

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

MAYO CLINIC HEALTH SYSTEM

and

JACKIE LUBAHN, INTERNAL ORGANIZER, SEIU
HEALTHCARE MINNESOTA

MAYO CLINIC HEALTH SYSTEM

and

SEIU HEALTHCARE MINNESOTA

Case 18-CA-168834

Case 18-CA-174200

BRIEF TO THE ADMINISTRATIVE LAW JUDGE
ON BEHALF OF THE GENERAL COUNSEL

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I. STATEMENT OF THE CASE

The complaint alleges that the Employer, Mayo Clinic Health System, has refused to bargain in good faith by insisting on unilateral control of benefits throughout the term of a collective bargaining without legitimate business purpose, based on a number of actions which, taken together, demonstrate an intention inconsistent with the requirements of the Act. The matter was heard by the Hon. David I. Goldman, Administrative Law Judge, on April 11 and 12, 2017.

This brief will first review the facts developed at trial, then present arguments about the sole evidentiary issue raised at trial, admissibility of Jackie Lubahn's bargaining meeting notes, and general issues of witness credibility. Then the brief will explain the general legal principles at issue, and finally close with the argument about why the allegations of the complaint should be sustained.

II. FACTS

A. Background

The Employer is a nonprofit worldwide leader in medical care, research and education that employs tens of thousands of employees. It maintains several medical campuses throughout the United States. The Union represented an eight-person bargaining unit (now down to six, Tr. 135-136) of skilled maintenance workers at the Employer's facility in Albert Lea, Minnesota (GCX 2). Their most recent collective bargaining agreement was in effect from October 1, 2012 until September 30, 2015. The Union also represents a separate unit of 120 housekeepers, janitors, dietary employees and nursing assistants at the Albert Lea facility, called the "general unit" (Tr. 150).

B. 2015 Meetings and Correspondence

At the beginning of the negotiations, the Employer was represented by Kylene Schaefer and Monica Fleegel, two Human Resources Department staffers from Albert Lea with a number of years behind them negotiating with the Union (Tr. 30). For the Union, Jackie Lubahn attended every meeting until May 2016, and was usually accompanied by unit members Nate Johnson and Bill Johnson.¹ In Lubahn's experience including six prior contracts, the parties reached agreements with only these local participants within a few meetings (Tr. 68, 151).

As might be expected between parties with such a long history, most of the proposals should be considered "tweaking," with a pay raise. The "new" issue for 2015 was the Employer's proposal to change employee benefit plans related to health insurance coverage, pension, funeral leave, paid time off (PTO), and short term disability (STD) to match the plans applied to nonunion employees system wide, including an explicit right to make changes in the benefits at any time without bargaining. This applied to basically every fringe benefit plan included in the prior agreement, excepting only salary continuation (long-term disability). (GCX 16, 17, 18; Tr. 32.) Hereafter, this "new issue" in the Employer's proposals will be referred to either as the "me-too" provisions or waivers.

The parties met all day August 27 and 28 (Tr. 162, 166).² They exchanged proposals (Tr. 162-163, GCX 16, 17). Each side read and explained its proposals, and asked questions about the other's (Tr. 163). Jackie Lubahn said the Union wasn't interested in the me-too proposals (Tr. 163). At one of the first three meetings, Fleegel

¹ Hereafter, only changes in the attending line-ups will be noted.

² "All day" generally meant about 9 a.m. to 3 or 4 p.m. (Tr. 162).

said the Employer had no present intention to make changes in any of the plans, it just wanted to be able to (Tr. 163-164).

As background, the Union's predecessor bargaining agent, UNITE-HERE, agreed to "me-too" for health benefits several years previous (Tr. 136-137). In 2014, the Employer proposed mid-term to convert other benefits to the "me-too" plans and the Union accepted it for dental benefits (GCX 3, 40). Unit employees came to regret accepting the waiver after the Employer drastically increased insurance premiums soon after obtaining the first waiver (Tr. 137). In 2015, the Union made it clear, early and often, that it was not going any further down that road.

On September 14, the Employer outlined other benefit plans, such as tuition reimbursement, that it provided to nonunion employees, and offered them to the Union if it would get on board with the waivers (GCX 39, p.9). Jamie Gulley joined the meeting in the afternoon to repeat the Union's resistance to waiving its rights to bargain over benefits for a full contract term (Tr. 168). Among other things, he said, you can't impose this on us, get rid of it, "we would not be giving up our bargaining rights under any circumstances" (Tr. 33, 169).

On September 24, Lisa Weed joined the Union committee to read a recently-enacted executive board resolution in support of the Union's resistance to the waiver language, which also supported a strike at any time (Tr. 100-101, 170-171; GCX 30, 31). The rest of the meeting was occupied with "side bars" the mediator asked the parties to keep confidential (Tr. 102-103). The parties agreed to extend the collective bargaining agreement for one month (GCX 32).

The Union reiterated its stiff opposition to the waivers by letter dated September 30, in which it also threatened to file an unfair labor practice charge (GCX 5).

On October 7, Lubahn referred to the executive board resolution and repeated the Union's resistance to the waivers (Tr. 172). The Employer merely touted the attractiveness of the nonunion benefit plans (GCX 39, p.11). Nate Johnson explained why the Union was so resistant by referring to what happened when the Union accepted the waiver in connection with health benefits in 2003 – the employees accepted the Employer's promise of a "sweet" benefit plan, but were almost immediately hit with unilateral implementation of draconian premium increases (Tr. 138, 172). The Employer made its one and only modification of the benefit language – memorializing the truism that the waiver expired with the contract (Tr. 172-173; GCX 18).³ The Union said, that doesn't help (Tr. 173).

It wasn't all good for unit employees – short-term disability benefits were lower (RX 111 p.2) and at least one employee stood to lose some PTO time under the new standards (RX 105 p.3). The Employer refused even to grandfather him at the old rates (RX 107) (as Fleegel said on August 28, "this is a Mayo Enterprise policy so because they are not bedside nurses we can't offer that level to them" (RX 105 p.14)).

Also on October 7, the Employer answered the Union's September 30 letter professing its good faith and its intention to bargain to impasse on the waiver proposals (GCX 6). The Union answered on October 9, protesting any potential implementation of the waiver proposal and professing acquiescence in the substance of the Employer's

³ All waivers expire with a contract as a matter of law, e.g., E.I. DuPont de Nemours, 364 NLRB No. 113 (Aug. 26, 2016), but as Gulley explained, once adopted, it is extremely difficult to "regress" from them (Tr. 41).

proposed benefit plans (GCX 7). The Employer answered on October 13 that it was not entertaining any intention to implement the waiver proposals (GCX 8). On October 14, the Union wrote again to state that the parties were close to an agreement on all other issues, if only the Employer would abandon the waivers (GCX 9).

On October 22, Jeff Vomhof from the Employer's central Human Resources office in Rochester joined the Employer committee, and attended basically the rest of the meetings. This was the first time anyone from the Employer's main human resources office in Rochester attended bargaining in Albert Lea (Tr. 75, 174). Vomhof closed the meeting stating that he had no authority to drop the waiver language (Tr. 175-176).

On October 27, the Union reiterated in writing its position that the waiver proposals were a "deal-breaker" (GCX 10). Contrary to past practice with this unit, the Employer refused any further extension of the old contract (Tr. 206).

On November 23, the parties (at which time Keri Slegh replaced Monica Fleegel on the Employer committee, Tr. 176) had another "side bar" session (Tr. 176-177). On December 14, the Employer started "shuttle diplomacy" with the mediator going back and forth to separate rooms rather than meeting with the Union face-to-face (Tr. 179). It made its wage offer prospective only, and started explicitly tying other issues to the Union's acceptance of the benefit waivers (Tr. 179).

On December 18, the Union wrote that it "does not understand why the employer now makes any future bargaining dependent on a term that is absolutely unacceptable and, moreover, that is illegal for the employer to impose. The impasse created by the employer serves no constructive purpose" (GCX 11).

On New Year's Eve, the bargaining unit voted unanimously, for a second time, to reject the bargaining waivers (Tr. 58, 140).

C. 2016 Meetings and Correspondence

On January 12, Jeff Zahnle joined the Employer bargaining committee and appeared at most of the rest of the meetings, and Jamie Gulley rejoined the Union's committee for this meeting (Tr. 180-181). Vomhof explained that all of the other unions the Employer deals with have caved in to the waivers on pension (Tr. 37). Gulley asked, if the Union accepted the Employer's pension proposal, what would be the value of the pension plan in 2017, and Vomhof said he could not predict the future (Tr. 39). He did say the last significant changes had a five-year notice, although other benefits could have less notice (Tr. 39). (See also GCX 24, pp.1-3; GCX 39, pp.15, 18.⁴)

Vomhof said the Employer's goal was consistency, and Zahnle said the employees should trust Mayo not to make big changes across the institution – if that happened, the Union could always propose something after the fact (Tr. 40). Gulley asked if the Albert Lea maintenance group could join the non-standard pension plan in effect for SEIU-represented employees in Rochester, and Vomhof said no. Gulley asked if the Employer was currently contemplating making any changes in any of the benefits, and Zahnle said no (Tr. 42). (GCX 24, pp.2-3; GCX 39, pp.18-19.)

Still on January 12, the Employer described some other benefits including identity theft protection and tuition reimbursement that the Union could have, but only if it agreed to the waivers first (Tr. 43). The Employer also said it heard employees liked

⁴ It has become apparent that GCX 39, Lubahn's notes, are out of order for the January 12, meeting. Page 15 ends with "others not in." Counsel for the General Counsel submits that page 18, which begins with a comparison of which other unions have accepted waivers and which haven't, should follow. Pages 16 and 17 should follow page 19. This brief will continue to refer to specific pages as marked.

the pension benefit (GCX 24, pp.3-4). Vomhof said the final contract needs to include the waivers, the Employer was prepared to keep negotiating, and it was set on these waivers being in any final deal. Gulley said they were at impasse on this issue (Tr. 43, 181). One of the Employer committee members said the Union was trying to trick it into committing an unfair labor practice (Tr. 182), and that all prior TA's were contingent on achieving a package deal including the waivers (Tr. 43-44). Lubahn said the Union would rather maintain the status quo than take the waivers, even with the new benefits (Tr. 45). (GCX 24; GCX 39, pp.19, 16.)

After a break, the Employer made a "modified" proposal on other issues, adding a nickel extra shift differential in the second year of the contract (Tr. 47). Lubahn said she was disappointed in that that was basically no movement (Tr. 47). Nate Johnson said the Employer was misreading employee sentiment, they were unanimously opposed to the waivers based on prior experience of losing things whenever they gave the Employer this kind of discretion (Tr. 48, 140-141, 183). At some point during this meeting, the Employer suggested taking six months off so the Union could cool off (Tr. 72-73). The Union asked for a one-year extension of the expired contract, which the Employer rejected, so the Union rejected the cooling-off period (Tr. 72-73). The parties wrapped up arguing about whose turn it was to make a move at the beginning of the next meeting (Tr. 49). (GCX 24, pp.5-7; GCX 39, pp.16-17.)

In a letter dated January 14, the Union repeated its request for an evaluation of the value of the Employer's proposal in the future, which it recounted was met in the meeting only by an accusation that the Union was trying to trick the Employer. It also

reviewed the evolution of the parties' economic proposals over the course of the negotiation so far – not much coming from the Employer. (GCX 12.)

In a letter dated January 22, the Employer disputed the Union's claim that it asked in a bargaining meeting about the value of the Employer's proposal (still without answering the question) (GCX 13). This was the last time the Employer commented on the negotiations in correspondence directed to the Union. On January 27, the Union wrote to reiterate its request for an evaluation of the value of the plans in future years (GCX 14).

On January 29, Lisa Weed rejoined the Union committee (GCX 30). The Employer started by insisting on "shuttle diplomacy" (Tr. 104, 184). After an hour-and-a-half, the Employer agreed to meet to discuss one issue: superior privileges (known in some contracts as "minimum standards") (Tr. 105-107, 185). After getting the Employer into the room, Jackie Lubahn asked if they could put aside the waiver proposals temporarily and see where they could get on other issues (Tr. 185). The Employer committee split on whether to discuss anything but superior privileges – Zahnle at least was willing to discuss all issues (Tr. 108-109).

After some discussion about the precise meaning of the superior privileges provision, and Employer insistence that it and everything else was inextricably tied to the waivers, Lubahn asked, how are wages tied to the waivers? (Tr. 110-111). Zahnle answered that the Employer had some room to move on wages, but only if the Union caved in on the waivers first (Tr. 112). Lubahn asked to put the waivers aside and bargain over wages, and Zahnle objected to being hamstrung and declared meeting face-to-face "pointless conversation" (Tr. 112). The parties broke again, and the Union

then offered to reduce its holiday pay proposal from double time to single time on four holidays (Tr. 113). The Employer responded through the mediator by repeating its last offer on shift differential and jury pay, attached to the following statement (Tr. 114):

Proposals regarding compensation and benefits are economic items. Economic items are very difficult to separate as one impacts the other. There is cost to administering multiple benefit plans, those costs have to come from somewhere so they limit our ability to make any movement on wages. One impacts the other; to separate and negotiate in isolation will benefit neither party and especially the staff who will not benefit from the new benefits that other staff enjoy. . . . Willing to discuss movement on wages. All contingent to acceptance of the enhanced benefit package with full me too language. (GCX 34.)

The Union answered with the following message delivered by the mediator:

“Does the Union have to accept the employer’s me too language before further bargaining over terms will occur?” The Employer answered with the following message delivered by the mediator: “We have given a proposal. We are willing to listen to a counter proposal.” (Tr. 115-116; GCX 35.) The Union asked for a yes-or-no answer; the Employer refused to give it that way (Tr. 116-117). (GCX 33.)

On February 1, the Union wrote to confirm its description of the prompt for face-to-face meetings on January 29, and to reiterate its request to talk about something else for a while, which had been rebuffed by the Employer (GCX 15). After that, neither side wrote any more letters describing the negotiations to each other.

On February 22, the mediator brought the Union committee (just Jackie Lubahn and Nate Johnson this time) (Tr. 186-187) a note that read:

We have shared with the Union which of their open proposals we still have room for movement on as well as which of their open proposals we will not agree to under any arrangement. With respect to the open proposals that we have room to move on, if the Union is willing to agree to all of our “me too” proposals, in exchange for that agreement, we have room to move on those proposals. If the Union is unwilling to accept our “me too” proposals, we have no further room for movement on wages or any other

of the open proposals that we might be prepared to otherwise move on. We intend to continue bargaining in good faith as we have done to date and are open to further discussions, but without the Union agreeing to our “me too” proposals, we don’t presume to see a means to bridge the gap between the parties. (GCX 41.)

The mediator made a list of specifically what was open and what was not. The Union sent back a message stating that “We do not accept the employer’s me-too proposals and still expect the employer to give a counter proposal (their turn)” (Tr. 188). The mediator returned stating that the Employer stood by its statement (Tr. 189). The meeting ended about 45 minutes after it began. (GCX 39, p.20.)

On March 10, the Union delivered a proposal through the mediator removing another holiday from its proposal to increase holiday pay from time-and-a-half to double time (Tr. 192). The Employer answered by sending a note identical to the one it sent on February 22 (GCX 42). In response, the Union decreased its wage offer (Tr. 193). The Employer answered by sending a third note identical to the February 22 message (GCX 43.) The Union then asked if the Employer had a last-best-final offer? (Tr. 193). The Employer answered by asking if the Union had one? That ended the meeting. (GCX 39, pp.21-22.)

On March 15, 2016, in conjunction with a decertification campaign at the Employer’s Red Wing, Zumbrota, and Ellsworth Minnesota facilities (GCX 19), the Employer’s Human Resources Advisory Director, Nicole Rundquist, sent correspondence to employees at those facilities (GCX 20). The letter stated, in pertinent part:

- Approximately 95% of the employees (that’s over 50,000) across Mayo Clinic are non-union, and Mayo Clinic has been consistently named one of the Top 100 Employers in Fortune’s ‘100 Best Companies to Work For’ survey. . . . This ranking would be impossible if you believed the union’s claims that all of your pay and benefits would be taken from you the moment you became non-

union. This is complete nonsense! These things were not taken away from any of the several other groups who chose to decertify from their union at various Mayo Clinic sites, . . . Believing the false unsubstantiated claims is playing right into SEIU's hands in their attempt to keep dues-paying memberships.

- In its flyer, the union urges you not to gamble on decertification, but in reality the gamble is having a union represent you. Bargaining during negotiations is the true gamble. You could get more, you could get less. You could be required, against your wishes, to go out on strike! . . . “Nationally, layoffs and strikes are a hard reality of unions that they like to ignore. All of our jobs are made more secure by the success of our business, working together for excellent patient care, NOT being represented by a third party union.
- The union has apparently prompted some to repeatedly state that Mayo Clinic cannot guarantee any particular benefits or compensation advantages should you choose to decertify from the union.”. . . It's not because we wouldn't prefer to do so, or because we would be unwilling to do so, but rather because it is the law that we not make any promises or comment on what might happen if a decertification is successful!
- You have an extraordinary opportunity here. We invite you to give us a chance and educate yourself on the true facts. It is your choice to rejoin a union, this one or another one, in the future if you're disappointed. Our experience has been that this doesn't happen, and we're confident you won't go back either if successful.

Rundquist attached a chart to her letter purporting to compare union and non-union terms and conditions of employment the facilities. According to the chart:

- Non-union wages for “like” jobs in the MCHS [Mayo Clinic Health System] are higher.
- Non-union employees have richer PTO and Short Term Disability (STD) plans than what is provided in the union contract.
- Non-union employees have richer retirement plans (including pension and 403(b) match).
- Non-union employees are eligible for the Professional Development Assistance Program (PDAP), which is much more generous than the current tuition reimbursement program available to union members. In addition, non-union employees are eligible to apply for the Dependent Scholarship which provides \$3,000 per year per student.
- Shift Differential pay for non-union staff is greater than what is provided in the union contract.

Shortly thereafter, on March 31, 2016, the Red Wing, Zumbrota and Ellsworth employees voted to decertify the Union (GCX 19).

On April 11, the parties started out in “shuttle diplomacy,” despite repeated Union demands to meet face-to-face. Through the mediator, the Employer again threatened retroactivity, and asked for a “cooling off” period of six months without negotiations (Tr. 195). It took threat of a ULP charge before the Employer agreed to meet face-to-face (Tr. 52, 196). (GCX 39, p.23; GCX 44, 45.)

Then Gulley read a list of five prepared questions. Gulley asked if the Employer would bargain about wages if the Union did not first agree to the waivers, and Vomhof read a prepared statement back to the effect that the Employer had no further room to move on wages without movement from the Union on the waivers. (Tr. 55; GCX 25, p.1.)

Gulley asked what terms had to have the waivers attached before the Employer would bargain over wages, and Vomhof listed PTO, STD, pension, and health benefits. Gulley left his script to ask, anything else? Vomhof answered that the Employer needed to get acceptance on all the benefits with “me-toos” before it could move on wages. Then Gulley asked if the Employer would agree to anything that was not subject to the waivers? Vomhof repeated that PTO, STD, pension, and health benefits needed to be agreed to with “me-too” language. Gulley asked if that meant the Employer would not agree to any terms related to those benefit plans without the “me-too” language, and Vomhof said that was correct. (Tr. 55-56; GCX 25, p.2.)

Finally, Gulley asked which TA’s are not subject to the Union’s acceptance of the waivers? Schaeffer said union security is a TA, and Vomhof interrupted her to say this was a package proposal. Gulley asked if even union security was contingent on the waiver, and Zahnle said he already answered that. Gulley said he was writing that

down as a refusal to answer, at which point the Employer committee blew up, started yelling, and stood up suddenly enough to knock over their chairs. Zahnle said this was why they didn't want to meet face to face, and Vomhof and Kari Slegh added this was why the Red Wing unit recently voted to decertify the Union. (Tr. 56-57, 197; GCX 25, p.3; GCX 39, pp.26-27.)

The Employer then sent a letter to the seven-member bargaining unit on April 20, 2016, expressing the Employer's view of the negotiations (GCX 21). The letter stated, in pertinent part:

The plans being offered are the same plans enjoyed by the majority of employees across the Mayo Clinic, including many of your other union co-workers. Several of you have expressed interest in receiving these new benefits, and the union has also expressed a willingness to accept these new benefits. All we are asking is that the benefits be taken under the same terms as are applied to all other employees across Mayo Clinic who are on these plans. Unfortunately, the union is asking that these benefits be provided under different terms and conditions than what is provided for everyone else. Essentially, the union is asking for a 'special deal' for just this group of employees.

...[O]ur benefit proposals are part of a much larger benefit standardization project across all of Mayo Clinic. It simply isn't efficient or the best use of Mayo Clinic resources to administer many different sets of benefit plans to various groups across Mayo Clinic. Instead, we are able to provide more generous benefits through the efficiencies gained by providing standard core benefits across all employees.

It is worth reflecting on whether SEIU is truly looking out for your individual best interests by refusing to accept the benefits that you have said you wanted, or are they just looking out for their own interests.

The bargaining unit replied with a letter of its own to the Employer (GCX 22). The Union's letter stated, in pertinent part:

Our opinions matter. Our work is important. We do a good job. Before any changes are made that will affect our jobs or our benefits and the lives of our families we deserve to be consulted. We deserve to have a say and a vote in what happens to our work in the future. We remain hopeful that we can reach an agreement on a new contract that covers our wages,

benefits and working conditions, but we want you to know that we have no intention of giving up our bargaining rights to do so.

On May 19, Lisa Weed rejoined the Union committee, and Kylene Schaeffer stopped coming, replaced as the Employer's chief negotiator by Jeff Vomhof (Tr. 119; GCX 36). The Employer opened the meeting by stating through the mediator that it had nothing new to offer (GCX 36). The parties got together and the Union drew up a condensed version of a "package" offer, not much different from previous offers on any significant issue (Tr. 119; GCX 37). The Employer condensed its outstanding offer into a similar "package" (Tr. 120). Then the Union drew up a new package offer, including modifying its offer on benefits to accept current plans or "substantially similar" plans (Tr. 121; GCX 38).

The traveling mediator conveyed a message that the Employer had no counter, but would like to discuss "where we are at" and "where you want to go from here" (Tr. 122-123). Back in joint session, Nate Johnson then reiterated the unit's resolve against waiving its right to bargain at any price. The Employer said it wasn't seeing the Union's latest package as any compromise, or as permission to make any changes. (Tr. 123; GCX 36, pp.2-3.) It also insisted on the .5 FTE eligibility standard for PTO in the face of the Union's request to maintain its current 20 hour average standard (GCX 36, p.3). The Employer repeated its opposition to "any special deal" (Tr. 126; GCX 36, p.4.) The Employer repeated its intention to get "firm me-too language" (Tr. 124-125). The Employer repeated that if it did something the Union didn't like, the Union could always try to change it in future negotiations (Tr. 129; GCX 36, p.5).

On September 15, the parties discussed a recent snafu over merging pension plans in other units, and the recent retirement of a unit member (Tr. 59-62, GCX 26).

Gulley said the waivers were “not agreeable” to the Union. Nevertheless, he asked the Employer to specify where it could go on wages so he could have the unit vote on the proposal (Tr. 477-478). Vomhof said the Employer was not at the end of the road on wages, but it wouldn’t be any more specific without a written commitment to accept the waivers first (Tr. 478). The Union declined. (GCX 26.) Since then, the parties have met only long enough to express their continuing resolve (Tr. 64).

Since then, the contract between the same parties involving a larger unit (120 employees) including service and maintenance employees at the same facility expired. Negotiations there are hung up over the same waiver issue. (Tr. 29, 66-67.)

III. EVIDENTIARY ISSUE: LUBAHN’S NOTES

There was only one evidentiary ruling at the trial that merits any discussion, that being the admissibility of Lubahn’s bargaining notes as substantive evidence. Bargaining notes taken during meetings have routinely been admitted by the Board for various purposes as substantive evidence of the course of negotiations, usually without explaining any particular rationale for overcoming their nature as hearsay. E.g., Atlantic Queens Bus Corp., 362 NLRB No. 65, ALJD slip op. at 6 (Apr. 21, 2015); Prentice-Hall, Inc., 290 NLRB 646, 648 (1988). Every witness in this case that took notes during the meetings was permitted to offer those notes as substantive evidence.

Lubahn also took notes during the meetings, but she alone testified that she “cleaned up” her notes after the meetings by recopying them, completing sentences, and adding things that she remembered at the time she did the clean-up. With respect to every meeting but the last, May 19, she did the clean-up within a day or two of the meeting (Tr. 153). She then threw away the original notes that she took during the meetings because she didn’t know any better (Tr. 153).

Although it will make little if any difference to the result in light of Lubahn's extensive recollection of the contents of the meetings, her notes should also be considered fully admissible under the "recorded recollection" exception of Fed.R.Evid. 803(5), which permits admissibility of:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

Are Lubahn's notes a "memorandum or record concerning a matter about which a witness once had knowledge"? Yes, she was present for the meetings. At the trial, did Lubahn have "insufficient recollection to enable the witness to testify fully and accurately"? Yes, she so testified, which makes sense nearly a year after even the most recent of the events in question.

Were the notes "made or adopted by the witness when the matter was fresh in the witness' memory"? This exception to the hearsay rule does not require that the memorandum be made contemporaneous with the recorded event. See, e.g., United States v. Smith, 197 F.3d 225, 231 (6th Cir. 1999); United States v. Lewis, 954 F.2d 1386, 1393-1394 (7th Cir. 1992). To an extent this is a judgment call, and sufficient reason for distinguishing Lubahn's May 19 notes from the others.

This is one aspect of the Rule that has at least been passed on by the Board, although briefly. In Economy Fire & Cas. Co., 264 NLRB 16, 16 fn.1 (1982), the Board found an affidavit given two-and-a-half months after the events in question met the conditions of the exception, while in Gonzales Packing Co., 304 NLRB 805, 817 (1991), an ALJ found two months between the events and the statement too long. Two months

may be debatably a long time to remember an event, but the same day or the next surely is not.

As Lubahn testified, she only added things that were still fresh in her mind when she made the copy. That should be sufficient foundation to satisfy both the “freshness” requirement and the requirement of correct reflection.

The question here is whether or not GCX 39 qualifies for admissibility under Rule 803(5). Whether there may have been other notes that would also be admissible under the same or another exception is not relevant to that. Lubahn testified that these notes are her best recollection, made when the events were fresh in her mind. That is the foundation for admissibility. Admissibility is different from credibility – if other contemporaneous notes or other testimony differs from Lubahn’s notes, the fact finder will have to weigh the differences, but that does not affect the threshold question of admissibility. If a fact-finder thinks destroying the originals affects Lubahn’s credibility, that, too, is a different issue.

This could be analyzed as a two-part issue. Lubahn testified that she copied the notes, adding a word or two here and there to make complete sentences, and added things that were still fresh in her mind when she made the copy. The first part is admissible as a copy of the (admissible) contemporaneous originals unless Lubahn destroyed the originals in bad faith. Fed. R. Evid. 1004(1). The second part is admissible as straight recorded recollection. See United States v. Cambindo Valencia, 609 F.2d 603, 633 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980). Since all of the notes are therefore admissible, it doesn’t matter whether Lubahn could distinguish what she copied from what she added.

Again, in light of Lubahn's extensive testimony about the meetings, there isn't much that needs supplementation from the notes. However, at least for some background matters like who all attended, how long the meetings lasted, and how each side's proposals evolved over the course of the meetings, Lubahn's notes are the only complete Union record through April 11, and they should be considered admissible, substantive evidence.

IV. CREDIBILITY ISSUES

There are only a few disputes of fact, and not all of them even matter to any substantive issue. Some that do matter to a substantive issue, including whether the Employer ever offered to drop its insistence on a waiver connected to funeral leave, are discussed in the argument section where that dispute matters.

Who got mad at the end of the April 11 session? It wouldn't even be that bad if there was some screaming and shouting. Collective bargaining can be an intense and emotional process. The problem with this incident is if the Union witnesses are credited over the Employer witnesses, then the conclusion would follow that the Employer witnesses made a coordinated effort to color their testimony to make themselves look better, a serious credibility and good faith issue, even when it doesn't matter.

In sum, the Union story is that after Gulley accused Vomhof of refusing to answer a question, the Employer committee in unison started shouting, got up suddenly enough to knock over their chairs, and slammed the door on their way out, while the Union committee sat in stunned silence taking notes. The Employer story is that everyone was talking loudly just because they had to in order to be heard over the din, the chair just stuck on the carpet, and the door always slams.

The Union witnesses should be credited over the Employer witnesses. First, look at the notes – the last comment noted from the Union side is Gulley’s assertion that Vomhof refused to answer a question. But that’s what started tempers rising. No one’s notes have any Union comments after that – every one that has a description of the blow-up refers only to Employer statements after that, including this is why we don’t want to meet face to face (Gulley, GCX 25), you tried to trap us, no wonder 40 people voted to leave (Lubahn GCX 39), I did not say that and you know it, this behavior is exactly why staff voted to decertify in Red Wing (Slegh, RX 195). Schaefer, Vomhof, and Zahnle have no notes describing this incident (RX 130, 185, 205). Thus, the notes support finding that it was only the Employer committee that was shouting, while the Union committee sat taking notes.

Second, consider demeanor. Zahnle got upset simply describing the incident (Tr. 422-423). Lubahn credits him with starting the shouting, and Gulley credits him with knocking his chair over. Zahnle’s demeanor on the witness stand was consistent with those accusations.

Third, consider likelihood. Zahnle said the chair always stuck in the carpet. If that was true, he should have been able to anticipate and control it – unless he was too upset to remember that might happen.

They all testified that Gulley asked the same five questions. Yet in all their notes, they accurately recorded five different questions (RX 130, p.5; RX 205, p.5). The last one was off the subject of benefits anyway, directed at the effect of the waiver proposals on previously-reached TA’s. Gulley asked it again when he got conflicting answers from Schaefer and Vomhof (Tr. 56-57). The Employer witnesses’ insistence that Gulley kept

asking the same question over and over shows how little attention they were really paying.

A second issue in dispute is the conditions upon which the Employer agreed to meet face-to-face on January 29. The Union witnesses said (Tr. 105-108, 185) it was based on Employer insistence that it would only discuss the superior privileges clause (GCX 2, Art. XVI, p.7). The Employer witnesses said it was Union's idea to concentrate on the superior privileges clause and that it was tricked into attending on that basis (Tr. 326, 373-374, 439-440). Why would the Union want to talk about the superior privileges clause? It wasn't in the Union's proposal at all, but deleting was in the Employer's (GCX 16, 17). The Union was happy with the status quo on this issue, but the Employer had to get it out of the contract because it was a contradiction to its waiver proposals. And the ensuing discussion was all about the Employer's problems with it (it's been used beyond what it was intended for), not any Union issues with it. The Union had no interest in talking about this provision. In addition, the Union wrote its version of the event into a letter on February 1 (GCX 15), and the Employer never answered that description, despite its prior willingness to engage on the written characterizations of the meetings. Therefore, the Union story should be credited.

V. ARGUMENT

The Employer violated Section 8(a)(1) and (5) of the Act by rigidly insisting, without legitimate and substantial business reasons, on bargaining waivers allowing the Employer to make unilateral changes to any and all fringe benefits during the term of the contract, while also communicating to employees that a contract will not result in terms and conditions of employment any better than those of non-represented employees. The Employer's conduct gives rise to an inference of bad-faith bargaining,

since the Employer's apparent intent is to reach agreement only on terms that will demonstrate to employees that union representation is of no benefit to employees.

A. Applicable Legal Principles

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."⁵ "Whether a party is chargeable with an overall failure to bargain in good faith 'involves a finding of motive or state of mind,' which must be inferred from the evidence viewed as a whole."⁶

In evaluating the claims that an employer is not bargaining in good faith, "the Board looks to the employer's conduct in the totality of the circumstances in which the bargaining took place."⁷ "The Board not only looks to the employer's behavior at the bargaining table but also to its conduct away from the table that may affect the negotiations."⁸ Relevant considerations include whether the employer's bargaining conduct "may even have been motivated by anti-union animus"⁹ or was accompanied by expressions of "hostility towards the union,"¹⁰ or entailed advancing and adhering to bargaining positions "without adequate explanation or justification."¹¹ Employer communications protected by Section 8(c) of the Act may nevertheless constitute

⁵ Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984) (quoting NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960)).

⁶ NLRB v. Columbia Tribune Pub. Co., 495 F.2d 1384, 1391 (8th Cir. 1974) (quoting NLRB v. Reed & Prince Manufacturing Co., 205 F.2d 131, 139-140 (1st Cir.), cert. denied, 346 U.S. 887 (1953)).

⁷ NLRB v. Billion Motors, Inc., 700 F.2d 454, 456 (8th Cir. 1983).

⁸ Id.

⁹ Columbia Tribune Pub. Co., 495 F.2d at 1391.

¹⁰ Billion Motors, Inc., 700 F.2d at 456.

¹¹ Id. (citing and quoting NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 153 (1956) ("refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith")).

relevant evidence bearing on the presence of unlawful motives for the employer's bargaining conduct.¹²

Conduct away from the bargaining table sometimes plays a critical role in identifying bargaining conduct that falls short of the duty to bargain in good faith. For example, in General Electric Company,¹³ the employer prepared for negotiations on a national contract by conducting its own research and on that basis formulating a single firm offer that anticipated the union's demands. The employer launched a massive publicity campaign involving all media and communications sources. The employer then presented its offer to the union as 'fair and firm' without holding anything back for later trading or compromising. In finding a Section 8(a)(5) violation, the Board reasoned that "collective bargaining as thus practiced is tantamount to mere formality and serves to transform the role of the statutory representative from a joint participant in the bargaining process to that of an adviser."¹⁴ The Board made its decision upon consideration of the totality of the employer's conduct.¹⁵ The Second Circuit upheld the Board's decision, recognizing that it turned on two key considerations: first, that the employer took a 'take it or leave it' approach to negotiations in general which emphasized both the 'powerlessness and uselessness' of a union to its members and second, that by taking the public position that it was "the true defender of the employees' interests," the employer demonstrably impaired its ability to alter its

¹² NLRB v. General Electric Co., 418 F.2d 736, 760-761 (2nd Cir. 1969), cert. denied 397 U.S. 965 (1970); Safeway Stores, Inc. v. NLRB, 641 F.2d 930, 933 (D.C. Cir. 1979) ("[T]he employer's communications are more than evidence of an unfair labor practice; they are the unfair labor practice itself. It defies logic and good sense to suggest that such statements are beyond the purview of the Board"), cert. denied, 444 U.S. 1072 (1980).

¹³ 150 NLRB 192, 194 (1964), *enfd.* 418 F.2d 736 (2nd Cir. 1969).

¹⁴ *Id.* at 195-196.

¹⁵ *Id.* at 197.

bargaining positions in response to union counterproposals, even where doing so would be reasonable.¹⁶

Similarly, in Safeway Trails,¹⁷ the Board held that the employer, by its entire course of conduct, attempted to ‘undermine and subvert’ the authority of the employees’ chief bargaining representative.¹⁸ Specifically, after learning that the union representative was not going to present the employer’s unchanged offer to the membership for a vote, the employer sent copies of its proposed contract and “final offer” to the employees. Attached to the contract was a letter blaming the union representative for the failure to reach agreement. The letter told the employees that the “time for action...is past due” and that each employee should “act in the interest of (his) own personal welfare and aid in getting an early settlement.”¹⁹

In the present case, manifest hostility to the Union was part of the background of the negotiations and ultimately found expression at the bargaining table. Here, as in General Electric, the Employer publicly took the position that the labor policies that it had formulated independently for its non-union employees best served the employees’ interests. Furthermore, as in General Electric, the Employer’s persistent and public denigration of the Union’s demands for any different terms impaired its ability to give good faith consideration to any reasonable alternatives proposed by the Union. And here, as in Safeway Trails, the Employer publically blamed the Union for the failure to reach agreement, and, after disparaging union representation as a means of bettering their working conditions, urged employees to act in their own personal interests.

¹⁶ 418 F2d 736, 756, 758-759 (2nd Cir. 1969), *cert denied* 397 U.S. 965 (1970).

¹⁷ Safeway Trails, 233 NLRB 1078 (1977), *enfd.* 641 F. 2d 930 (D.C. Cir. 1979). *cert denied* 444 U.S. 1072 (1980).

¹⁸ *Id.* at 1082.

¹⁹ *Id.* at 1080.

Although these statements may be protected under 8(c) of the Act, the motivation underlying the Employer's bargaining position is clear—a *union is not needed because the Employer knows what's best for its employees.*

B. The Employer's Conduct Away From the Bargaining Table Manifested its Hostility to Collective Bargaining

As shown above, the Employer's HR Advisory Director Nicole Rundquist sent a March 15, 2016 letter to the Union-represented employees at certain other Mayo facilities (Red Wing, Zumbrota, and Ellsworth) while the Albert Lea skilled maintenance unit negotiations were still ongoing, and only weeks before negotiations in another, much larger SEIU unit, the 120 employee Albert Lea "general unit," were about to commence. Rundquist's letter casts a revealing light on the Employer's Human Resources Department's labor policies and thus on the mindset that the Employer's negotiators brought to the bargaining table in dealing (and preparing to deal) with the two SEIU Albert Lea units. The letter similarly illuminates the Employer's conduct in the contemporaneous negotiations with other bargaining units where the Employer also insisted on the fringe benefit waiver language at issue here.²⁰

²⁰ The Employer repeatedly justified its position by pointing out that other bargaining units, including some units represented by the Union, have accepted benefits bargaining waivers in their contracts. The Employer is apparently of the view that union acceptance of its bargaining position precludes a finding that it insisted on the proposal in bad faith. However, in Gen. Elec. Co., Battery Prod., Capacitor Dep't v. NLRB, 400 F.2d 713, 726-27 (5th Cir. 1968), cert. denied, 394 U.S. 904 (1969), the court rejected that facile conclusion, stating:

"The company attempts to absolve itself of bad faith inflexibility by pointing out* * *that a contract was in fact negotiated. * * * * In contrast, we quote from Judge Friendly in Siegel Co. v. NLRB, 2 Cir. 1965, 340 F.2d 309, 310:

'When the issue has been pressed throughout, the party unable to force the other to bargain or to include an agreed provision in the written contract does not 'waive' a completed refusal to bargain simply by signing up for the best it can get. It would seriously contravene the basic objective of industrial peace to place such a party in the predicament where it could make a valid charge of an unfair labor practice only if it forewent a contract altogether.'

The latter expression reflects what has always been this Court's philosophy * * * * Similarly, in this case, acceptance of the waiver provision by other units does not diminish the bad faith nature of the Employer's proposal.

The Employer's consistent message, both during the decertification election campaign and in bargaining with its unions, is that a union contract would not guarantee any advantages that the Employer would not equally provide to non-union employees without a contract. That is the clear message expressed in the March 15 letter to employees considering decertifying the union at the Red Wing, Zumbrota, and Ellsworth facilities. HR Advisory Director Rundquist's letter to employees emphasized that 95% of the Employer's employees were non-union and that non-union employees enjoyed higher wage and fringe benefits than union-represented employees. Rundquist stated that employees who had rejected unionization in the past were not worse off as a result and that, although the law prevented her from guaranteeing that the same would be true if these employees rejected collective bargaining, she was "confident" that the result would be the same for them as well. By contrast, she stated, the 5% who relied on collective bargaining, unlike those who did not, were engaged in a "true gamble" that they would get more rather than less.²¹

C. The Employer's Rigid Bargaining Positions Are Consistent With Its Anti-Union Message To Its Employees.

The Employer's public position that collective bargaining provides no benefits that are not available to an equal or greater degree to nonunion employees is clearly manifested in its bargaining demands of its unions. Throughout the negotiations with the SEIU, as well as with its sister unions, the Employer has been unyielding in its

²¹ Interesting to note the Rundquist e-mail opens by referring to a Union flyer "full of outrageous claims" that allegedly "take[s] liberties with the facts." In reality, the Union flyer merely points out that a collective bargaining agreement is a legally binding contract, and without one, employers are free to make unilateral changes (RX 224) – which happens to be all true! Now the Employer wants the same freedom to act unilaterally even with a collective bargaining agreement.

demand that unionized employees agree to a new contractual provision making all fringe benefits subject to unilateral modification.

The Employer's unwillingness to retreat from its articulated position in the slightest degree over more than a year of negotiations discloses a desire to demonstrate to all employees that union representation would not afford them even the slightest advantage over employees without union representation. That inference seems inescapable because the alternative explanations that the Employer has advanced do not withstand scrutiny.

Thus, the Employer has rigidly insisted on waiver language allowing it to make unilateral changes in all fringe benefits even while acknowledging that it doesn't expect to make changes in any fringe benefits. Similarly, while experience has demonstrated that the flexibility to modify some fringe benefits—such as health benefits—serves the legitimate interest of both labor and management,²² the Employer has insisted on unilateral control of all benefits, even funeral benefits and PTO, neither of which has any apparent extra cost to administer, in the way a pension plan has costs. And its rationale for nonetheless insisting on the right to change all benefits unilaterally—that it wanted all its employees to have the same benefit plans—fails credibly to account for the fact that its existing plans, such as the noncontract PTO plan, do not provide uniform benefits, but rather include variations in benefits for different groups of employees (see Table 1 at the end of the brief). In the parties' most recent negotiations for a unit of 600 employees at Rochester Methodist Hospital, the Employer did not even propose additional waivers (Tr. 78). In effect, the Employer affords special treatment to some

²² *E.g.*, S. Nuclear Operating Co. v. NLRB, 524 F.3d 1350, 1359 (D.C. Cir. 2008); BP Amoco Corp. v. NLRB, 217 F.3d 869, 874 (D.C. Cir. 2000).

categories of employees while refusing to entertain any proposals for special treatment for the employees represented by the Union. Since individual classifications of employees with different overall compensation packages are accommodated within the existing plan, a business need for a bargaining waiver by the Union to maintain plan consistency is not apparent.

The Employer may argue that it backed off of its me-too funeral leave plan. The record, however, does not support this manufactured testimony. Vomhof testified that he “made clear . . . at different times” that if the Union agreed to waivers on four “core” benefits – PTO, short-term disability, pension, and health insurance – it could do without funeral leave (Tr. 150, 182). There is no other record support for this claim – no other Employer witness even made this claim. Lubahn denied that any such thing was ever communicated (Tr. 483). The closest thing there is to “support” is the fact that on April 11, Vomhof only listed PTO, STD, pension and health in answer to Gulley’s question about which benefits had to have me-toos (Tr. 55-56; GCX 25, p.2). However, no one commented on that as a concession before the meeting got out of hand, and funeral leave with waiver was back on the Employer’s list of must-haves at the next meeting (RX 196). The most logical conclusion from that is that Vomhof simply forgot funeral leave on April 11 and no one noticed.

Moreover, backing off funeral leave does not account for the Employer’s insistence on PTO. What does it cost to administer a slight modification of PTO? Even in its noncontract PTO plan, the Employer makes special accommodation for patient care nurses. Why couldn’t it do that for a few maintenance employees?

Uniformity and efficiency only go so far. It would save employers money if they could pay everyone minimum wage, but that wouldn't make a minimum wage proposal in this case an indication of good faith. Uniformity and efficiency may be legitimate goals in general, but they are not unlimited. It would always be more efficient for the Employer if it could do what it wanted without bargaining first. It would be more uniform if the Employer could treat every employee the same. That much efficiency and uniformity, however, was made illegal in 1935. The National Labor Relations Act requires some inefficiency and some unique treatment of represented employees. So while some uniformity may be a legitimate objective, complete uniformity is not.

The Employer says it has centralized to one payroll system, and one call-in center for employees to call to ask questions. While uniformity might be more efficient, it is just not possible in a partially-represented workforce. No matter how much the Employer wants to standardize the script, it is required by law to tailor some of the answers. What if an employee calls and asks if she has to join a union? The answer has to vary by facility, depending on the employees' choice of a representative or not.

This isn't really about uniformity anyway, it's about control. The Employer only wants as much uniformity as it wants, as evidenced by its continued sufferance of variation. Even in its non-contract plan, it has special PTO rules for patient care nurses, and it continues to tolerate differences in other benefit plans (see Table 1 at the end of the brief).

The Employer didn't propose "uniformity" anyway. The Union accepted uniformity (Tr. 117, 131-132). The Employer proposed a right to make whatever changes it wants to make. The statute requires the parties to bargain in good faith to a

contract, and to memorialize their agreement in writing. That presupposes some stability, some repose, for the term of the contract, to which the Employer's broad waivers are antithetical.

The Employer said over the bargaining table that it meant only to apply the same programs and the same changes it applied to noncontract employees, but that's not what its written proposal says. If the Employer really meant to tie changes to the noncontract plans, it knows how to do that – see contracts, including but not limited to St. Mary's Hospital, short term disability: "The Employer reserves the right to amend or change this plan at the time it makes similar changes to the Hospital's disability plan for nonunion, nonexempt employees" (GCX 28, p.32); St. Mary's Hospital, insurance benefits: "the Employer may apply changes in existing benefit plans . . . which are applied to non-contract employee groups during the term of this agreement" (GCX 28, p.36); Rochester Methodist Hospital, insurance benefits: "the Employer may apply changes in existing benefit plans . . . which are applied to non-contract employee groups during the term of this agreement" (GCX 29, p.35). Apparently the ability to mirror changes made to noncontract employees within the bargaining units isn't enough anymore – now the Employer wants the right to make any changes, any time, maybe only for represented employees.

Finally, while insisting that the economy and efficiency of employer-wide benefits terms justified its demand that the Union waive any guarantee that contractual fringe benefits would not be reduced during the contract term, the Employer disclaimed any ability to estimate the cost-savings that would result in its Pension Plan if the Union accepted its waiver proposals. Although the Employer claims the Union never actually

asked this question at the bargaining table, it's in writing – GCX 12. The Employer nonetheless simultaneously insisted that the Union needed to accept its terms before there could be any further bargaining about wages. By this means, the Employer unreasonably placed an obstacle in the way of resolving the dispute through frank discussion of the costs and benefits of alternative proposals.²³

In short, given the absence of legitimate and substantial business reasons for its rigid insistence on its waiver clause and on assertedly “uniform” company-wide benefits for union and non-union employees alike, the natural inference is that the Employer is motivated by a different objective: to demonstrate to the Union and all its employees that a union contract’s promise of fringe benefits does not guarantee that fringe benefits will be any more available to union-represented employees than they are to persons without a contract. Bargaining rigidity motivated by such a purpose is not good faith bargaining.²⁴

The inference that anti-union motivation explains the Employer’s bargaining conduct is confirmed by the evidence regarding the April 11 negotiating session and the Employer’s subsequent communications to unit employees implying that they would be better off without a union. At the April 11 bargaining session, the Employer negotiators reacted explosively to the Union’s refusal to agree to the Employer’s bad faith waiver proposals as a condition of any increased benefits, suggesting that the Union deserved to be decertified as a result. Following up on its own decertification suggestion, the Employer thereafter wrote to all the unit employees directly on April 20 to reiterate its

²³ Cf. *NLRB v. General Electric Co.*, 418 F2d at 757 (inferring bad faith from the employer’s “persistent refusal, after publicizing its proposal, to estimate not only the cost of components of its offer, but the total size of the wage-benefit package it would consider reasonable”).

²⁴ *Id.* (inferring bad faith from the employer’s adhering to unreasonable positions “with no apparent purpose other than to avoid yielding to the Union”).

unwavering demand that all employees be treated the same and to belittle the Union's "asking for a 'special deal' for just this group of employees." The only "special deal" the Union is asking for is its statutory right to bargain over terms and conditions of employment.

The Employer then questioned "whether SEIU is truly looking out for your individual best interests by refusing to accept the benefits that you have said you wanted, or are they just looking out for their own interests." The Employer was free with its opinion about what the employees wanted (Tr. 183), but it scoffed when confronted with an actual expression of employee sentiment (Tr. 146). Here, as in Safeway Trails, *supra*, the Employer's efforts to undermine union representation in the employees' eyes is an indicia of bad faith bargaining.

Some of the other tactics used by the Employer through this negotiation also shed light on its state of mind, including its resistance to face-to-face meetings and its refusal to acknowledge the impasse and wrap this up.

The Employer says it didn't want to meet face-to-face because it didn't trust the Union (Tr. 372-373). What's not to trust? This "trust" claim is part of the smoke screen for the Employer's desire to look like it was bargaining when it really wasn't. Instead, it was sitting in its private room for two hours at a time writing the same note it just sent a couple hours ago (Tr. 187-192; GCX 39 pp.21-22; GCX 41, 42, 43). The only "trust" issue the Employer ever articulated was the Union's alleged "trick" to get it to meet face-to-face on one issue, superior privileges clause, and then change the subject. Yet the Employer was already refusing to meet that day because of this undefined lack of trust, and it made that superior privileges issue up anyway.

Slegh's notes also characterize the trust issue in a way that calls the Employer's good faith into question. It is not clear if this was her private musings or something someone said at the table, but telling nonetheless – on January 29, she wrote: "We had a lot of movement early on as we trusted them. But once they started digging in their heels the trust decreased" (RX 190 p.1). So the trust issue wasn't based on anything nefarious the Union did – it was based on the Employer's conclusion that the Union disagreed with its opinion about what was best for employees.

Also on the issue of trust, Vomhof testified that in September 2016, Jamie Gulley asked what the Employer would give on wages in exchange for the waivers, so he could take a full proposal back to the members. The Employer refused to play along. Instead, Vomhof testified he was skeptical that the Union wasn't serious because it had previously said 1) we'll never take the waivers; then 2) we'll take some but not all; then 3) we'll take them all but we need to know the numbers. (TR. 386-387.) "The next time, they'd back off" (Tr. 386), said Vomhof, although there is no evidence that the Union ever "backed off" of anything.²⁵ In Vomhof's description, the Union had progressively approached the Employer's offers, which one would think the Employer should find encouraging. Instead of trying to close the deal, however, the Employer preferred to hold back and drag things out further. Vomhof said he was afraid to put all of his cards on the table – after almost a year and 14 bargaining sessions, what was he waiting for? This isn't cards, it's a shell game – guess which shell the wage increase is under? Pay

²⁵ Zahnle's notes indicate the Employer considered the Union's wage offer moving from 3.75% in the first year of the contract on March 10 (GCX 39 p.21) to 4% on May 16 was "regressive" (RX 206), but there is no evidence the Employer even noticed that at the table, and it was not a retraction on any tentative agreement.

your money and point to one, and then we'll be happy to turn it over and see what's under there.

This is why the complaint refers to “conditioning bargaining over wages to be paid to Unit employees on the Union’s agreement to its waiver language.” Sure the Employer made a wage offer, but by the end it held onto this “secret plan” to raise wages, only if the Union first agreed to its broad waivers. Even when the Union bit on that, the Employer refused to disclose what was in the “secret plan.” How can that advance rather than hinder the drive toward an agreement?

Both Vomhof and Zahnle testified that they were afraid the Union would accuse the Employer of regressing if they “put their cards on the table.” Why would the Union do that, unless that’s in fact what the Employer was planning to do? Gulley told them at the table that he understood it would not be regressive to make a contingent proposal and pull it back if the Union did not accept it (RX 200). That is consistent with the law – see, e.g., Midwestern Instruments, Inc., 133 NLRB 1132, 1139 (1961); Great Falls Employers Council, Inc., 123 NLRB 974, 982 (1959). The Employer’s fear of being accused of regressing is a smoke screen. The Employer previously said it thought it had its finger on the employees’ pulse and they wanted these benefits – why not put it to a vote?

At that point the Union could not move without compromising its core principle, and yet it expressed a willingness to do that and test it among the employees. The Employer could make a final offer with waivers, on its terms. It just didn’t want to. There’s only one reasonable conclusion to draw from that – it wasn’t interested in ending the negotiations.

The notes shed more light on the Employer's duplicity regarding its "room to move." On March 10, in relation to the Union's first apparent attempt to get a final proposal the employees can vote on, Slegh wrote, "Feel they are baiting us" (RX 193). On April 11, she writes, "No numbers given feel it was a scam on their part (to get our #s)" (RX 195). Then on September 15, however, Slegh reveals the Employer's true intentions by writing "We aren't going to buy it – we didn't do that with any other groups" (RX 200). Zahnle agreed: "Have room but not going to propose more until we know U will accept me toos. Not final position but not going to buy it. Didn't have to do it with other unions" (RX 207). How is it a "scam" to try to get the Employer to make a complete proposal? Again, the Employer's intention was to make sure this Union didn't get anything anyone else didn't get.

"Impasse" is not offensive to the Act, unless it is reached in pursuit of an illegal objective. So why would the Employer deny that they are at impasse (RX 193, 195)? It acted like they were – it didn't budge on its offer since December 14, 2015, and it would rather take six months off than keep meeting.²⁶ Absent the Union's agreement to the "cooling off period," however, the Employer apparently senses a public relations advantage in sitting through marathon unproductive sessions repeating its mantra of what it must have. That's pretend bargaining.

The Union tried everything. It offered a "supposal" to agree to some waivers (Tr. 369). It offered to agree to allow the Employer to make changes that did not "substantially" alter the benefits (GCX 38). It threatened legal action. It asked for a final offer that it could take to employees for a vote. The Employer never budged. Nor

²⁶ Although Schaefer testified at one point that taking six months off was the mediator's idea (Tr. 336), her own notes attribute the idea first to Vomhof (RX 130, p.1).

would it make a final offer. Why wouldn't it do that? Because it would have had to take a real position on wages, after repeatedly enticing the Union with this vague offer to "move on wages" if the Union would only cave on waivers first. The only logical explanation for that is that the Employer's feint on wages served to drag things out.

The Employer repeatedly said if it made changes the Union didn't like, the Union could always bring it up again in future negotiations. As hard as the Employer bargained this issue so far, that's a taunt, not an enticement.

The Employer is likely to rely on McClatchy Newspapers, Inc., 321 NLRB 1386 (1996), enfd. in part and review granted in part, 131 F.3d 1026 (DC Cir. 1997), cert. denied, 524 U.S. 937 (1998), to support its insistence on benefit waivers. McClatchy merely establishes that an employer may in good faith insist on a limited waiver of the union's rights to participate in and grieve merit wage increases, over and above guaranteed minimums. It does not justify the broader and more extensive waivers at issue in this case, or speak at all to the Employer's subjective good faith under the circumstances established in this case.

VI. CONCLUSION

The Employer's attitude toward bargaining was perfectly encapsulated in Counsel's opening statement: "Only after significant management consideration, those representatives have explained, are changes made, taking into account the best interest of Mayo Clinic and its employees" (Tr. 24). The Employer insisted that it alone will

decide what's best for its employees, and what's best for employees is going to be the same whether they are represented or not. That is not consistent with the subjective good faith required by the Act.

Dated: May 17, 2017

Respectfully submitted,

/s/ Joseph H. Bornong

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Table 1: Unique Benefit Plans

Unit	Unique plan(s) (unique features)
Albert Lea General Unit (GCX 27)	PTO (eligibility based on hours worked, not FTE; no waiver) Funeral Leave Pension Superior Privileges
St. Mary's Hospital (GCX 28)	PTO Funeral Leave Pension (see also GCX 59)
Rochester Methodist Hospital (GCX 29)	Funeral Leave Pension (see also GCX 60)
Steelworkers- Austin (GCX 46)	Pension
St. Mary's Hospital – Painters (GCX 50)	Funeral Leave
Franklin Heating Station (GCX 61)	401(k) plan
Noncontract plans	PTO unique for patient care nurses (GCX 52) STD unique for Rochester patient care nurses, and for minor children of employees at Mayo Clinic Rochester and Mayo Clinic Health Systems (GCX 53) Funeral leave applies only to selected locations (GCX 58) Professional Development Assistant Program applies only at selected locations (RX 121)

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF THE GENERAL COUNSEL were served by electronic mail on the 17th day of May, 2017, on the following parties:

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