 NLRB at 1220; Reichold Chemicals, 288 NLRB at 70; Vanderbilt Prods. 129 NLRB at 1329; see also McClatchy Newspapers, 131 F.3d at 1033.

On these additional independent grounds, Respondent should be found to have engaged in bad-faith bargaining. To hold otherwise would severely undercut the NLRB's "*fundamental purpose of protecting and promoting the practice of collective bargaining* and the rights of employees to fully engage in that practice through their chosen representative." E.I. Du Pont De Nemours, 364 NLRB No. 113 at *1 (emphasis added).

CONCLUSION

Respondent has engaged in bad-faith bargaining in 3 different ways, each of which separately establishes that Respondent has violated the NLRA. First, Respondent unequivocally conditions bargaining about wages or other terms on Charging Party first accepting a comprehensive bargaining waiver. Second, Respondent continues with its take-it-or-leave-it approach and, furthermore, has denigrated Charging Party as a bargaining representative as well as the collective bargaining process more generally. Third, Respondent insists to impasse regarding the permissive subject of waiver. Given the rigid and extreme nature of Respondent's demand for a comprehensive bargaining waiver, however, Respondent would still be engaging in bad-faith bargaining even if the waiver were a mandatory subject. In sum, Respondent continues to force Charging Party into a double bind that is the hallmark of bad-faith bargaining: either Charging Party agrees to waive virtually all bargaining rights before Respondent will "bargain" with Charging Party or Respondent will simply not bargain with Charging Party.