UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

2017 JUL 27 P 12: 19
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FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

SOUTHCOAST HOSPITALS GROUP, INC.,	)	
Petitioner,	)	
v.	)	Case No. _____
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner Southcoast Hospitals Group, Inc. ("Petitioner") hereby respectfully petitions this Court for review of a Decision and Order of the National Labor Relations Board ("NLRB") in NLRB Case No. 01–CA–150261, reported in an Order at 365 NLRB No. 100 and entered on June 28, 2017. Petitioner respectfully requests that this Court set aside the Decision and Order, and grant any further relief to which Petitioner may be entitled.

Respectfully submitted, this 27th day of July, 2017.

/s/ Anthony D. Rizzotti

Anthony D. Rizzotti
Gregory A. Brown
LITTLER MENDELSON, P.C.
One International Place, Suite 2700
Boston, MA 02110
617.378.6000
arizotti@littler.com
gbrown@littler.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on July 27, 2017, the foregoing Petition for Review was served via overnight mail to the following:

Gary Shinners, Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Ronald S. Cohen
Regional Attorney
NLRB - Region 1
10 Causeway Street, 6th Floor
Boston, MA 02222-1072

John Gordon, Associate Director
Massachusetts Nurses Association
340 Turnpike St
Canton, MA 02021-2700

Alan J. McDonald, Esq.
Kristen A Barnes, Esq.
McDonald Lamond Canzoneri
352 Turnpike Rd. Ste., 310
Southborough, MA 01772-1756

/s/ Anthony D. Rizzotti
Anthony D. Rizzotti
Attorney for Petitioner

Littler
Employment & Labor Law Solutions Worldwide

Littler Mendelson, P.C.
One International Place
Suite 2700
Boston, MA 02110

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July 27, 2017

Gregory A. Brown
617.378.6056 direct
617.378.6000 main
gbrown@littler.com

VIA HAND DELIVERY

Ms. Margaret Carter
United States Court of Appeals for the First Circuit
One Courthouse Way, Suite 2500
Boston, MA 02210

Re: Southcoast Hospitals Group, Inc. v. National Labor Relations Board

Dear Ms. Carter:

This firm serves as counsel to Petitioner Southcoast Hospitals Group, Inc. Enclosed please find an original and five copies of a Petition for Review of a Decision and Order of the National Labor Relations Board with an attached Statement. Copies of the enclosed Petition are being served on Respondent NLRB and MNA representatives via Federal Express.

Please stamp the enclosed marked "Copy" of the Petition and return it to me via the awaiting messenger.

Thank you for your assistance in this matter.

Very truly yours,

Gregory A. Brown

Enclosures

Cc: (w/enclosure, via overnight mail)
Gary Shinners
Ronald S. Cohen
John Gordon
Alan J. McDonald
Kristen A. Barnes

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Southcoast Hospitals Group, Inc. *and* Massachusetts Nurses Association. Case 01–CA–150261

June 28, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On March 7, 2016, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and supporting, answering, and reply briefs. The General Counsel filed cross exceptions and supporting and answering briefs.

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

ORDER

The National Labor Relations Board orders that the Respondent, Southcoast Hospitals Group, Inc., Wareham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Massachusetts Nurses Association (the Union) by failing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Unilaterally changing the terms and conditions of employment of unit employees by implementing its final offer without the parties having reached a lawful impasse.

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

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

[2] We affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to provide the Union with requested information.

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing its final offer without having reached a valid impasse. The Board has held that "overall impasse may be reached based on a deadlock over a single issue." *Atlantic Queens Bus Corp.*, 362 NLRB No. 65, slip op. at 1 (2015) (citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000)). "The party asserting a single-issue impasse has the burden to prove three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of 'overriding importance' in the bargaining; and (3) that the impasse as to the single issue 'led to a breakdown in overall negotiations' . . . ." Id. (quoting *CalMat*, 331 NLRB at 1097). Here, for the reasons explained by the judge, the Respondent failed to prove that an impasse existed as to any particular issue and, even assuming that impasse was reached on a particular issue, the Respondent failed to show that it led to a breakdown in overall negotiations.

Chairman Miscimarra agrees that the Respondent violated Sec. 8(a)(5) and (1) of the Act when it implemented its final offer without having reached a valid impasse, but he does so based solely on the Respondent's failure to prove "a breakdown in overall negotiations" as required under the third element of the *CalMat* standard, and he does not rely on sec. III(b) of the judge's decision.

In addition, Chairman Miscimarra disagrees with the judge's statement, in sec. III(a) of his decision, equating the Respondent's invalid declaration of impasse with a "refusal to bargain." Chairman Miscimarra believes this statement is incorrect in two respects. First, an unfair labor practice does not arise merely from a false declaration of impasse (i.e., declaring impasse when a legally valid bargaining impasse does not exist). What violates Sec. 8(a)(5) in this situation is the employer's implementation of its final offer in the absence of a valid impasse; the employer's false declaration of impasse does not constitute an independent violation of the Act. Second, even when an employer falsely declares the existence of an impasse and then unlawfully implements its final offer, this cannot accurately be described as a "refusal to bargain" since both parties, obviously, were bargaining. Although the phrase "refusal to bargain" is sometimes used loosely to describe all violations of Sec. 8(a)(5), it really applies to cases in which a union has requested bargaining over a mandatory bargaining subject, and the employer refuses to bargain over the matter. By comparison, the Respondent's violation here arises from a separate 8(a)(5) obligation, recognized by the Supreme Court in *NLRB v. Katz*, 369 U.S. 736, 743 (1962), to bargain to an agreement or impasse (or at least to provide the union notice and opportunity for such bargaining) before making changes in any term or condition of employment that constitutes a mandatory bargaining subject. This *Katz*-type violation occurs where, as here, there has been no "refusal to bargain," but the employer has not satisfied its duty to refrain from making changes in mandatory bargaining subjects unless bargaining has resulted in an agreement or impasse. See *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 25–26 (2016) (Member Miscimarra, concurring in part and dissenting in part) (describing difference between the Sec. 8(a)(5) duty to bargain upon request and the duty to refrain from making unilateral changes unless the employer has provided the union notice and opportunity for bargaining to an agreement or impasse); *E.I. du Pont de Nemours*, 364 NLRB No. 113, slip op. at 17–19, 20 fn. 35, 21 fn. 39 (2016) (Member Miscimarra, dissenting) (same).

We find it unnecessary to pass on whether the Respondent violated Sec. 8(a)(5) by introducing a new and regressive proposal in violation of the parties' ground rules, as the remedy for this additional violation would be subsumed within the remedy for the unlawful implementation violation. Chairman Miscimarra would affirm the judge's finding that the Respondent did not violate Sec. 8(a)(5) in this regard.

In adopting the judge's tax compensation remedy, we rely on *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016).

Case: 17-1740 Document: 00117182609 Page: 6 Date Filed: 07/27/2017 Entry ID: 6109061

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

(a) Furnish to the Union, in a timely manner, the information requested March 9, 2015, regarding the number of nurses that have used the FMLA benefit.

(b) Upon the Union's request, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on and after April 15, 2015, as part of the implementation of its final bargaining offer.

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

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1 a report allocating the backpay awards to the appropriate calendar year for each employee.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All registered nurses employed by Southcoast for its Tobey Hospital site, excluding the Director of Nursing, the Assistant Director of Nurses, Nurse Managers, Administration Supervisor, managerial employees, supervisor, confidential employees, and all other employees.

(f) Within 14 days after service by the Region, post at its facilities in Wareham, Massachusetts, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Massachusetts Nurses Association (the Union) by failing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees by implementing our final offer without having reached a lawful impasse.

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

WE WILL furnish to the Union, in a timely manner, the information requested March 9, 2015, regarding the number of nurses that have used the FMLA benefit.

WE WILL, upon the Union's request, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on and after April 15, 2015, as part of the implementation of our final bargaining offer.

WE WILL make unit employees whole, with interest, for any loss of earnings or other benefits suffered as a result of the unlawful unilateral implementation of changed terms and conditions of employment.

WE WILL compensate any affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 1 a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All registered nurses employed by Southcoast for its Tobey Hospital site, excluding the Director of Nursing, the Assistant Director of Nurses, Nurse Managers, Administration Supervisor, managerial employees, supervisor, confidential employees, and all other employees.

SOUTHCOAST HOSPITALS GROUP

The Board's decision can be found at www.nlrb.gov/case/01–CA–150261 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rick Concepcion, Esq., for the General Counsel.
Joseph D. Whelan, Esq. and *Matthew H. Parker, Esq. (Whelan, Corrente, Kinder & Siket, LLP),* of Providence, Rhode Island, for the Respondent.
Jason R. Powalisz, Esq. (McDonald, Lamond, Canzoneri), of Southborough, Massachusetts, for the Charging Party.

DECISION

Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. In this case a hospital and its nurses' union were engaged in collective-bargaining negotiations for a successor labor agreement. At the eighth bargaining session the employer declared impasse and unilaterally implemented its bargaining proposal. The Government argues that the hospital violated its bargaining obligations under the National Labor Relations Act (Act) by failing to provide requested information relating to a benefits proposal, by introducing an untimely and regressive wage proposal in violation of the parties' agreed-to bargaining ground rules, and by unilaterally implementing its bargaining proposal in the absence of valid bargaining impasse.

As discussed herein, I find that the hospital's failure to provide the requested benefits information violated the Act. I find that under all the circumstances, the regressive wage proposal did not independently violate the Act. Finally, I find that a valid bargaining impasse did not exist when the hospital declared impasse and unilaterally implemented its proposals. The implementation violated the Act.

STATEMENT OF THE CASE

On April 16, 2015, the Massachusetts Nurses Association (MNA or Union) filed an unfair labor practice charge alleging violations of the Act by Southcoast Hospitals Group (Southcoast or Hospital or Employer) docketed by Region 1 of the National Labor Relations Board (Board) as Case 01–CA–1502161. An amended charge was filed in the case on May 19, 2015. Based on an investigation into the charge, on July 31, 2015, the Board's General Counsel, by the Regional Director for Region 1 of the Board, issued a complaint and notice of hearing alleging that the Hospital had violated the Act. On August 12, 2015, the Hospital filed an answer denying all alleged violations of the Act. The Hospital filed a first amended answer on October 5, 2015.

A trial was conducted in this matter on October 27–29, and November 18–19, 2015, in Providence, Rhode Island. Counsel for the General Counsel, the Union, and the Charging Party, filed posttrial briefs in support of their positions by January 28, 2016. On the entire record, I make the following findings,

conclusions of law, and recommendations.

JURISDICTION

Southcoast is, and at all material times has been, a corporation with an office and place of business in Wareham, Massachusetts, where it is engaged in operating a hospital. In conducting its business operations, Southcoast annually derives gross revenues in excess of $250,000. In conducting its business operations, Southcoast annually purchases and receives goods valued in excess of $5000 at the Hospital directly from points outside Massachusetts. At all material times, Southcoast has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

FACTUAL FINDINGS

Introduction

Southcoast is part of a larger entity, Southcoast Health System, which includes, in addition to Southcoast, a physicians' group, a visiting nurses group, and some other minor subsidiaries. Southcoast operates three acute care hospitals in Massachusetts: Charlton Memorial in Fall River, St. Luke's in Bedford, and Tobey, in Wareham. Of the three hospitals, Tobey is the smallest with 80 beds and approximately 150 nurses. Tobey is also the only one of the three where the nurses are represented by a union. The most recent collective-bargaining agreement between the parties provides that,

> Southcoast recognizes the [Massachusetts Nursing] Association as the sole and exclusive bargaining representative for all registered nurses employed by Southcoast for its Tobey Hospital site, excluding the Director of Nursing, the Assistant Director of Nurses, Nurse Managers, Administration Supervisor, managerial employees, supervisor, confidential employees, and all other employees.

Another union, the SEIU, represents "virtually everybody [else] at Tobey," primarily the maintenance, service, and clerical and technical support employees.

The MNA has represented the Tobey nurses for approximately 40 years. At least for the last 18 or 19 years since, Southcoast was formed, the MNA and Southcoast, have maintained a notable record of labor peace. With the exception of the events described herein, the parties have never failed to reach a successor labor agreement through collective bargaining.

The parties' most recent collective-bargaining agreement was entered into October 1, 2012, and scheduled to terminate no earlier than September 30, 2014 (the 2012 Agreement).

The reopener negotiations

The 2012 Agreement contained a provision permitting, at the request of either party, the agreement to be "reopened during the second year for the purposes of renegotiating regarding the economic terms of this Agreement." Invoking this clause, in the fall of 2013, the Hospital sought "reopener" negotiations with the Union. The parties met on several occasions but were unsuccessful in negotiating any changes to the 2012 Agreement under the reopener clause. Those negotiations were formally "closed" by a September 4, 2014 letter from the Hospital's then attorney, Anthony Rizzotti, to the MNA's associate director, labor division, John Gordon, which stated that all proposals were being withdrawn.

The failed reopener negotiations involved at least three proposals that have relevance to subsequent events. First, during the reopener, the Union sought across-the-board wage increases but the Hospital opposed this. With the withdrawal of all proposals the Union acceded to there being no across-the-board wage increase.

Second, as part of the reopener, the Hospital proposed to "halve" the wage "steps" available to nursing employees. Under the 2012 Agreement, and in past agreements as well, nurses at Tobey progressed annually—on the anniversary date of their hire—through 21 wage steps listed in the contract. The first step set the minimum salary for a nurse, with a higher wage set for each successively higher step. Newly hired nurses were placed into a step—presumably step 1 in the case of a nurse recently joining the profession—although the contract states that a newly hired nurse can be hired in at a higher step based on prior relevant experience. At the top step—step 21 in the 2012 Agreement—maximum pay was reached. Thus, for a nurse hired in at step 1, a maximum pay rate would be achieved, based on longevity, after 20 years. The steps provided for significant wage advancement over the years. For instance, the 2012 Agreement provided that as of October 1, 2012, a staff nurse earned a rate of $26.94 an hour in step 2, while a nurse at step 21 earned $50.50 an hour.[1] After the top step was reached, the nurse remained at the top step.

Step increases are to be distinguished from across-the-board raises that might be included in a bargaining agreement. Thus, the 2012 Agreement provided that effective May 1, 2013, the minimum base (i.e., 40-hour work week) pay increased $0.75 an hour. This across-the-board increase would then be applied to each step level.

The other Southcoast nonunion Hospitals did not have yearly step increases for nurses. Rather, nurses in these hospitals were eligible for an annual merit pay increase.

According to David DeJesus, the senior vice president for human resources of Southcoast Health System, who "oversaw the strategy of bargaining" during the wage reopener, one of the Hospital's core proposals was to "realign the steps." According to DeJesus, "[s]ome of the steps had grown pretty significantly, so we wanted to realign those to be a bit more reasonable." Gordon described the Hospital's as "propos[ing] to cut the steps in half." As part of the proposal the Hospital also proposed

[1] I use these examples for illustrative purposes only. There were some wrinkles. Pursuant to the 2012 Agreement, step 1 was dropped, and step 2 became the new step 1, and so on through the steps. A new step 21 was to be added that was 2 percent higher than the old step 21 (i.e., than the new step 20).

adding a 2 percent step increase at the top step. As referenced, the proposals were not agreed to by the parties during the reopener negotiations and were withdrawn pursuant to the September 14, 2014 letter described above.

Finally, another proposal unsuccessfully advanced by the Hospital in the reopener negotiations also is relevant to subsequent events. Among the 2012 Agreement's paid holidays for nurses were the holidays of Patriots' Day and Columbus Day. (Patriots' Day, celebrated the third Monday in April, is an observed public holiday in Massachusetts.) The Hospital had proposed changing these two contractual holidays to "floating" holidays, essentially eliminating the holiday pay of time and a half for a nurse who worked either day. Eligible nurses could still take the days as "floating" holidays, but would be paid regular straight time instead of the higher holiday pay rate.

As discussed below, the Hospital had eliminated these days as full paid "holidays" in their two other nonunion facilities. The union that represents service employees at Tobey, the SEIU, had agreed during negotiations in late March 2014 to the same proposed change in holidays.

In the September 4, 2014 letter to the Union announcing the closure of reopener negotiations, the Hospital's attorney noted, "As we discussed, the Hospital does intend to vigorously pursue its holiday pay proposal in full contract negotiations." The letter makes no reference to the step proposal, and in fact, as discussed below, the proposal to "halve" the steps did not resurface.

The annual letter to employees from Southcoast Health System

By letter dated October 15, 2014, Southcoast Health System's president, Keith Hovan, sent an annual message to all 7200 employees of the Southcoast system, at each hospital and all subsidiary enterprises, bargaining unit and nonbargaining unit. A version of this letter is sent every year around this time (just after the close of the fiscal year) and provides an overview, as DeJesus explained, "in terms of where we are as an organization." The letters "[t]alk about our budget to some extent. And then generally talk about our wage and benefit program for the coming year." This letter described the implementation (for nonunion employees) of many of the wage and benefit cuts that the Hospital would seek from the Union in upcoming negotiations.

The 2014 letter described "significant" recent growth, particularly in adding new physicians, but described "growing pains" resulting in an anticipated 3-percent shortfall in the operating budget for 2014. It described the layoff of approximately 70 employees that was already in process among certain nonbargaining unit employees, and a hiring freeze. It announced an increase in health insurance premiums and deductibles, limits on "cashing in" earned time off, a change in pension contributions, and the letter announced a

> wage freeze in our FY 15 budget. From October 1, 2014 to September 30, 2015, performance evaluations will be conducted as usual, but there will be no accompanying merit increases. These changes in our wage program will impact all employees. We will monitor our financial results closely and should we exceed our budget we will consider a pay increase or payment. As always, we will negotiate with both unions with our traditional goal of being consistent with wages and benefits throughout Southcoast.

Negotiations for a successor agreement

By letter dated June 11, 2014, from Gordon to the Hospital's director of human resources, Margaret Hess, the Union gave notice to the Hospital of its intent to terminate the 2012 Agreement as of September 30, 2014. Gordon's letter stated that the Union wished to begin negotiations for a successor agreement in July.

While there may have been oral conversations between Rizzotti and Gordon attendant to the reopener negotiations or other contracts they were negotiating at the time, there is no record of a response regarding the successor agreement from the Hospital or its attorney until Attorney Rizzotti responded by email dated September 24, 2014. In that note, Rizzotti suggested that "we extend the contract since we have not started yet." Gordon responded, agreeing to extend, and the next day the parties executed an extension agreement extending the 2012 Agreement through October 31, 2014. The parties spent the balance of October agreeing on dates to meet, and on October 28, the contract was extended again through December 17, 2014, after the parties agreed to bargaining dates beginning November 10.

DeJesus testified that the Hospital did not want to meet and bargain during October, as it was busy responding to the recent realization in August that its economic situation "had gotten much worse," and it thus became engaged with "a very detailed and difficult process" of selecting and carrying out a layoff of approximately 70 (nonbargaining unit) employees, and managing their transition. According to DeJesus, "there was a mountain of work . . . through all of October."

The bargaining teams

Before the November 10 meeting, DeJesus, contacted Gordon to tell him that Rizzotti was no longer going to represent the Hospital at negotiations. Instead, the Hospital's chief negotiator was to be Attorney Joseph Whelan.

In addition to Whelan, the Hospital's bargaining team was composed of DeJesus, the Tobey chief nursing officer, Carol Conley, the associate chief nursing officer at the Tobey Hospital Sue Mangini, Director of Human Resources Margaret Hess, and Janet Peirce, an HR representative at Tobey.

The union bargaining team was composed of Union Negotiator Gordon, and three employee nurses at Tobey, cochairs Sharon Miksch and Maddie Jezierski, and committee member Heidi Kilpatrick.[2]

November 10 meeting—agreement to ground rules

The parties met on November 10, 2014, at a meeting devoted to introductions and to setting the ground rules for the collective bargaining. The union committee attended. Only Whelan

[2] I note that in addition to oral testimony at the hearing, in reconstructing events at the bargaining table I have relied upon contemporaneous notes of bargaining taken by witnesses. I accept these as evidence of what was stated at the bargaining table and of what transpired in bargaining. *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963). The contemporaneously recorded bargaining notes of various witnesses were entered into evidence without objection.

and DeJesus attended for the Hospital. This meeting, like all subsequent bargaining sessions, occurred at the Tobey Hospital.

At the November 10 meeting the parties did not engage in substantive bargaining—by which I mean, substantive proposals were not discussed. However the parties did meet for several hours. Attorney Whelan, in particular, was new to the Southcoast and he was introduced with some discussion of his background as a labor negotiator.

The parties discussed ground rules for the negotiations. The Hospital indicated that there was no need to put the ground rules in writing, "that there would be good faith." However, the Union emerged from a caucus with the ground rules written and the parties executed an agreement setting forth eleven numbered ground rules that dealt with issues such as paid time off from work for union bargaining committee members, the identification of the primary spokesperson from each side, and rules governing the submission of proposals, including the following:

> Neither party will submit new proposals, as opposed to counterproposals, after the fourth meeting, December 17, 2014. All proposals must be reduced to writing. For purposes of this ground rule, the first meeting is the meeting held on November 25, 2014.

According to Gordon, the purpose of this ground rule was "to limit the number of proposals that either party can submit up [until] the fourth session. After the fourth session, we can't submit any new proposals. It's what's on the table is on the table, at that point."

This November 10 session was considered session zero, with session one to be the next meeting, with meetings scheduled for November 25, December 5, 11, and 17.

November 25 meeting

The parties met again on November 25, for their first substantive bargaining session. This meeting began with the parties exchanging initial proposals.

At this point I think it helpful to note a feature of the parties' bargaining process used throughout the bargaining. The written proposals and counterproposals offered by both sides throughout negotiations proposed changes to, additions to, or deletions from specific articles, sections, and even pages of the expiring 2012 Agreement. Both parties followed this procedure throughout bargaining and every written proposal explicitly identified the provision of the old contract it was changing, and, for additions to the old contract, in which article and/or provision the new language was to be located.

This modus operandi is a practical and typical one for bargaining successor collective-bargaining agreements. It means that—and I find, although I think it undisputed—that the parties were proposing and intending to renew the 2012 Agreement except as changed or modified in these negotiations. In other words, the intent of the parties was that unmentioned provisions of the 2012 Agreement were being renewed. These negotiations were not conducted on a blank slate, but on the template of the 2012 Agreement. While this observation may be considered so obvious as to not merit mention, it think it is important to establish from the outset. As will be seen it has implications for some of the disputes between the parties.

The Union's initial proposal contained 14 numbered proposals.

Union proposals (UP) 1–6 involved financial proposals.

> UP 1 proposed amending the collective-bargaining agreement at Article II Section 2.1. Minimum Salaries Page 2, to provide for an across-the-board wage increase of 5% on October 1, 2014, October 1, 2015 and October 1, 2016.
>
> UP 2, proposed amending the collective-bargaining agreement at Article II Section 2.2. Shift Differential Page 3 to increase the evening differential to $4 an hour and the night differential to $6 per hour.
>
> UP 3 proposed amending the collective-bargaining agreement at Article II Section 2.3. Weekend Duty weekend differential to $3 per hour.
>
> UP 4 proposed amending the collective-bargaining agreement at Article II Section 2.4. On Call Pay Page 4 to increase on-call pay to $6 per hour.
>
> UP 5 proposed amending the collective-bargaining agreement at Article II Section 2.5. Charge Nurse Page 4 to increase charge pay to $6 per hour.
>
> UP 6 proposed amending the collective-bargaining agreement at Article II Section 2.9. Preceptorship Page 7 to increase preceptorship pay to $5 per hour.

In addition to the Union's financial proposals (UP 1-6) the Union's proposals were:

> UP 7 was a proposal to add a new provision to Article II, Section 2.11, entitled "Floating" that would limit the limit the Hospital's "floating" of nurses. Union Negotiator Gordon explained "floating" as follows:
>
> The hospital, and this is the same in every hospital, from time to time, they'll have sick calls or other things that happen, and they'll be short in a particular unit. And they will pull a nurse from another unit where they feel they have enough staff to cover the patient census, and they will float that nurse. They will float her to the unit that is short.

Floating was a significant proposal for the Union. As Gordon explained:

> Floating is something that—it's something that the nurses despise. I mean they really do. They work in their individual units and they get very, very comfortable in that, and so to float somebody out of their unit that they're really used to really throws them off their game. They don't like it. It doesn't matter what hospital I have represented. I have represented quite a few over my years, it is the same lament that I hear from nurses everywhere; they do not like floating. That is a huge issue for them.

The Union's floating proposal restricted "[e]xcept in emergency circumstances" nurses from being "floated to another unit without the nurse having received the unit-based orientation." The proposal also provided that "a nurse who is floated to another unit" was not expected to perform duties "which the nurse believes she/he is not competent to perform." The pro-

posal also provided for three bullet points: "Per Diems"[3] will float first," "RNs will only be required to float once per shift," and "[n]ewly hired RNs will not be required to float until they have completed six (6) months."

UP 8 proposed amending the collective-bargaining agreement's Mandatory Overtime provision, Article III Section 3.3 at page 8, to add a paragraph stating: "The Hospital will comply with Massachusetts General Law and Massachusetts Regulation on Mandatory Overtime."

UP 9 proposed rewriting the collective-bargaining agreement's provision on time schedules, Article III, Section 3.4 at page 8. The existing provision stated that

Time schedules and days off will be posted two weeks prior to each schedule period. It is understood that such schedules may be changed to meet emergency or special conditions.

UP 9 restated the first sentence of Article III, Section 3.4 but proposed that the second sentence be revised to state:

It is understood that such schedules will not be changed unless it is to deal with an emergency. Nurses will be notified of schedule changes by the Nursing Office 48 hours in advance.

UP 10 proposed revising Article IV, Section 4.1. at page 10, regarding "Flex-Up Positions." Under the 2012 Agreement, a limited number of nurses could assume "flex" positions under which they "generally" worked 32 (or 24) hours per week, but could be required, "based upon the Hospital's patient care requirements" to "flex" up his/her hours. From the Union and Gordon's perspective, the current flex policy,

> was causing a lot of problems within the bargaining unit. The nurses were really upset over it. The nurses on my committee said that this was causing some nurses to leave the hospital that they hated flex so bad. We said that to [the Hospital bargainers]."

The Union proposed to "[e]liminate all Flex-Up provisions. All Flex RNs will revert to their base hours."

UP 11, the Union proposed amending Article VIII, Section 8.5, at page 20, which previously listed various professional meetings that nurses would be granted time off with pay to attend (subsections (a)-(d)), to add subsections (e) and (f),

> (e) The Tobey MNA Negotiating Committee will be released with out [sic] loss of pay or benefits to attend contract negotiations.
>
> (f) The Hospital shall give paid release time to any local official to attend an investigation meeting, grievance meeting, arbitration or any other meeting or hearing that they need to attend.

UP 12 proposed amending article IX , section 9.8 (Reduction in Force), at page 25, by rewriting it to provide that if the Hospital restores or fills a position that has been eliminated, or fills a vacancy in the bargaining unit, any nurse previously displaced from the position will, for 18 months following being displaced, be offered the position being filled. In other words, the Union's proposal provided for recall rights to a position for 18 months for a nurse bumped or laid off in a reduction of force.

In UP 13, the Union proposed a new section 14.2 at page 31 that would provide for the first time for a contractual successorship provision. This would require the Hospital to include as a condition of sale or transfer of ownership a clause making the collective-bargaining agreement binding upon the successor. The Union's proposal also provided that the Union would be provided notice of an agreement by the Hospital to merge, affiliate or sell and to agree to bargain with the Union over any impacts on the bargaining unit of such change.

UP 14 was offered as a "place holder," notifying the Hospital that the Union might be proposing a side letter regarding a new bariatric surgical program just starting up in the Hospital, but no proposal was ever made by the Union on this subject.

The Hospital also offered its initial proposals. The Hospital's proposals consisted of nine numbered proposals. None of the nine proposals addressed wages.

Hospital Proposal (HP) 1 proposed amending the collective-bargaining agreement at article II section 2.10 to provide for new registered nurse graduates to be hired into a special transition unit or residency program and for up to 6 months receive a reduced rate of pay. Specifically, HP 1 proposed the following language amending 2.10 (with proposed added language underlined and proposed deleted language struck):

> "A new RN graduate who is temporarily employed by the Hospital (in an "overhire" capacity *or hired into a Dedicated Transition Unit ('DTU') or nurse residency program* to work a regular committed schedule ~~for a specific period of time~~ which will normally last no longer than six months, *will receive a reduced rate of pay of $18 per hour for up to six months. Such employee will be*~~, is~~ a member of the bargaining unit . . ."

In discussion, the Hospital negotiators explained that this proposal was in effect at their other hospitals. In addition to permitting an introductory lower rate of pay for newly graduated nurses, it would allow the Hospital to establish an orientation program that would permit training of the new graduate in a specialty area.

HP 2 proposed amending article III, section. 3.1 Hours of Work to add a new subsection that stated: "For staff rotating from the day to night shift where weekend shifts are required, Friday and Saturday will be deemed weekend night shifts." This was an attempt to clarify which shifts was part of the weekend duty.

HP 3 amended proposed amending article V Holidays to make Patriots' Day and Columbus Day (2 of the 10 paid holidays provided under the contract) "floating holidays." As described above, this had been proposed by the Hospital in reopener negotiations and would reduce the pay for employees who worked on those two holidays.

HP 4 proposed amending article VI of the collective-bargaining agreement to add a new section 6.3 (g), that provided: "A nurse must have sufficient ET in her/his bank at the time the request is made to cover the requested time off."[4]

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[3] "Per diem" nurses were not regular staff nurses, and presumably worked as temporary workers.

[4] ET refers to "earned time," which encompassed an employee's accumulated bank of sick leave, vacation, and holiday time.

HP 5 proposed amending the second sentence of Article VI Section 6.6(b)(i),which concerned the "cashing" in of accrued and unused ET, to limit the annual amount a nurse could cash in to "no more than two (2) weeks."

HP 6 proposed that article VII, section 7.1, which sets forth the medical and dental insurance, including a schedule of premiums paid by employees, would be amended to reflect a 3.5 percent contribution increase toward medical insurance premiums for employees. (The proposal was not specific as to whether it was medical and dental for which the Hospital was proposing the increase, but later discussion made clear that this proposal concerned medical insurance premiums.)

HP 7 proposed an amendment in article VII of the collective-bargaining agreement of the employee contribution for dental insurance, but for the amount of the increase stated that it was "TBD" (to be determined).

HP 8 proposed deleting article VIII, section 8.15 of the collective-bargaining agreement, a provision that provided that nurses may be "eligible for an additional four weeks of FMLA leave beyond the twelve (12) weeks of FMLA leave provided" pursuant to Federal law.[5]

HP 9 proposed changing the pension benefits for employees. Pursuant to the 2012 Agreement, the Tobey nurses were covered under the Southcoast Health System Partnership Plan, a defined contribution retirement plan. During the 2012 Agreement, the Hospital made an automatic ("core") contribution of 3 percent (of each employee's wage, for each employee with 2 years of service) to the plan and matched an employee's contributions dollar for dollar up to an additional 3 percent. In HP 9, the Hospital proposed eliminating the automatic 3 percent core contribution and 3 percent match, and replacing them with a Hospital contribution that matched employee contributions up to 6 percent.

After exchanging proposals the Hospital, speaking through Whelan, stated orally that it would be adding a proposal to clarify that a nurse who is on-call and then called into work, begins getting paid when he or she arrives at the hospital. The parties went into a caucus for about 45 minutes and returned to the bargaining table at about 1:55 p.m. The parties proceeded to go through the proposals.

With regard to HP 1, regarding the lower introductory wage rate and specialty training for new RN grads, the Union contended that such a proposal would not be successful and that the Union believed that specialty areas should be offered internally to veteran nurses. CNO Conley stated that the Hospital had been using this system at its other hospitals for a couple of years, and that with the many new nurses graduating there was not much wage pressure. She indicated that new nurses liked the intensive training coming out of school. The Union argued that such a program geared toward veteran nurses would provide better retention than training new nurses in specialty areas who might leave for other hospitals for better pay once trained in a specialty area.

With regard to HP 2, regarding the clarification of which shifts constituted weekend work, the parties discussed this, and the Union asked what problem the Hospital was trying to fix with this proposal. Whelan talked about wanting to better define when the weekend is for scheduling purposes.

With regard to HP 3, the Hospital's holiday proposal, this was the holiday proposal seen during the reopener negotiations. The Union rejected this proposal.

With regard to HP 4, the Hospital's proposal that a nurse must have existing ET in the bank in order to take that amount of ET, the Union believed that this was already the practice. However, the Union indicated it could agree to the proposal but told the Hospital that it would counter with language for this section of the contract that would require managers to respond within a certain amount of time to employees' requests to use ET.

With regard to HP 5, capping the cashing in of ET to 2 weeks, the Union told the Hospital it rejected this proposal. The Union told the Hospital it was just one more "give-back."

With regard to HP 6, through discussion it was clarified that the increase to employee premiums applied to health insurance. Whelan told the Union that although submitted as a proposal, "this was not a proposal, but notification" to the Union that this increase would be made, a right that the Hospital maintained it retained under the current terms and conditions. The Union questioned why, in that case, it was framed as a proposal, but the Hospital maintained it was, in any event, a notification. The Union rejected this, for the time being, but told the Hospital it would need to review the contract to see if it agreed that the Hospital had a unilateral right to make this change. (Ultimately, after review, the Union determined that it agreed with the Hospital that it could undertake this change unilaterally.)

With regard to HP 7, little was discussed, as the Hospital stated that they were still deciding whether to propose an increase in dental insurance premiums. As Gordon put it, this proposal, then, was offered as a "place holder" to notify the Union that such a proposal might be coming.

With regard to HP 8, the Hospital's proposal to eliminate the additional 4 weeks of FMLA-based leave, the Union rejected the proposal, but asked the Hospital "to tell us how many people utilized this article 8.15 over the past year" and "took the extra four weeks." Whelan responded that "[h]e'd look into it and he'd get back to us." Whelan told the Union this was a costly benefit for the Hospital: "this gets to be expensive." Whelan told Gordon that "we would get . . . numbers for him." (As discussed below, this information was never provided.)

With regard to HP 9, the Hospital's proposal to change the pension contribution and matching rules, Whelan said that "the language in the contract is that it's part of the Southcoast Fund and the Southcoast plan was changing" in the manner that the Hospital was proposing here. The suggestion was that the "contract says you['re] part of the pension fund [and the] fund is changing" systemwide. In other words, as DeJesus, testified, there was "discussion about whether we could just impose it." The Union requested that the Hospital provide it with a copy of the "plan design." Gordon testified that the Union wanted to review the whole pension plan and have its retained pension experts, Segal & Associates, review the matter. The Hospital

[5] FMLA refers to the Family and Medical Leave Act, 29 U.S.C. § 2601, which permits eligible employees to take up to 12 weeks of unpaid leave in a 12-month period to attend to certain personal serious health conditions and certain family care matters.

justified this proposal to the Union by saying "they needed this change in order to save money." Whelan told Gordon, "of course" the plan design is "available and we would get . . . that for him." (In fact, it was not provided until April 1, 2015.)

The Union's proposals were also discussed at this meeting. Union Proposals 1–6 involved proposals to increase wages and pay differentials. The Union told the Hospital that "obviously wages were important to us." However, Gordon also told the Hospital "even though . . . our initial [proposal] was five [percent each year], it's not like we really expected to get five, five, and five. We understood we start off typically at every negotiation something high." Gordon testified that for this reason, the Union is not surprised when an employer starts negotiations "with no wage proposal." Later in the meeting, Gordon told the Hospital that the differentials in his proposal "were not a priority."

The Hospital's response on these proposals was unwavering at this and at each negotiating session. Whelan told the Union he "wanted to give a direct response to them, per [his] style"[6]

Whelan sweepingly rejected all of these proposals. In rejecting the Union's wage proposals, Whelan told the Union that "we're interested in a pay freeze." According to Gordon's bargaining notes, Whelan explained the Hospital's position as "pay freeze and pos[ition] won't change." Miksch's notes quote Whelan saying that "in rest of organ[ization] we have pay freeze—no increase that['']s our position." During this bargaining session, Gordon wrote a note to himself, "Hospital says no place to go on these items." Whelan said he "wanted to be clear about our position from day one."

Gordon testified that he told the Hospital that the nurses "as a whole had taken pay freezes and zeros across the board in the past. And Joe [Whelan] was saying that their position was not going to change. . . . They weren't interested in talking about our first six proposals, which were all financial proposals." According to the testimony and notes of Associate Chief Nursing Officer Mangini, someone on the management side, in reference to the Union's financial proposals, stated that there would be "no increase due to others not increasing,' meaning that "no one else is going to get an increase . . . due to others not getting an increase

Notably, while the Hospital adamantly rejected the Union's financial proposals, the Hospital did not offer a written wage proposal (and did not do so until March 9). In a hotly disputed point at trial, Whelan and HR Representative Peirce (and no one else, including DeJesus), testified that at this bargaining session, Whelan referred to the pay freeze the Hospital sought as "including steps."[7]

While all witnesses agreed that Whelan repeatedly talked about the Hospital wanting a "pay freeze," Gordon and Jezierski denied that Whelan ever stated that the "pay freeze"—included a step freeze, a change to the 2012 Agreement that would require an affirmative proposal from the Hospital, and not just a rejection of the Union's wage increase proposals.

Neither Gordon nor Jezierski's bargaining notes reflect any statement that the Hospital's position included a step freeze (until much later, March 9). DeJesus, the Hospital's chief witness, did not testify that Whelan said this in this meeting. His bargaining notes do not record such a statement. Neither Miksch's testimony about this meeting nor her notes reflects this.[8]

The evidence in favor of it is (1) Whelan's testimony: after several witnesses failed to substantiate that an explicit statement was made at this meeting that the pay freeze involved a step freeze, Whelan took to the stand and testified to this effect. ("our response [to the Union] was that we were . . . proposing a pay freeze, and that would include steps"). (2) There is corroborative value to Whelan's testimony in a note he wrote to himself on his copy of the Union's bargaining proposal about what he wanted to say just before responding to the Union's proposal. The note stated: "Respondent w/ [the word "hold" is then scratched out] no—pay freeze including steps." (3) Peirce's bargaining notes from the meeting record "Pay freeze, pay freeze for steps." (4) And to some extent, Peirce's testimony that "we were proposing a pay freeze which would include

[6] The emphasis on Whelan's "clear" and "direct" style was an attribute that the Hospital witnesses seemed to repeat endlessly both at the negotiating table and at trial. See, e.g., Tr. 723 ("we wanted to be clear and direct, up front. . . . I explained to their bargaining team that I try and do that. That I try to be clear and direct." . . . [W]e wanted to be clear and direct."); Tr. 260 ("Mr. Whelan said he wanted to be clear and direct"); Tr. 306 ("And at that meeting, didn't I say we wanted to be clear and direct"); Tr. 412 ("Talked about your style in terms of being direct, and said that people generally compliment you on being direct in putting the issues out in front, and stating positions clearly"); Tr. 416 ("You said that you wanted to give a direct response to them, per your style . . . . And you said that you wanted to be clear about our position from day one"); Tr. 418 ("You talked about being direct in response and we would be direct in response"); Tr. 490 ("You opened by saying that you wanted to be clear and direct"); Tr. 536 ("Mr. Whelan said that he wanted to be clear and direct"). Truly, this is only a sampling of the number of times in the testimony that such comments appear.

[7] On the fourth day of this five-day hearing, Whelan moved from his role as the Respondent's trial counsel to the Respondent's fifth and final witness. He testified to some of the most disputed issues in the trial. The Board takes the position that "it is not the Board's function or responsibility to pass on the ethical propriety of a decision by counsel to testify in an NLRB hearing." *Wells Fargo Armored Service*, 290 NLRB 872, 873 fn. 3 (1988). However, a case like this one demonstrates the wisdom of State bar rules that frown on the practice, particularly where, as here, the advocate chose to testify on behalf of his client (he was not called by the other side), the conflict was eminently foreseeable, and his testimony involved sharply disputed issues that require multiple credibility determinations. See rule 3.7 of the ABA Model Rules of Professional Conduct, Lawyer as Witness ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; . . . .") See also, ABA Canons of Professional Ethics, Canon 19 ("When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client").

[8] I do not believe Miksch's agreement to Whelan's question that she knew on November 25 that the Hospital wanted "a real pay freeze" reflects knowledge that the Hospital wanted to freeze steps.

steps."[9]

I felt that there was a certain tendentiousness to the explicitness of the statements testified to by both Whelan and Peirce. I do believe and find that the other witnesses did not hear this statement and (perhaps with the exception of DeJesus), did not know that the Hospital's "pay freeze" response to the Union's wage proposal included an intent to propose a freeze to steps. However, particularly in light of Whelan's corroborating note setting forth what he planned to say to the Union, and the note in Peirce's contemporaneous bargaining notes that refers to a "pay freeze for steps," I find that this was said by Whelan, once, in the November 25 session.

For reasons including the credible testimony of Gordon and other union witnesses, and for reasons I discuss at length below, I do not believe the Union understood the Hospital's intention in regard to the steps (until March 9).

With regard to UP 7, on nurses floating to another unit, Whelan asked if there was a specific problem or was the Union looking to improve the contractual language. Gordon said both and there were extensive discussions at the bargaining table with employee members of the committee about the problems nurses had with floating.

As to UP 9, regarding the notification of changing of time schedules, Whelan asked about this and Gordon said it was a sensitive issue for people's personal schedules.

Whelan asked about UP 12, the reduction-in-force proposal, and Gordon explained that it is about recalling an employee into their prior position.

There was discussion about Southcoast's financial position. This was a central theme and dispute that arose repeatedly during the negotiations and over time became the main focus of the parties. Relying on publicly available documents, Gordon maintained that the Hospital was doing well financially, and had a surplus of nearly $45 million. Whelan and the Hospital representatives took issue with this. They argued that the Hospital must be (and was by the Hospital) viewed as financially integrated with the other Southcoast system groups. According to the hospital bargainers, revenue for work done by Southcoast physicians' group employees in the hospitals was recorded on the Hospital's financials, not the physicians' group, but the physicians' group's financials carried the expenses. The physicians' group in particular had grown—from 30 to 300 physicians and to 1200 total employees in the last 6 years—and the result, according to the Hospital, was that the Hospital's financial statements, viewed in isolation, as a practical matter overstated the Hospital's profitability, and that the finances could not be considered in isolation. Systemwide, argued the Hospital, while there was an operating surplus in 2012 of $17 million, there was an operating budget loss in 2013 of $7.5 million which grew to $30 million in 2014.

According to Peirce, "our position was that we weren't in a position to provide increases. And the Union's position was that we were; that our financial position was such that we could." With regard to the Union's financial proposals, Gordon said that "his members had taken pay freezes in '09 and '10 and '11, while management continued to get pay increases, staff had been frozen." DeJesus testified that "We had been clear from Day 1 that we—we wanted a pay freeze. We needed a pay freeze."

The parties took a caucus for about 45 minutes. After the caucus, Gordon responded briefly to the Hospital's proposals. He said that there would be counteroffers coming on HP 1 and 2. He rejected HP 3 at this time. There would be a counter forthcoming on HP 4. The Union rejected HP 5–8 at this time. Gordon said he needed to see the plan design on HP 9. Whelan said that the Hospital had no concrete responses at this time.

There was a caucus, the parties reconvened, and broke shortly thereafter.

December 5 meeting

The parties met on December 5, 2014. They got to the table at approximately 1:20 p.m. and the meeting ended about 4:10 p.m.

The Hospital presented two "supplemental" proposals. Supplemental proposal HSP 1 was the proposal regarding on-call pay that Whelan had orally mentioned at the November 25 bargaining session. HSP 1 proposed to amend Article II, Section 2.4 (on-call pay) of the collective-bargaining agreement "[f]or clarification purposes only" by adding a new sentence stating that "Such pay will begin when the RN arrives at the Hospital."

HSP 2 proposed amending article III, section 3.6 of the collective-bargaining agreement by inserting a sentence requiring a nurse seeking extra shifts to sign up for them: "Further nurses desiring to be called for additional hours under this Section 3.6 must sign a voluntary staffing needs list that will be maintained by the nurse manager/designee to be located at the nursing staffing office." Whelan said this was a new "concept" to try to help the supervisors from having to call so many nurses when they needed to bring in a nurse to work on short notice.

The parties caucused for approximately 25 minutes. When they returned, and in the context of rejecting the Union's financial proposals (UP 1–6), Whelan revisited the issue broached last meeting about pay freezes in past years. As discussed above, at the November 25 meeting, in arguing that the employees should receive a pay increase, Gordon had referenced that the employees took pay freezes in 2009 through 2011, or "zeros" as he called it. Whelan now challenged that, saying that he had researched the matter and that in 2010 and 2011, employees received step increases, only in 2009 was pay frozen in a way that no employees received any step increases. Whelan said there's "[b]ig differences from a zero wage and a freeze." Gordon and Whelan "had a long discussion about job rate philosophy and how steps get developed, the concepts of step—steps et cetera," with Whelan arguing that the "norm" for steps was to get someone up to a job rate that reflected proficiency in the job and from that point forward "the history of

[9] Based on the manner in which she offered this testimony, I questioned Peirce about whether she could recall Whelan saying this, and she clarified that she "can't speak to the specifics of what he quoted," but that "it was clear to me that it was for steps, as well as across the board." This did not stop her from answering the same question, on redirect, attributing to Whelan the words, "we were proposing a pay freeze, and that the pay freeze included steps." I discount her testimony on this point.

unionization is that . . . same work, same pay." Whelan argued that it was "unusual to have steps all the way," meaning for a 20-year period. Gordon responded that "steps are the industry standard" and "don't count as pay increases." Gordon "talked about that those [steps] are previously bargained. That they're not pay increases." He said that it "is $ already in place." There was discussion about CEO pay, and the Union's claim (disputed by the Hospital) that Southcoast's CEO had received a 440 percent pay since 2008, while nurses "took zeros." Whelan advanced the argument "that, in fact, people did get pay increases in '10 and '11." Whelan discussed "the [financial] situation that we're in. That economic proposals are key to us. That we had to right the ship."

Whelan testified that in this conversation the Hospital used 2009 as the example of the kind of pay freeze (i.e., no general wage increase *and* no step increases) that the Hospital was looking for in these negotiations. He testified that he told the Union that 2009 was the only year when "the [Union] was asked to take a true pay freeze," and what happened in 2009 "was what we were asking for, for this bargaining session, and that was there was going to be no step increase and no general wage increase."

Gordon denied that the Hospital used this conversation to explain that it was looking for a "pay freeze" like in 2009—i.e., with no step increases, or stated this directly in this meeting. Rather Gordon testified that this debate was, in effect, used by the Hospital to argue that the employees had not sacrificed as much or as consistently as Gordon claimed. Jezierski also denied that in this meeting Whelan equated events in 2009 with what the Hospital was demanding for these negotiations. I credit their testimony.

Notably, neither Mangini nor Peirce offer support for the claim.

Further, none of the bargaining notes—introduced for seven meeting participants—corroborate Whelan's claim that the lack of steps in 2009 was expressly linked to, or expressly used as an example of, what the Hospital was seeking in these negotiations.

Whelan's assertion on this point was less certain under cross-examination than it had been on direct. Although he had just testified to it, on cross-examination he would not agree that he told Gordon the Hospital was looking for "a true pay freeze" ("No. Not necessarily") and accused counsel of "trying to put words in my mouth . . . with the word 'true.'" Asked whether he said at the table "what we're going to do is what we did in 2009," Whelan answered, "No, I said more than that. I said it in many different ways. We had a lengthy conversation." He then asserted that he told Gordon "what we're looking for is what happened in 2009," but, asked if he said that, responded "in substance" and said "whether I used the exact words, I don't know." I do not detect deception in Whelan's answer, but on this hotly disputed topic, the retreat from an affirmative statement that he told the Union the Hospital wanted the step freeze from 2009, to saying that, in words he couldn't recall, in a lengthy conversation based on analogy to and distinguishing events 5 years ago from events 3 and 4 years ago, explains to me why none of the union committee members, and none of the bargaining notes, grasped the point that Whelan wanted them to take.

It is of some consequence here that the entire discussion was about—not a Hospital proposal—but the Hospital's rejection of the Union's proposal, and *that* proposal did not involve or freeze the steps. To be clear, if the question is, on December 5, did the Hospital know that in its own mind it hoped to freeze steps, the answer is, probably yes. But if the question is did it convey this to the Union as on that date, I find that the answer is no.[10]

The parties then again discussed the issue that underlay much of the dispute in these negotiations: the parties' respective views of the Hospital's financial situation. There was discussion about CEO pay, and the Union's claim (disputed by the Hospital) that Southcoast's CEO had received a 440-percent pay since 2008, while the nurses "took zeros." Whelan advanced the argument "that, in fact, people did get pay increases in '10 and '11."

Whelan stated that "Southcoast was not in a healthy place" in order, according to Gordon, "to support his position that they weren't in the position to talk about our first six proposals." Gordon raised the Union's view that the Hospital was financially sound and had significant funds in reserve, which was based on the Union's reading of the Hospital's IRS Form 990 filings. Gordon also pointed out to the Hospital's negotiators a state-prepared audit of Massachusetts hospitals that showed a $45 million operating profit for Southcoast Hospitals Group for fiscal year 2012. Whelan said that the surplus was from other areas, not from the Hospital's operations. Whelan told the

[10] I do not credit DeJesus' testimony (Tr. 425), which was the product of purely leading questioning from Whelan, that it was clear to the Union that the Hospital was proposing a step freeze, or that there was discussion at the table that the pay freeze in 2009 was "what we were proposing for this past year." I do not credit Whelan's testimony (Tr. 727–728) that in his discussion with Gordon about the "history" of steps, he stated that pay freeze in 2009 "was what we were asking for, for this bargaining session, and that was there was going to be no step increase and no general wage increase." All of this direct testimony left the strong impression that Whelan and DeJesus were providing conclusory accounts of what they meant to say, wished they'd said, or thought they meant, rather than what was stated. Even the cold transcript leaves it uncertain whether they are testifying to the Hospital's position or testifying about what was actually stated at the bargaining table. I am of the view that Whelan and DeJesus' perception of the importance of this point overwhelmed their judgment. I also specifically note that the point is not proved by Miksch's agreement with Whelan's question to her that the Hospital wanted a "real pay freeze," nor by her response to a series of questions where Whelan first got her to agree that she knew as of December 5 that the Hospital wanted a pay freeze and then that the Hospital's position (on no specified date) was that this meant no step increases, because Whelan "kept saying that." The record does not support that "Whelan kept saying that," and further, I watched this exchange and was clear to me that Miksch was confused by the questioning. The herculean efforts that the Respondent had to go through to try to prove what, were it true, would have been an easily verifiable (and documented) point, did not enhance its credibility. I suppose I should add here that, for reasons that become apparent below, and notwithstanding the weight the Respondent places on the point, it makes no difference to the outcome of this case whether the step freeze was proposed orally in the early bargaining sessions or, as I find, not until March 9, 2015.

Union that in a future meeting the Hospital would have "their financial people there" to discuss the financial situation of the Hospital. Whelan said that the "operational budget [was] not in a healthy place."

Whelan added that he "was not saying we have an inability to pay" and that "interest income is what is keeping things [a]float." Gordon said he was "taken a[b]ack" and said but "you['re] saying you don't have an inability to pay"? Whelan stated, "no [,] we have ability to pay" but he said that the Hospital's position was that "our financial trend was heading in the wrong direction and we couldn't continue in that direction."

The parties moved on to discussing union proposals other than the Union's financial proposals. Whelan discussed the Hospital's need for flexibility and the need to have nurses float. However, Whelan expressed an interest in discussing how the floating process could be improved.

Whelan question why UP 8 on mandatory overtime was necessary, and Gordon indicated that he wanted to be sure that the Hospital "was not using the contract as a way around" State law on mandatory overtime. The parties discussed the Union's proposal on scheduling changes (UP 9) and asked for examples of the problem.

The parties discussed UP 10 regarding elimination of flex-up. Whelan said that the Hospital needed flexibility and needed "to be able to match your staffing to the patient volume." He rejected the Union's proposal to eliminate flex-up.

With regard to UP 11, the Hospital said it could agree to (e), i.e., to pay union committee members for lost time at work due to negotiations, but rejected the proposal, in that it would not put it into the agreement. The Hospital said it would consider the issue in the context of ground rules when the parties began bargaining. As to (f), regarding releasing local union officials from work for grievance-arbitration related matters, the Hospital said it had some latitude on the issue, but would not accept it as proposed.

There was discussion of the Union's reduction-in-force proposal (UP 12) and Whelan suggested that displaced employees could rely on the job-posting process rather than having a right to return to their previous position if it became vacant.

As to the Union's successorship proposal (UP 13), Whelan stated that "successorship is generally covered by law," and that, rumors aside, the Tobey Hospital was not for sale. Gordon said that the Union wanted a successorship provision in all its contracts and that it was "a key priority for them[, t]heir most important proposal."

After a caucus at approximately 2:50 p.m., the parties reconvened at about 3:40 or 3:45 p.m. Gordon told Whelan orally that the Union was going to give the Hospital a proposal for a 3-year contract with no wage reopener, thus proposing to change the dates in the duration clause of the agreement and to delete the reopener provision in the 2012 Agreement. This was, Gordon testified, consistent with the UP 1, the Union's wage increase proposal, which covered a 3-year time frame and did not anticipate a wage reopener.

Gordon then responded to the Hospital's proposals. As to HP 1, Gordon said that the Union was open to having a designated transition unit but that it wanted current employees to have the opportunity to go into the program and that the Union would counter. With regard to HP 4, Gordon was agreeable to employees needing to have the time off already in the bank in order to schedule time off, but he wanted to counter by setting some time limit for managers to respond to employee requests for time off in the summer. The Hospital withdrew HP 7, regarding dental contributions, and agreed that "[w]e would not have an increase in dental contributions."

Gordon repeated that he needed a copy of the summary plan description for the pension. There was discussion of HP 2, the effort to define weekend shift, with Gordon seeking to understand the problem that the Hospital was trying to fix with the proposal. Gordon indicated the Union would counter. On the UP 9, the Union offered a proposal that employees who picked up an extra shift early in week would not have their regular shift later in the week cancelled. The Union committee gave some examples of the problems faced by the nurses in this regard.

There was a discussion of flex positions (UP 10), with union committee members explaining that flexing was being used for portions of shifts, or for just a few hours at a time, "like an on-call system," and that it would be more tolerable if used just to cover vacancies or leaves of absences. The meeting then ended.

December 17 meeting

The meeting originally scheduled for December 11 was cancelled by the Union. Gordon testified that he "believed[ed he] was required by my boss to attend another union meeting that they wanted me at." According to DeJesus, he had been told by Hospital representatives that in the previous year's reopener negotiations, Gordon's cancellation of meetings had been a problem.

The parties met again on December 17, beginning the bargaining at approximately 1:30 p.m. In addition to Gordon, the Union's committee of Miksch, Jezierski, and Kilpatrick was present. The Hospital also had its full committee: Whelan, and DeJesus, but also Conley, Mangini, and Peirce.

Whelan began, stating, in reference to the Hospital's position on the Union's financial proposals that the Hospital's position was not changing. He said that economics was critical to the Hospital and he believed the Union "understood our circumstances."

Whelan then presented a new oral proposal to amend Article III, Section 3.2 Overtime, as to daily overtime. Under the current terms and conditions of employment, overtime pay (pay and a half) began after eight hours, or, if the shift was scheduled longer (typically 10 or 12 hours), when an employee worked beyond the regularly scheduled shift. This new December 17 proposal provided that overtime pay would begin after nine hours, or, in the event of a longer scheduled shift, after the employee had worked one additional hour beyond the scheduled time period. In effect, the proposal would convert what was currently the first hour of overtime pay to straight time pay. The parties discussed this proposal and the Union requested "a list of all the nurses and their one-hour overtime" in an effort to see "what drives this proposal."

Then Mangini discussed the issue of the flex-time concerns and employees working partial shifts that had been raised by

the Union in the last meeting. Mangini asked about the problems the nurses were having with flexing. Jezierski gave an example of a nurse who was called at 2:30 p.m., "flexed off at 3:00 PM, but then called and told, well, I might need you back at 7:00 PM" With regard to the Union's proposal to eliminate flex-up, Gordon testified:

[It is] very difficult for a nurse or anybody, any individual to kind of live their life [as described by Jezierski]. I mean a lot of these are parents, single mothers, single husbands, whatever, with kids. My rule of thumb with all the hospitals is you can mess with their pay before you mess with their schedule because they set their whole lives around the schedule. That is how important it is. So this was a big issue for the nurses and they'd like to . . . see it fixed.

The Hospital did not reject the proposal but said that it would discuss it internally and "see what they could do."

CNO Conley then talked about the Hospital's proposal (HP1) for the designated transition unit and how the Hospital envisioned it working. The parties discussed whether its staffing with recent graduates would decrease or increase employee turnover. Gordon told the Hospital that the Union was not "totally opposed to the concept and that we would submit a counter to them."

At some point in this meeting—the record is unclear—but likely before the first caucus, the Union gave a written proposal (UP 15) that reflected the oral proposal it had made at the last meeting, which was a change to the appropriate portion of the collective-bargaining agreement (Article 14, Section 14.2) to provide for a 3-year agreement with no wage reopener.

After a caucus, Gordon, in consideration of the Hospital's daily overtime proposal, requested the "last year of the first hour of overtime by unit and by shift." The Hospital said that it would obtain the information and get back to the Union.

Whelan turned to the Union's proposals. Whelan stressed that "economics were critical to [the Hospital]. That the pay freeze, the pension, the holiday time were all critical economic issues to us and that we needed to have that."

Whelan then provided the Union with a counterproposal on the floating issue (UP 7), which he read across the table. This addressed some of the Union's proposal but ignored other parts. The Hospital stated that it would identify core competencies that a floating nurse would have to have in order to be floated to a particular patient or area, and the Hospital said it would endeavor not to float an RN twice in a shift. The Hospital also wanted new graduate nurses—not newly hired nurses—to be the group that would not be floated for their first 6 months. According to Gordon, the Hospital's counter reflected "bits and pieces of what they were willing to tweak to our proposal, to make it work."

As to UP 8, which sought to have the contract guarantee that the Hospital would comply with State law as to mandatory overtime, Whelan stated that "we didn't think that was an issue here" and rejected it. The Hospital rejected UP 9 that sought to scheduling changes. On flex-up (UP 10), the Hospital reiterated that it would be responding at a later time.

On UP 11, the Hospital rejected the Union's proposal, refusing to put the commitments in the collective-bargaining agreement. It did indicate a willingness to agree to the substance of the Union's request on (e), but not in the labor agreement.

On UP 12, the Union's reduction-in-force proposal, the Hospital said it would counter with a concept: the Hospital told the Union it was agreeable to the concept of permitting a person to be recalled to an open prior position, but for a period of 3 months—the Union's proposal was for an 18-month recall provision.

The Hospital rejected the Union's successorship proposal (UP 13) and said that it would take a look at UP 15, the 3-year duration clause proposal with no wage reopener.

At that point the Hospital provided the Union with the written daily overtime proposal that it had orally conveyed at the beginning of the meeting.

After that, the parties caucused and did not reconvene to bargain further that day, ending at about 3:30 p.m.

The Union's December 30 information requests; the January 30 meeting

By letter dated December 30, 2014, the Union sent an information request to the Hospital seeking a range of financial information. This request was made, according to Gordon, in response to the Hospital's contention during the bargaining sessions that "they were not in a good place financial[ly]."

On the same day, the Union sent another information request to the Hospital, reiterating requests it previously had made orally to the Hospital, seeking: (1) a showing by nurse of all first hour overtime for the past year; and (2) the plan design documents for the nurses' pension plan and "a breakdown of how the Plan works currently, core, employee contributions and employee match."

The Union cancelled the meeting on January 6 because Gordon had to attend an arbitration for a unit involving another employer. After that, the Hospital did not want to meet until January 30, as its human resources department was occupied conducting a reduction in force of supervisory employees.

The parties met again on January 30. Whelan and DeJesus were present for the Hospital. For the Union it was Gordon, Kilpatrick, Jezierski, and Miksch.

The meeting began with DeJesus telling the Union that the financial information would be forthcoming. Whelan also followed up on a commitment he had initially raised in the December 5 meeting, and told the Union that the Hospital would have its Chief Operating Officer (COO) Linda Bodenmann attend an upcoming bargaining session to make a financial presentation to the Union about the Hospital's finances. COO Bodenmann had recently presented the financials to the SEIU union in their negotiations with the Hospital. DeJesus believed that Bodenmann's information had been helpful in those negotiations. (The SEIU negotiations began in approximately December 2014 or January 2015 and were successfully completed in October 2015).

As referenced, the competing views of the Hospital's financial situation had been a divisive issue in the bargaining. The Union had requested financial information. The Hospital relied upon its claims of losses to justify its demand for a pay freeze and regressive proposals on other financial issues. The Union's reading of publicly-available financial documents, including the 990s, suggested to the Union that the Hospital had an operating

surplus of $45 million. Whelan had told the Union that the $45 million was from other areas, and that the Hospital was hurting financially systemwide. The Union had challenged him to show them more evidence and detail on this. Gordon testified, there was "[i]nformation that we wanted. You know, they were claiming that they were hurting financially. We were showing . . . that they had 45 million. We were basically saying, you know, Mr. Whelan, you need to explain to us."

DeJesus then talked about the reductions in force that had been occurring that month at the Hospital (among nonunit employees), and used it to emphasize to the Union that

> I wanted to be clear, because the Union was taking the position that we were not in bad financial shape [but] we wouldn't be taking action like this unless we were in tough financial shape. . . . So my point in saying that was to share with them that we don't take these decision lightly. That we would not be asking for a pay freeze if it truly wasn't necessary."

After an hour-long caucus, the Union presented a counterproposal on HP1, the new graduates dedicated transition unit. The Union's counterproposal provided for the hiring of "new RN graduate[s]" into a residency program for up to 3 months, payable at the step 1 rate under the collective-bargaining agreement, and provided for incumbent bargaining unit members to have the ability to be awarded these positions. The Hospital discussed with the Union that it had this program at its other two hospitals, and "we wanted the same situation at Tobey, otherwise it would impede our ability to recruit at Tobey."

The Union then turned to its financial proposals (UP 1–6) and withdrew entirely the evening differential (UP 2, first item), reduced by $ 0.50 the night differential proposal (UP2 second item), withdrew the weekend differential (UP 3), reduced the on-call pay differential by $ 0.50 (UP 4), and reduced the charge nurse pay by $3 (UP 5), and the preceptor pay (UP 6) by $2.25.

On floating (UP 7), the Union rejected the Hospital's overall counterproposal, but agreed with the Hospital's prior counter on bullet point 3 of this proposal, that the proposed 6-month restriction on floating should apply to "new graduates" and not (as written in the proposal) "Newly hired" nurses. The first two bullet points of the Union's floating proposal were still at issue.

The Union wanted UP 8, on following State law for mandatory overtime, to remain on the table. As to UP 9, the Union was waiting for the Hospital's response on flex positions before considering changes. As to UP 11, the Union agreed to withdraw the request for (e), but was waiting for language on (f). As to UP 12, the reduction-in-force proposal, the Union reiterated that it wanted a bumped employee to be able to return to their old position.

The Union expressed concern about HP 2, which Gordon said would result in night employees having no weekend off. The record suggests that Mangini may have joined the Hospital bargaining team for this discussion. The Union rejected HP3, the Hospital's holiday proposal, and countered on HP4, seeking to require management to respond to nurse requests for ET time off within 48 hours. The Union rejected HP5, which proposed a two-week limit on cashing in of earned time. On HP 6, the proposed increase in health care contributions, the Union agreed that the Hospital had the right to implement that increase unilaterally, and, for that reason, questioned why it was a bargaining proposal. Whelan explained that the Hospital wanted to have the current premiums in the contract.

On HP 8, the proposal to eliminate four weeks of FMLA leave, Gordon again asked for information about this proposal, this time asking for the cost for the extra month of FMLA leave. The Hospital told the Union that "it's a bit difficult to get," and described that it would have to determine who took a leave of absence, determine whether they took a 4thmonth, and then figure out the cost associated with it.

As to HP 9, the pension formula change, the Union rejected this. The Union had yet to receive the pension information repeatedly requested from the Hospital on November 25, December 5, and again December 30.

After a 40-minute caucus, the parties returned for about ten minutes. Whelan told the Union that the Hospital was withdrawing HP 2, the proposed change to defining weekend shifts. On HP 1, the Hospital said that it would soon propose that there be a percentage of positions available to incumbent union members for the proposed transition unit.

The Hospital said it would provide a full and comprehensive listing of all its outstanding proposals at an upcoming meeting.

Whelan then "reiterated that our position on economics would not change. That the economics were critical to us; the pay freeze, the pension, the holiday issues." In this regard, Whelan suggested that "it would be helpful if Linda Bodenmann came in and did a presentation" on the financial situation.

Dates were set for future meetings for February 12 and 17. The meeting ended.[11]

February 12 meeting

The parties' February 12 meeting commenced at approximately 1 p.m. at the Hospital.

At this meeting Hospital COO Bodenmann joined Whelan and DeJesus and Bodenmann gave a power point slide presentation on the Hospital's financial situation.

Bodenmann's explained that the Hospital's goal was to have a 2 percent operating margin each year and that had not been accomplished in the last 2 years, since 2012. Bodenmann mentioned that the Hospital had recently been downgraded by Moody's, that volumes were down, that there was cost to revitalize the emergency department, and that the lack of flu season had hurt receipts. Bodenmann's presentation materials showed that after operating gains of $17 million and net income gains

[11] In a return to a dispute that consumed much of the Respondent's energy at trial, and on brief, I note the Respondent's extensive effort on brief (R. Br. at 27–29) to contend that Gordon knew, as of the close of this January 30 meeting that the Hospital proposed a step freeze. Relying on two pages of cross-examination (Tr. 302–303)—most of which contradicts the point the Respondent want to make—the Respondent seizes on a statement by Gordon that he thought on January 30 "that the Hospital wanted the step freeze because you had it everywhere else." But in full context, I think that the Respondent misses the point. The point is what had the Respondent proposed at the bargaining table. As Gordon testified, and as I find, the Hospital did not communicate a bargaining proposal (orally or in writing) for a step freeze until March 9.

of $34 million in fiscal 2012, in 2013 operating losses of $7.5 million were offset by investment income, and in fiscal 2014 the offset of nonoperating gains to operating losses of over $30 million left a net income loss of $7.7 million. DeJesus called this a "downward slide . . . and we just couldn't continue in that direction." According to DeJesus, based on efforts taken by the Hospital (such as layoffs, pay freezes for the physicians'' group and at the other hospitals), Bodenmann told the Union that the Hospital was "heading in the right direction." According to Gordon, Bodenmann "was just going over telling us this is why they felt they didn't have the ability to give us our financial increases that we were requesting through our proposals."

After Bodenmann's presentation, and a half-hour caucus, the parties reconvened. Whelan presented what DeJesus described in his testimony as "a comprehensive position of where we stood" on both the Union and Hospital's proposals. As to the Union's financial proposals (UP 1–6), Whelan told the Union: "we've made it clear what our economic position is. You just heard it. We are very strong on our economic position. We won't be changing our economic position. These are critical to us. We need the pay freeze. We need the pension. We need the holidays."

The Hospital's comprehensive proposal included no written proposal to freeze the steps, or any written proposal on wages at all.

On UP 7, the Union's proposal to limit floating, Whelan reoffered the Hospital's counterproposal from the previous meeting but the parties remained divided over the Union's demand that per diem employees float first and limiting RN floating to once per shift.

Whelan said that the Hospital could "get there in concept" with regard to UP 8, but was concerned about the Massachusetts regulations that the Hospital would be contractually agreeing to abide by. Later that session the Hospital provided some language it wanted added to UP 8. The Hospital said it would "hold" (i.e., "we'll continue to talk about it" and get back to the Union) on UP 9, 10 and 11 (f).

With regard to UP 12, reductions in force, the Hospital indicated that this could be worked out, but the Hospital held to its offer of a 3-month period to recall displaced nurses to their old position should a vacancy arise.

On the Union's successorship proposal (UP 14), the Hospital said it did not yet have a position but was working on it through the Hospital's general counsel, and would get back to the Union on this issue. As the Respondent points out on brief (R. Br. at 33), this was the first time in the negotiations that the Hospital had indicated willingness to discuss the successorship proposal.

As to the Hospital's proposals, Whelan mentioned that the Hospital had amended its previous position. The Hospital then withdrew HP 2, the proposal to clarify the weekend shift. The Hospital said it was "holding" the same position on HP 3, 4, and 5. The Hospital had withdrawn HP 7 (dental premium increase) in earlier meetings. There was a tentative agreement on HSP 1 (on-call pay). The Hospital withdrew the daily overtime first hour proposal it had put on the table December 17.

Gordon asked the Hospital if it had already acted on its pension proposal and changed the pension contribution benefit to eliminate the 3 percent automatic employer contribution. Gordon was aware that this had been implemented elsewhere in Southcoast, and the Hospital had originally suggested it had a right to unilaterally implement this provision. The Hospital representatives said that they were not sure, and would let the Union know. (DeJesus testified that he learned that the change had not been made and reported this to the Union.)

Gordon mentioned that it was "bizarre" that the Employer was proposing a change in health insurance that it already had a right to implement. Whelan repeated, as he had before, that "we were just clarifying what the numbers were."

The parties caucused for about 70 minutes. When the parties reconvened, the Hospital provided some additional language on UP 8, on complying with the State law on mandatory overtime. After some more discussion on the reduction-in-force language, the parties set dates for further meetings: February 27, March 4, 9, and the parties agreed that the Federal mediator would join the meetings on March 4. The meeting adjourned at approximately 4:25.

At some point during this meeting, Whelan offered to have Bodenmann meet with a financial consultant chosen by the Union. Whelan told the Union that the Hospital "would be happy to have [Bodenmann] get together with anybody that [the Union] would have on their side to walk through the financials and prove their understanding of our financial position."

Gordon then requested a copy of Bodenmann's slide presentation.

Cancellation of February 17 and 27, and March 4 meeting

At the conclusion of the January 30 meeting, future meetings were scheduled for February 12 and 17. The February 12 meeting is described above. The February 17 was cancelled. The meeting did not go forward at Gordon's request, but the record is unclear when or why this happened.

At the conclusion of the February 12 meeting, the parties agreed to future dates for meetings, including February 27.

The morning of February 27, Gordon was informed that two of the three employee union committee members were not being released from work to attend negotiations. In response, Gordon emailed the Hospital's HR Director Hess at 9:13 a.m. stating that "The Hosp[ital] is unable to release 2 of my 3 committee members so we are cancelling negotiations for today." Gordon testified,

> I wasn't going to go to the negotiations with just one committee member. . . . We try to set the dates in advance to try to help the Hospital release the employees. These are nurses so it involves patient care. . . . If I get a call that morning saying two of them can't be released it's usually for good reason, so I canceled the negotiations.[12]

Hess responded to Gordon only a few minutes later, stating: "Janet [Peirce] is working to have the committee members released today, please do not cancel. Thank you." At 9:35 a.m. Peirce wrote to Gordon, confirming that two of three committee

[12] The parties' ground rules for negotiations provided that

> Southcoast will grant paid release time, subject to its operating needs and subject to the following, for up to 3 bargaining team members who are scheduled to work during all or part of the period of a scheduled collective bargaining session . . . .

members had been approved for release, and that "[t]hey continue to work on releasing Sharon [ ] as well. Hope that helps. Thanks." However, Gordon maintained that he had already told his people that it was canceled and stuck to the cancellation.

Gordon also indicated that "we need the financial information we requested last meeting so we are prepared to discuss anything else." This was a reference to the slides of Bodenmann's financial presentation that the Union had requested at the February 12 meeting. Whelan mailed copies of Bodenmann's slide presentation to Gordon that day.

The parties' next meeting was set for March 4, but Gordon had to cancel this meeting due to a medical emergency involving his elderly mother.

March 9 meeting

The parties met again March 9. The meeting got underway about 1:40 p.m. The Federal mediator, Paul Chabot, attended bargaining for the first time.

Whelan started by stating that he recognized that this was a tough situation but that the operating expense problem had to be corrected, and the Hospital was "heading in the right trend, right direction." Whelan then handed out a comprehensive proposal across the table, titled "Hospital['s] Modified Proposals and Counterproposals." This March 9 set of proposals, which had signature lines for the Union and Hospital at the bottom, provided the following 12 numbered paragraphs, which I describe here:

> 1. HP 1 (new grad unit and lower pay) was withdrawn, provided that the Union agreed with the Hospital's modification to UP 7 (as discussed below).
>
> 2. In place of UP 7 on floating, the Hospital counterproposed the following addition of a new section to Article II, Section 2.11:
>
> > Floated nurses will receive a patient assignment within his/her nurse competencies. When floated, nurses will be provided with an opportunity to become familiar with the Unit to which they are floated. The Hospital will endeavor to avoid floating a nurse more than once per shift. New graduate nurses will not be required to float until they have completed six (6) months of employment.
>
> 3. HSP 1, the on-call pay provision; amended to add a new third sentence to the first paragraph of Article II, Section 2.4, but with the word "RN" changed to "Nurse" so that the proposal now read as follows: "Such pay will begin when the Nurse arrives at the Hospital." The parties had a tentative agreement on this language already.
>
> 4. UP 8, the Union's proposal to have the Hospital comply with state law on mandatory overtime, was now counterproposed by the Hospital—with the following parenthetical material added:
>
> The Hospital will comply with Massachusetts General Law and Massachusetts regulations *(specific to private, acute-care hospitals)* on Mandatory Overtime. (Emphasis added.)
>
> 5. UP 9, the Union proposal seeking advance notice of schedule changes, was counterproposed as follows (Article III, Section 3.4):
>
> Time schedules and days off will be posted two weeks prior to each schedule period. It is understood that such schedules *of control hours will not may be changed unless it is to deal with an* ~~to meet~~ emergency or upon mutual agreement. ~~or special conditions necessary to properly staff the Hospital.~~ Nurses will be notified of schedule changes by the Nursing office 48 hours in advance whenever feasible.
>
> 6. HP 3, Article V, holidays. This proposal remained the same, effectively changing Patriots' Day and Columbus Day from "paid holidays" to "floating holidays."
>
> 7. On HP 8, the Hospital continued to propose deleting Article VIII, Section 8.15 to delete the extra four weeks of FMLA leave.
>
> 8. As to the UP 12, reduction in force, the Hospital counterproposed adding the following language at the end of Section 9.8(b):
>
> If the specific position (unit, shift and hours per week) for which a nurse was displaced due to layoff/bumping becomes available within three (3) months from the initial layoff that caused the nurse to be displaced, the displaced nurse will have the first option to return to that position."
>
> 9. As to UP 13, the successorship proposal, the Hospital wrote "(To be determined.)"
>
> 10. As to HP 9, relating to pension contributions, the Hospital's proposal now stated:
>
> > For clarification purposes only: The pension formula will be amended effective _____, 2015 to provide that there will be no core contribution and a 6% matching contribution by the Hospital.
>
> 11. The Hospital added a written proposal, Article II, Section 2.1 Minimum salaries, stating,
>
> > There will be no step increases beginning March [ ], 2015 and ending on March [ ], 2016.
>
> 12. As to UP 15, Article XIV, Section 14.2—Duration and Renewal, the Hospital's proposal stated: "TBD"

After providing this "comprehensive" proposal, the parties went into caucus.

Gordon testified that the step freeze proposal (item 11, above) "really caught" the committee's eye. Union committee member Jezierski testified that she was "shocked" by this proposal, because step proposal "was never part of the Hospital's proposal. We were the only one who had put in financial proposals and none of them dealt with step raises."

The parties stayed in separate caucus rooms for the bulk of the afternoon, with the mediator traveling between rooms to speak to the parties. The parties returned to the table at approximately 4:15 p.m.

When the parties returned from caucus, Whelan provided the Union with an amended version of the "Hospital['s] Modified

Proposals and Counterproposals" that he had provided at the beginning of the session. This version added dates for the contract duration, the step freeze, and the pension proposal.

> On item 12, the Hospital now proposed that the contract continue through September 30, 2015, just six and a half months into the future.
>
> On item 11, the step freeze proposal, the Hospital now proposed that the step freeze would begin April 1, 2015, and continue through March 31, 2016, thus proposing the step freeze to begin in three weeks, and to continue six months beyond the proposed term of the labor agreement.
>
> On item 9, the pension proposal, the Hospital now proposed that the pension contribution formula would be amended as proposed effective April 1, 2015.

Whelan then told the Union that "this was our complete position," and adding that, "we're not shutting down discussion on successor language, but we're at our bottom line on the other proposals." The Hospital indicated that it was "working through some language" on successorship.

Gordon told Whelan that the Union felt that this proposal item 11 (the freezing of step increases) violated the parties' ground rules and "was an illegal proposal" and "that we were contemplating a ULP." Whelan stated that "it's only a counterproposal to your wage proposal."

At some point in this meeting, Gordon asked again, with regard to item 7 (HP 8), the elimination of the extra month of FMLA leave, how many people used this benefit over the last year. The Hospital said that "[t]hey were gathering the information."

Gordon also questioned why the Hospital's pension proposal was now prefaced with "for clarification purposes only." The parties had previously discussed whether this proposal was merely notification of what the Hospital intended to do or an actual proposal to the Union. The Hospital had initially told the Union that, like the health insurance premiums, this change was an action that the Hospital could take unilaterally, so it was not so much a proposal as notification. The Union disagreed with this and maintained that changes had to be bargained. Gordon wondered if this language signified a return to that dispute. Whelan's response is not contained in the record.

With regard to the reduction-in-force proposal, Gordon countered the Hospital's 3 month proposal to return a bumped employee to a prior position, with the suggestion that the parties use 1 year, which would equal the length of time that a laid-off employee had recall rights under the labor agreement.

At some point in this meeting there was discussion of getting the finance people together, so that Bodenmann could meet to discuss the Hospital's financial situation with a financial expert retained by the Union.

The parties set March 20 for the next bargaining date.

March 20 meeting

This session began at approximately 2:45 p.m. The Union was represented by Gordon, and employees Miksch, Jezierski, and Kilpatrick. The Hospital was represented by Attorney Whelan and DeJesus.[13] The mediator was also present for this meeting.

Gordon said that the parties need to get their "financial people together" and that the Union was working on that. Gordon said that Julie Pinkham, the executive director of the Union, was arranging for a financial expert to be retained by Union, and that "it would happen ASAP." But Gordon added that while waiting that there's "not a lot to talk about."

Whelan said, "so there's no change in your position." Whelan said he realized the "financial talks [between experts] were important to help [the Union] understand, but we knew the financials and the financial discussion would not change our position." Whelan said, the "[r]eality is the reports will not change our position. We know what we know."

Gordon said, "well, we need to know the facts. We're willing to take zeros at other places, but we don't see that here on our financials. And there's floating and successorship."

Whelan responded that on successorship the Hospital would respond to the Union's proposal during the upcoming meeting to discuss financial issues. The parties discussed when the financial meeting would occur.

Gordon said quickly and the Hospital was also eager to have the meeting soon. Gordon said that the Union "[m]ay take a softer stand with [its] proposals," it "[d]epends on [the] financial positions."

The parties caucused. Once back at the table Whelan told the Union he had an amended proposal. He also told the Union again that the Hospital wanted to get the financial people together to help them understand the financial situation.

The Hospital distributed its amended proposal, and told the Union this was its "final" proposal. The proposal was the same "comprehensive" proposal made at the March 9 meeting, with the following two changes. This proposal responded to the Union's successorship proposal by counterproposing the following language for article XIV, section 14.2:

> This agreement shall be binding upon the parties hereto and their successors. The Hospital shall give notice of the existence of this Agreement to any purchaser. The hospital will bear no liability as a result of this provision.

Second, on the floating issue, the Hospital proposed:

> The parties will enter into a side letter that provides: "Per Diem nurses on SK2 and SK3 will be floated before regular full-time or regular part-time nurses. This agreement will expire September 30, 2015."

The Union told the Hospital that the proposed successorship did not meet what the Union needed, and that it would develop additional or better language to counter with. The Hospital said it would listen but that "there [were] no promises in negotiations." As to the new proposal on floating, the Union said it wanted this in the floating section of the contract, not in a side letter, and it wanted the agreement to cover the whole hospital, not just the two units mentioned (SK2 and SK3, which are the

[13] Peirce was not at this meeting. Mangini indicated that she was at all the meetings, but there is no indication in the bargaining notes or other evidence that she (or Hess) were present at this meeting.

med/surgical floors in the hospital). The Hospital said that this was the best they could offer on this issue.

The parties went into caucus after the Hospital distributed the amended proposal and in that setting there were discussions with the mediator. The mediator suggested that the parties press ahead with plans to have a meeting between financial experts.

The parties did not return to the table that day. The meeting ended for the day.[14]

Cancellation of March 31 meeting; union retention of consultant; further response on union information requests

The next meeting was scheduled for March 31. On March 30, Gordon emailed Whelan notification that the Union was cancelling the negotiations "until our financial people sit down and meet with the hospital's financial people." Whelan responded sharply:

> We do not agree to cancel negotiations tomorrow. This will be the fourth session that you have unilaterally cancelled. Our finance person has been available for weeks to meet with yours, and remains available. We will be at the table at the agreed upon time and hope that you change your mind. We have given you a final proposal and we await your response. This process has gone on for too long and we need to bring it to closure.

Gordon responded as follows:

> While I appreciate the fact that South Coast wants to bring this negotiations to closure, the MNA will not just settle this contract without doing its due diligence to secure a fair and equitable contract. The cancellation of sessions by either side is just part of the process. We set dates weeks and sometimes months in advance and yet my negotiating team members have difficulty getting released on time almost every time. The Union has requested information on a number of things and have yet to receive them, for example; Pension Plan design document and a list of nurses who have utilized the FMLA extension language over past year. I was on vacation last week which you and your team were aware of, so not much was going to happen while l was away, just like if you were away. The parties have agreed to have their Financial people sit down and review South Coast's financials so that the MNA is in a better position to understand South Coast['s] position that it cannot give the nurses any kind of wage increase. As I have stated both at the table and to you on the phone the union cannot respond to any package offer until we have reviewed the Hospital[']s finances. In regards to your statement that the process has gone on long enough, what is long enough? We have had a total of seven (7) sessions, while requesting mediation after only five (5) sessions, something I've never seen in my thirty plus years of doing this.

Let me reiterate "we ARE cancelling negotiations for tomorrow 3/31/l5."

As Gordon pointed out in his testimony, the parties had discussed on March 20, moving forward to set up the meeting with a union-retained financial expert. Gordon testified that the Union was looking to hire "somebody who was an expert in hospital finance." Within a couple of days of this email exchange the Union's executive director had retained an expert in hospital finances to work for the Union. The consultant was Fred Hyde. Hyde is a professor of business at Columbia University, a physician, an attorney, and experienced in hospital finance issues.

On April 1, Whelan sent Gordon the following email, stating:

> As a follow[-]up to my voicemail from yesterday, please call me this morning regarding the finance meeting and the next negotiating session. Also, although we could not find an information request, here is the pension SPD and an outline of the changes that have already been put in place for other employees of the system. The extended medical leave information is being gathered.

As stated in the email, attached was information on the Hospital's pension plan for employees and an information sheet detailing the changes already implemented at the other hospitals, the same changes proposed for the Tobey nurses bargaining unit. Although not the old plan information (i.e., the current plan for the bargaining unit employees) Gordon testified that this information was responsive to the Union's pension information request, which had been made orally in the November 25, and December 5 meetings, and made in writing on December 30, and in the March 30 email.

No one from the Hospital ever followed up with the Union to provide the requested FMLA leave information. As of the

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[14] The testimony at trial contained one sharp dispute about an incident Whelan claim occurred on March 20, or perhaps, on March 9, Whelan was not sure. Whelan testified that at some point on one of these days he had a one-on-one meeting with Gordon in the hallway outside the negotiating room. Whelan testified that at this hallway meeting he told Gordon "I'm in a tough spot here, but . . . we cannot do a deal without . . . the wages being frozen, then pension, and the holiday thing." Whelan then testified that Gordon told Whelan, "well, you know, I can't do a deal with those."

Gordon adamantly denied saying this. Gordon explained the hallway discussion as follows: "our position hadn't changed from what I said across the table to him. Out in the hallway I said to him, if they could find a way to move on some of our important items, we could soften our position on some of their items. That was the crux of our discussion."

I believe Gordon. In addition to his credible demeanor, the statement attributed to him by Whelan was inconsistent with the position Gordon expressed at the bargaining table both before and after this—there he linked the Union's positions to his view of the Hospital's finances, which were going to be discussed by the Hospital and the financial expert being retained by the Union, and then reviewed. (I discuss this at some length, below.) I recognize, but am not concerned that when questioned about this hallway meeting on cross-examination, before Whelan had even testified about it, Gordon did not instantaneously remember what was discussed in a hallway meeting, described by Whelan as occurring either on March 9 or 20. He was surprised by the question and did not recall. But after Whelan testified about the meeting, Gordon testified on rebuttal that he did remember the conversation Whelan was referencing and denied saying that he could not reach agreement. I do not find that suspicious, as urged by the Respondent. Rather, I think that Whelan refreshed Gordon's memory through his questioning and through Whelan's own subsequent testimony. I credit Gordon as to what was stated in this hallway meeting.

hearing, the information had not been provided.[15]

April 8 financial meeting

By April 1, Whelan had suggested that the parties' have their "financial experts" meeting on April 8. Gordon agreed.

The meeting took place as scheduled, April 8. Present for the Hospital were Attorney Whelan, DeJesus, and COO Bodenmann. Present for the Union were a union researcher, Nicole Roach, Gordon, and the Union's retained expert, Fred Hyde.

The meeting became contentious immediately, primarily between Hyde and Bodenmann. Bodenmann suggested that she go through her financial presentation for the group and Hyde said that "he didn't need that" and was not interested in that. Hyde asked for copies of the Hospital's audited financial statements. Bodenmann was "affronted," and commented that the Union "should have put the request in before we had the meeting" and reviewed them in advance. Bodenmann and Hyde argued about this. Bodenmann had copies of the audited statements with her at the meeting. After some argument, and Gordon's intervention, she agreed to provide Hyde with copies of the audited statements. She provided him a 41-page document covering fiscal years 2012–2014. This was the first time in the negotiations that this financial information had been provided to the Union.

The parties caucused. When they reconvened, Hyde and Bodenmann clashed over whether it was appropriate to consider the finances of just the hospital portion of the Southcoast system or, as the Hospital maintained, the entire system's (i.e., hospital, physicians' groups and other entities) finances should be considered as an integrated entity. They both cited accounting standards. Hyde argued that the Hospital's financial problems related solely to the physicians' group, and he asked when the Hospital had taken over the billing for the doctors. Hyde criticized the assumption of this obligation by the Hospital. According to DeJesus, Hyde "agreed to disagree on how [the financials] should be presented," but acknowledged that it made sense, given healthcare reform that the Hospital had moved to increase hiring of physicians. However, Hyde suggested that the financials were presented in a way that "prov[ided] some financial benefit to physicians," and Bodenmann "took great umbrage at that."

DeJesus testified that after much back and forth on financial accounting matters, Hyde stated that the Hospital

> should in any event respect our nurses, and treat them respectfully. I picked up on that. I had been silent up to that point, but I picked up on that and said I agree with you and we do respect our nurses. And out of respect for our nurses, I said to John [Gordon], that we need to get a date to settle this. To get all this done. And he made a statement that of course we could get a date and I said, well, you've canceled four different meetings. He said his mother was sick for one of those. I said I'm sorry about that, but there's been a series of cancellations here. It's not fair to the nurses for this to continue to go on. You know what our position is.

DeJesus also testified that Whelan joined in this exchange at the end of this meeting and told Gordon, "you know where we stand. We've given you our final proposal. And we need to resolve it."

The foregoing exchange is undisputed. Sharply disputed is DeJesus' further testimony that the exchange included Gordon referencing "impasse" and expressing intransigence on the Union's economic positions. According to DeJesus:

> [Gordon] said, what are you going to do, take us to impasse? Meet with us and take us to impasse? I said we're going to meet with you. If we can't get to resolution we will go to impasse. And that the nurses should know how they're going to be paid on Patriot's Day with some advance notice.

DeJesus further testified, with prompting by Whelan, that Whelan told Gordon "that any deal we did had to include a pay freeze. It had to include the pension. It had to include the holidays. And that his response was he would not do a deal that included a pay freeze or the pension or holidays, given our financials."

Gordon flatly denied these comments were made by him.

I won't say it is an easy credibility determination—and I definitely do not believe the alleged conversation carries the significance that, based on its brief, the Respondent believes it does—but I discredit the testimony that there was discussion of impasse at the end of this meeting and I discredit the testimony that Gordon said "he would not do a deal that included a pay freeze or pensions or holidays, given our financials."

First of all, Gordon flatly denied these comments were made at this meeting, and while I found DeJesus generally to be a good and credible witness, I feel the same way about Gordon. Roach, the union researcher who attended the meeting also did not recall these comments—she recalled a discussion at the end about cancellations, but none of the rest of it—but her corroboration of Gordon appeared mostly to be based on a lack of memory rather than sureness that the conversation did not occur. Whelan's corroboration of DeJesus on impasse was not convincing. He testified that he "didn't remember exactly what was said, but the word 'impasse' was used." Whelan testified that he thought "originally [Gordon]" used the word impasse but "I'm not certain of that." He recalled DeJesus saying "something to the effect, yes, we will go to impasse and we're going to get this . . . done before Patriots' Day." Whelan also claimed that in the conversation he said "we're not going to do a deal without pay freezes," to which Gordon said: "something like that's not going to happen, or we're not going to do a deal with those." That is not the way the credible evidence shows that Gordon framed the Union's economic position.

In resolving this dispute, I cannot help but note that throughout the trial, DeJesus, and then Whelan had a tendency to at least appear to be testifying with an eye toward the Respond-

[15] At trial Whelan displayed a dismissiveness towards the Union's FMLA information request. He testified that "I wanted to get [Gordon] the information on the FMLA extensions, just so that couldn't keep saying that [he didn't have it]." Whelan testified that he "never had the sense" that the information was important to Gordon. As to why the information was never provided, Whelan testified that he could not recall "whether it was because we simply forgot about it, or whether it was just we couldn't gather it." In any event, Whelan testified that "we certainly intimated that" the information would be provided and never told the Union that the Hospital would not provide it.

ent's legal theories. It could not help but harm their credibility. But most important to my credibility resolution, as to *this very conversation*, we have DeJesus' sworn pretrial affidavit, executed June 17, 2015, just 2 months after the meeting in question (and over 5 months before his testimony). This pretrial affidavit specifically recounts not just the events from the April 8 meeting but *this* conversation. However, it contains no reference to impasse or to Gordon's expression of intransigence on the Hospital's proposals. DeJesus' affidavit states:

> At the end of this [April 8] meeting, Hyde said we needed to treat our nurses with respect as well as we do our doctors. I said I agreed wholeheartedly, which is why we need to come to an agreement. We've been negotiating for months. We gave you our financial information on February 12th and here we are on April 8th, you've had to cancel meetings, we've given you our final position, you know that Patriot's Day is coming Up; and we want to resolve these issues. Gordon got upset, he said his mother was sick, that's why they cancelled. I said I understood that, but we needed to get this resolved. I told Gordon we needed to get another date.
>
> I don't believe another date was set at this time, but we did schedule a session subsequently for April 15, 2015.

While the Respondent dismisses the significance of the omission, there can be no doubt that it provides a classic example of impeachment evidence. One need look no further than the *Jencks* case itself to see the value that the Supreme Court puts on such omissions in the weighing of credibility.[16]

For sure, the specificity and context of the statement must be considered in assessing the weight of the omission—the context must indicate a probability that the facts would have been included if they were true. But that is, I conclude, the case here. DeJesus' statement recounts not only the specific meeting which the disputed trial testimony covered but the specific conversation that occurred, by all evidence, as the meeting was ending. Moreover, by the time the affidavit was given in June, the Respondent's legal theory of this case—as to impasse and as to the alleged intransigent bargaining position of the Union—had been well-developed and articulated by Whelan in his lengthy position statement submitted in May to the Region during the investigation of this case. Frankly, it is hard to understand why DeJesus' account of this very conversation in his affidavit *would not* contain reference to the alleged discussion of impasse, and to Gordon's display of intransigence, had they occurred as DeJesus and Whelan testified they occurred.[17]

As is often the case, there is no way to be certain as to how to resolve this credibility dispute, but given all the evidence, including the credited denial of Gordon, I find that the disputed discussion of impasse and Gordon's alleged statement that he would not agree to a deal that included the Hospital's terms, did not occur at this meeting.

April 15 meeting; declaration of impasse and implementation

Either near the end of the April 8 meeting or in subsequent conversations, Whelan pressed Gordon for a date for the next meeting. Gordon told Whelan,

> I can give you a tentative date, but until I have the report back from Mr. Hyde I don't know where I can go with this. Because I wanted to get the report from him. . . . So I asked [Whelan] to wait, but [Whelan] said no, we need to get a date.

Gordon testified that he asked Whelan if this was "because of the holiday. He said, yes, you've got it correct."

The afternoon of April 14, Gordon sent Whelan an email stating: "I won't have the report till next week. Not sure it's worth meeting tomorrow." Whelan responded: "we need to meet. We will see you in the morning." Gordon responded, "Why do we need to meet? I explained when we set this meeting it was tentative." Gordon also testified that he orally told Whelan that he "needed the report" from Hyde before he could negotiate further.

The parties convened April 15. Gordon and the union committee (absent Miksch who had resigned her duties) were present for the Union. Whelan and DeJesus were there for the Hospital. The mediator was present, and the parties began by meeting separately with the mediator.

The Union developed a "package" counterproposal, which it conveyed to the mediator verbally and, for some portions, with handwritten wording. (Gordon indicated he would follow up with a typewritten version.)

The new "package" proposal incorporated the Union's existing proposal with a reduction in wage demands from 5 percent each year to 4 percent each year. It provided for adjusting the night differential to $5, the on-call differential to $5, the charge RN to $3, and the preceptor rate to $2.75. The Union's proposal dropped UP 11(e), which was the proposal for paid time for the union negotiating committee to attend contract negotiations, but retained UP 11(f) relating to paid time for union officials to attend union activities, such as meetings and arbitra-

[16] As the Supreme Court explained in Jencks v. United States, 353 U.S. 657 (1957), its seminal decision requiring production of pretrial statements:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. *The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony*.

(Emphasis added.)

[17] The Respondent points out (R. Br. at 47) that "a Board agent drafted that affidavit—not Mr. DeJesus (or his counsel)" and the affidavit "certainly does not capture everything that he said to the Board agent." However, while drafted by a Board agent, the statement is sworn to by the affiant. More to the point, if DeJesus ever told the Board agent about the additional comments, there was no suggestion of that by DeJesus at trial. I note that the concluding paragraph of the affidavit states in bold type:

> I have read this Confidential Witness Affidavit consisting of 15 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct. *However, if after reviewing this affidavit again, I remember anything else that is important or I wish to make any changes, I will immediately notify the Board agent.* [Emphasis added.]

tions.

In addition, one of the "biggest [changes] obviously [was] the flex up" which was "brand new." The Union offered an "intricate" and "comprehensive proposal on flex up" (UP 10) that provided that instead of eliminating flex-up, the article would be substantially rewritten, "fixed to make it work properly."[18]

The Union accepted the Hospital's proposal (set forth in the March 9 and March 20 "comprehensive" proposal) on on-call pay, a matter on which the parties already had a tentative agreement. With regard to the Hospital's counter to the Union's UP 8 on mandatory overtime, the Union indicated "we could probably live with this" but needed clarification of what was intended by the Hospital's addition of the parenthetical: "(specific to private, acute-care hospitals)." As to the reduction-in-force proposal, the Union counterproposed, as it did orally at the March 9 meeting, that employees retain the right to return to a job they had been bumped or laid off from for one year (countering the Hospital's 3-month proposal for returning after bumping).

On successorship, the Union counterproposed with new language. The Union's new proposal included the language proposed by the Hospital but added a new sentence after the second sentence and before the third, so that the Union's successorship proposal now read:

> This agreement shall be binding upon the parties hereto and their successors. The Hospital shall give notice of the existence of this Agreement to any purchaser. The Hospital will include as a term of the sale that the purchaser will honor/or accept the current Collective Bargaining Agreement. The Hospital will bear no liability as a result of this provision.

The mediator took this new Union proposal to the Hospital negotiators. After some time, he returned and said that he wanted to bring the parties together. The mediator told the Union that the Hospital had something to put on the table.

The parties then met together. Whelan said he "wanted to be clear and direct. He heard our proposal, that we had been at this for 6 months, and that they were declaring impasse." Whelan said "it's very clear to us that . . . an agreement is not possible after six months of bargaining. . . [T]he rest of the organization . . . was in a pay freeze. That we've gotten no response on holidays. And that we were declaring impasse."

Gordon told Whelan that "it was a comical position." He said that "we did not feel that we were at impasse. That we had plenty of movement. That as of the last session they had moved on successor and the per diem piece." Gordon told Whelan, "you're not even responding to our package offer, and [Whelan] said, your package offer doesn't address the issues that we want to talk about." Gordon told Whelan, "this isn't about anything other than declaring . . . . impasse so you could institute the holidays," and Whelan said, "exactly right" (or words to that effect). There was an extended argument over the Hospital's financial situation.

The meeting ended at 11:15, about 20 minutes after the parties had begun meeting together. Whelan was "declaring impasse and saying they were going to implement their last offer." That same day, April 15, the Hospital sent a letter to the bargaining unit employees announcing implementation of the Hospital's final proposal. The letter defended the decision to declare impasse and announced the implementation of the various wage and benefit changes, stating that the implemented proposal includes:

> converting Patriots Day and Columbus Day from official holidays to float holidays, and any time worked on those days will be paid at straight time; a pay increase freeze (including step increases) will take effect for anyone whose evaluation date is between May 1, 2015 and April 30, 2015; as of May 31, 2015 the pension plan will be changed to be a matching contribution plan, with Southcoast matching your contribution dollar for dollar, up to 6%; FMLA Leaves will be for up to 12 weeks. At the negotiating table we agreed to the following MNA proposals: successor language will be added to the contract; changes to language related to Floating; Mandatory Overtime; Time Schedules, and Reduction in Force.

DeJesus testified that he wrote the letter on April 15, but then admitted on cross-examination that "there were parts of the letter that were written before the meeting. . . . We knew that impasse was a possibility on April 15th."

The Union received Hyde's report the evening of April 15.

The Union filed the unfair labor practice charge in this case

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[18] The text of the Union's newly proposed April 15 UP 7 stated:

7. Article V) Section 4. t Flex-Up Positions Page 10

Flex nurses are nurses who have agreed to be regularly employed to work in either the 32-08 hours per week flex or 24-08 hours per week flex categories. Flex nurses generally will work 32 or 24 hours per week. However, based upon the Hospital's patient care requirements, as determined by the Hospital a flex nurse may be required to flex her/his hours up by either 8 hours or 12 hours for a 12 hour nurse. The Hospital will not flex a nurse down below her/his base 32 or 24-hour commitment.

(b) Nurses in flex positions will be paid based on their actual hours worked and will be eligible for earned time based on their actual hours worked. but will be eligible for medical and dental insurance benefits on a full-time (i.e. 40 hours per week) basis for 32-08 hour flex nurses and on a 32-hour per week basis for 24-08 hour flex nurses.

(c) The Hospital reserves the right to terminate any flex nurse position, in which event the affected nurse will revert to his/her base schedule (32 hours or 24 hours per week) for all purposes including insurance benefits, and the reduction in force and recall provisions of this Agreement shall not apply.

(d) A nurse in a flex position shall have his/her schedule adjusted up by not more than 8 hours per week, or up by not more than 12 hours per week in the case of a nurse scheduled to work 12-hour shifts. The stated hours of the position shall be included in the job posting.

(e) The Hospital does not guarantee how often; if at all, a nurse in a flex position will work 8 or 12 hours beyond his/her base hours, however, the determination to flex-up shall be made prior to the schedule being posted and the nurses flex schedule cannot be changed once posted unless the RN volunteers. In addition to his/her flex hours, a nurse in a flex position may volunteer or may be required, to work overtime.

Flex positions shall not constitute more than 20% of bargaining unit positions on an FTE basis per unit. For purposes of calculating FTE status under this paragraph, a 24-08 hour flex position shall be a .60 FTE and a 32-08 hour flex position shall be a .80 FTE.

with the regional office of the Board the next day, April 16.

Sometime within the week after the April 15 meeting the Union sent a typed version of its April 15 counterproposal to Chabot, who provided it to the Hospital.

The parties stipulated at the hearing that the holiday proposal was implemented April 20, 2015; the change to the pension formula was implemented May 31, 2015, the pay freeze including freeze in steps was implemented May 1, 2015. The remaining proposals from the Hospital's final proposal were implemented April 15, although for some (i.e., reduction in force) there has not been occasion to apply them.[19]

There were no further bargaining sessions after April 15.

Analysis

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act defines the duty to bargain collectively as "the . . . mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[20]

The General Counsel alleges three independent violations of Section 8(a)(5) of the Act, and a fourth violation, a period of overall bad-faith bargaining based on the three alleged independent violations and the Respondent's overall conduct.

First, the General Counsel alleges that the Respondent's failure to furnish the Union with requested information relating to the Hospital's proposal to eliminate 4 weeks of FMLA leave violates its bargaining obligations under the Act. (Complaint ¶¶9, 15.)

Second, the General Counsel alleges that the Respondent's introduction of its written proposal to freeze step pay on March 9, was a regressive proposal offered in violation of the parties' agreed-to bargaining ground rules, and amounted to bad-faith bargaining in violation of the Act. (Complaint ¶¶10–11, 15.)

Third, the General Counsel alleges that the Respondent's declaration of impasse and unilateral implementation of its final bargaining proposal beginning April 15 violated the Act. Specifically the General Counsel argues that the Respondent has failed to prove its chief defense to the allegations of unlawful implementation, its claim that the parties had reached a valid bargaining impasse that privileged unilateral implementation of its proposal. (Complaint ¶¶12–13, 15.)

Finally, the complaint alleges that by its overall conduct—including the three independent violations of the Act alleged above, the Respondent has failed and refused to bargain in good faith. (Complaint ¶¶14, 15.)

Given my resolution of the first three issues, I do not reach the fourth, overall bad-faith bargaining allegation, as the additional finding would not materially alter the remedy. *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op at 4 fn. 11 (2015). Below, I consider each of the initial three arguments in turn.

I. FAILURE TO FURNISH REQUESTED INFORMATION(COMPLAINT PAR. 9, AND 15)

The General Counsel and the Union allege that the Respondent's failure to provide the Union with information on the use and cost of the extra 4 weeks of FMLA leave violates the Act.

"An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A-1 Door & Building Solutions,* 356 NLRB 499, 500 (2011); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005). "Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative." *A-1 Door & Building Solutions,* supra at 500; *Disneyland Park*, 350 NLRB 1256, 1257 (2007) ("Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information").

> Thus, employee personnel information, job descriptions, pay-related data, employee benefits, and policies that relate thereto are all presumptively relevant . . . Bargaining representatives are not required to make a specific showing of the relevance of requested information unless the employer has rebutted the presumption of such. Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information.

Ralphs Grocery Co., 352 NLRB 128, 134 (2008), reaffirmed and incorporated by reference, 355 NLRB 1279 (2010).

"Like a flat refusal to bargain, '[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act' without regard to the employer's subjective good or bad faith." *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012), quoting *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg., Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Moreover, "[t]he Board has held that a union may make a request for information in writing or orally." *Menorah Medical Center*, 362 NLRB No. 193, slip op. at 20 (2015); *Tubari, Ltd.*, 299 NLRB 1223, 1229 (1990) ("[t]here is no legal requirement that information requests be in writing, nor that they be repeated"). See, *LaGuardia Hospital*, 260 NLRB 1455 (1982) (oral requests enforceable); *Kingsbury, Inc.*, 355 NLRB 1195 (2010) (violation for not complying with oral request for information).

In this case, the violation is straightforward. From the first day it provided its initial proposal, November 25, 2014, the Respondent continuously proposed (HP 8) deleting article 8.15 from the contract, a benefit that provided 4 additional weeks of FMLA leave to otherwise FMLA-eligible nurses.

[19] The General Counsel does not allege that on-call pay provision (no. 3 from the Hospital's final offer) was unlawfully implemented, based on the tentative agreement reached by the parties on this proposal. (Tr. 384.)

[20] In addition, it is settled that an employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1). *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight* System, 325 NLRB 546 fn. 3 (1998).

At this November 25 meeting, the Union asked the Hospital "to tell us how many people utilized this Article 8.15 over the past year" and "took the extra four weeks." Whelan told the Union he would "get back" to them. At the January 30 meeting, Gordon asked for the cost the of the 4-week leave to the Hospital, a benefit that Whelan had on November 25, described to the Union as "expensive." In a March 30 email to Whelan, in response to an email from Whelan declaring that the negotiating process "has gone on for too long," Gordon reminded Whelan that the Union was still waiting to receive "a list of nurses who have utilized the FMLA extension language over past year." At the March 9 meeting, Gordon asked again, how many people used the extended FMLA benefit over the last year.

This information, concerning as it does, the benefits received by bargaining unit employees is presumptively relevant, doubly so, given that the request directly concerned a bargaining proposal advanced by the Respondent to eliminate a benefit that the Respondent asserted to be "expensive." As the Supreme Court explained in *Truitt*, supra, relying on principles adhered to since the earliest years of the Act, for a party to assert its positions without permitting proof or independent verification, "[t]his is not collective bargaining." 351 U.S. at 153 (quoting *Pioneer Pearl Button Co.*, 1 NLRB 837, 842–843 (1936)).

Here, the Respondent does not (and reasonably cannot) challenge the relevancy of the request. To the contrary, the Respondent promised to provide the information. At the January 30 meeting the Respondent told the Union that it was more difficult to obtain than anticipated, but at the March 9 meeting the Respondent assured the Union that it was "gathering the information," and made no reference to any difficulty in obtaining it. Whelan reiterated this in his April 1 email to Gordon, telling him that "[t]he extended medical leave information is being gathered." At trial Whelan admitted that "we certainly intimated" that the information would be provided. His November 25 statement that the benefit was "expensive" suggests that the Respondent had some knowledge about the benefits cost even before the request was made. No information was ever provided.

On brief, the Respondent argues that the request was too burdensome to comply with, but at the hearing witness Whelan admitted that he did not recall whether the failure to provide the information was "because we simply forgot about it, or whether we just couldn't gather it." No other witness volunteered the answer. There is, in fact, no evidence, and there was no claim at trial or to the Union during bargaining, that the Respondent could not gather this basic information with reasonable efforts. Indeed, the evidence is to the contrary as the Respondent's last word to the Union was that the information was being gathered.

Indeed, the entirety of the explanation offered to the Union about why "it's a pretty significant effort" and "a bit difficult to get," consisted of the assertion that the leave of absence records are paper not electronic and the Respondent would have to manually determine who took more than 12 weeks of (unpaid) FMLA leave, and what the people who performed work in their absence were paid (over and above what the employee on leave would have received).

It is the Respondent's burden to establish burdensomeness (*Mission Foods*, 345 NLRB 788, 789 (2005)), and this explanation does not. There are forms, and notifications, and accommodations involved in FMLA leave. There are approximately 150 nurses. It is unlikely, in the extreme, that more than a few have not only taken FMLA leave but taken more than the statutory 12 weeks and were using the extra leave provided by contract. Nursing supervisors know who these individuals are. Someone could search for the FMLA forms that DeJesus agreed that employees seeking FMLA leave must complete. I find it highly unlikely, but more to the point, entirely unproven that the Union's information request could not be promptly complied with. I reject the Respondent's burdensomeness defense as unproven, and unknown to be true by the Respondent. *Mission Foods*, supra.

Moreover, while the Respondent, on brief, faults the Union for not offering it an accommodation, the Respondent's argument turns the law on its head. If the Respondent believed that the Union's request was too burdensome to be satisfied, it was its duty—not the Union's—"to make a timely offer to cooperate with the union to reach a mutually acceptable accommodation." *UPS of America*, 362 NLRB No. 22, slip op. at 3 (2015); *H&R Industrial Services*, 351 NLRB 1222, 1224 (2007); *Mission Foods*, 345 NLRB at 789.

I note that the Respondent does not explicitly argue that the Union's FMLA leave information request was made in bad faith. However, at trial Whelan testified, and on brief argues (R. Br. at 70) that "Gordon 'never' gave Attorney Whelan the sense that the information 'was in any way important to him.'" Whelan stated at trial that he wanted to provide the information to Gordon "just so that he couldn't keep" asking for it. The Respondent then cites *ACF Industries*, 347 NLRB 1040 (2006), for the proposition (R. Br. at 70) that the Board "disfavors tactical information requests submitted for the purposes of delay." Of course, Whelan's failure to be impressed with the importance of the information request is not relevant. And the comparison to *ACF Industries* is not well-taken. There, the Board failed to find a violation where a union's massive information request was made 3 days before an announced implementation and after months of bargaining over the issue in the information request. In complete contrast to *AFC*, here the Union's request for leave information was made from the very outset of bargaining, repeated, and never provided despite the Respondent's promises that it would be.

The Respondent's violation of the Act is as clear as the record evidence of its months of indifference to the Union's information request. It could not even be bothered to show up for trial with an explanation of why it never provided the information. The Respondent violated the Act, as alleged, by failing and refusing to provide the requested FMLA leave information.[21]

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[21] Although the evidence is that the Union requested information on the number of nurses utilizing the extended FMLA leave on November 25, 2014, and March 9, 20015, the complaint alleges only that the request for this information and the Respondent's failure and refusal to furnish the information began since about March 9 (complaint at ¶¶8, 9). The complaint also does not reference a request for the cost of the extended FMLA leave, which the evidence shows was made January

II. INTRODUCTION OF STEP FREEZE PROPOSAL ON MARCH 9(COMPLAINT PARS. 10, 11, AND 15)

The General Counsel alleges that the Respondent's introduction of its written proposal to freeze step pay on March 9, was a bad-faith regressive proposal offered in violation of the parties' agreed-to bargaining ground rules, and as such, independently constituted unlawful bad-faith bargaining in violation of the Act.

There is no question that a party's failure to adhere to agreed-to ground rules in negotiations may serve as an indicia of unlawful bad-faith bargaining. *Harow Servo Controls*, 250 958, 959 (1980) (Board finds that "[r]epudiating the agreement to bargain about and settle noneconomic matters before negotiating the economic provisions of a collective-bargaining agreement" is an indicia of bad faith bargaining). Yet, the Board also considers the overall circumstances, as the Board is committed to "providing parties with the flexibility to enter into and deviate from new bargaining formats without the risk of being found to have violated their obligation to bargain in good faith" as this "facilitates effective bargaining and encourages productive experimentation." *Detroit Newspapers*, 326 NLRB 700, 704 fn. 11 (1998) (dismissing allegation that employer violated Sec. 8(a)(5) by failing to adhere to parties' agreement to reserve certain bargaining issues for joint bargaining).

Precedent is similarly nuanced as to regressive proposals. The Board has stated that "Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp*., 331 NLRB 223, 225 (2000), enfd. 26 Fed.Appx. 435 (6th Cir. 2001), citing *McAllister Bros*., 312 NLRB 1121 (1993); see also *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) (regressive bargaining tactics that are "designed to frustrate bargaining" are "an indicium of bad-faith bargaining").

In this case, I do not agree that that the Respondent's introduction of its March 9 proposal amounted to an independent violation of the duty to bargain in good faith.

The ground rules for bargaining agreed to by the parties made clear that all new proposals were supposed to be on the bargaining table by the fourth meeting (originally anticipated to be December 17, 2014, but which turned out to be January 30, 2015). An exception was made for counterproposals:

> Neither party will submit new proposals, as opposed to counterproposals, after the fourth meeting, December 17, 2014. All proposals must be reduced to writing. For purposes of this ground rule, the first meeting is the meeting held on November 25, 2014.

The plain purpose of such a rule is to facilitate settlement by establishing early in negotiations the issues in dispute, allowing the parties to work to narrow their differences without the later introduction of new disputes. As Gordon put it, after the fourth session, "It's what's on the table is on the table, at that point."

The General Counsel and the Union contend that the March 9 step freeze proposal was obviously regressive and offered well after the fourth meeting, and, therefore, violated the ground rules.

The Respondent makes two arguments in claiming that it did not violate the ground rules. First, it argues that its March 9 proposal to freeze the steps was a "counterproposal" to the Union's November 25 proposal for an across-the-board wage increase, and, as a counterproposal, was exempt from the ground rules' prohibition on post-fourth meeting proposals. The Hospital also contends that its March 9 proposal was not new: rather, it was a written version of an oral counterproposal made at the bargaining table to the Union in November and December in response to the Union's wage proposal. To this latter argument the Hospital adds the contention that the ground rules' statement that "All proposals must be reduced to writing" does not apply to counterproposals, or, I suppose (although the Hospital does not argue this) that an oral counterproposal can be reduced to writing many months after it has been made.

The General Counsel and the Union contend that the step freeze is not a "counter" to the Union's proposal for an across-the-board wage increase—the Union's proposal, after all, did not mention steps and implicates them only indirectly. Moreover, the General Counsel and the Union reject the contention that the step freeze was proposed (or counterproposed) in the initial bargaining session. They do not address the contention that proposals denominated as counterproposals need not be in writing—I doubt they contemplated anyone would make such an argument—but I assume they would not agree.

In any event, I think this is all somewhat beside the point. While I recognize that acceptance of the Hospital's reading of the ground rules would drain most all meaning from the rules, I think the wrong approach would be to resolve this dispute based on an arbitration-like contractual analysis of the ground rules.[22]

Whatever the answer produced by such contractual analysis of the ground rules, that is not the issue presented. Rather, the issue presented is whether the Respondent's conduct with regard to the ground rules is an indication of bad-faith bargaining.

Even if the General Counsel and Union believe that the Respondent's contentions carry a whiff of the disingenuousness, it is at least colorable to say that the proposal to freeze step pay was offered as a "counterproposal"—in response—to the Union's across-the-wage hourly wage proposal. This was, at least, the Hospital's framing of the issue on March 9. There is no precise definition of the term. All one can say that with enough inspiration, nearly any proposal made after an earlier one can

30. Moreover, the complaint does not allege a delay in providing basic pension information that was repeatedly requested beginning November 25 and not provided (in any form) until April 1. Given the complaint, I will limit the finding of violation to a failure and refusal to provide information on the number of nurses using the extended FMLA leave, with such violation occurring since about March 9, 2015.

[22] Interpreting the ground rules would require resolution of issues such as: how closely must a proposal relate to a proposal to be considered a "counterproposal"? Is a proposal that moves the parties further apart on an issue not raised by an earlier proposal fairly considered a counterproposal at all? Given that a counterproposal is a type of proposal, and it surely is, if "all" proposals "must be reduced to writing," is an oral counterproposal valid? And if not, can the "reduc[tion] to writing" contemplated by the ground rules occur many months after the initial counterproposal has been made?

be termed a counterproposal. In this case, at least, the Respondent's "counterproposal" deals with an aspect of the same general subject—wages—that the Union's proposal considered. I do not believe bad faith has been shown based on the Hospital's asserted interpretation of the ground rules.

The contention that the March 9 step-freeze proposal was an unlawful bad-faith regressive proposal is also problematic.

To be sure, I agree with the Union and the General Counsel that the March 9 step freeze proposal was regressive, and new. Before March 9, the Respondent had utterly failed to make clear that it was proposing (or counterproposing, as the case may be) a step freeze, or to take reasonable actions to put the step freeze at issue in bargaining for the Union to consider. This is true, notwithstanding the Hospital's repeated rejection of the Union's wage proposal with the assertion that it wanted a "pay" or "wage freeze,"[23] its discussions of "real" or "true" freezes in some but not other past years, its contentions of financial distress, or the fact that a letter to the Hospital system's employees in October 2014, described a "wage freeze" and no "accompanying merit increases."[24] Indeed, even assuming, as I have, that Whelan mentioned once on November 25, that he wanted a pay freeze "that included steps" this lone comment, buried as it was within multiple general oral references to a "wage freeze" or "pay freeze"—that had no specific reference to a demand for a step freeze here—does not suffice to constitute a counterproposal to a union wage proposal that did not even mention steps.

Even assuming the proposition that there was no requirement under the ground rules that such a proposal be in writing, I reject the Hospital's contention that its myriad of discussions at the bargaining table about a "pay freeze" or "wage freeze" constituted notice to the Union that the Hospital was countering with a step freeze. For regardless of how one interprets the *requirements* of the ground rules, the method of bargaining used throughout negotiations by both parties throughout negotiations—except, allegedly, in this instance—was to propose precise changes to the expiring contract—usually by page, paragraph, and sentence. The few oral proposals or counterproposals made by both parties during the negotiations were really notification to the other side of what was coming: in each instance they were quickly followed-up with a specific written version of the proposal. This is how the parties bargained. The Union had every right and reason to believe, and I find that the Union reasonably did believe that the Respondent had not advanced an affirmative proposal or counterproposal to freeze steps.

Thus, I find that the Union, as Gordon testified, was unaware, and reasonably so, before March 9 of any Hospital proposal to freeze steps. If the Hospital wanted to put a step freeze proposal on the table before March 9, it certainly knew how to do so. Indeed, it had made a step proposal in reopener negotiations only months before, that time communicating clearly its proposal. And it did so on March 9. Having failed to do so otherwise in this negotiations, it cannot successfully claim that it orally proposed a step freeze—in a negotiations in which written proposals and counterproposals immediately reduced to writing were the norm—through vague commentary, allusions, metaphors and financial complaints—methods of bargaining that most certainly do not square with its self-description as a "clear and direct" interlocutor.

And of course, undercutting the Hospital's position is that if its oral references to "pay freeze" and the like had been sufficient to communicate a proposal to freeze steps, there would have been no need at all for the Hospital to make the same proposal on March 9. Or put another way, a claim by the Hospital that even in the absence of its March 9 proposal it would have been free upon impasse to implement a step freeze as part of a final proposal—based on its oral representations in November and December, while every other part of its offer was in scrupulously detailed written form naming the page and sentence of the old contract to be changed—would not have been very convincing. I note that while the Hospital claims that its March 9 written proposal on step freeze was not new but merely part of a written update listing all proposals and counterproposals, its February 12 presentation by Whelan of its "comprehensive position of where we stood" made no reference, written or oral, to step freezes. The March 9 proposal was new, and very much a regressive proposal.[25]

However, a regressive proposal is "not unlawful in itself," rather it presents as bad-faith bargaining only if offered in bad faith, such as "for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp.*, 331 NLRB at 225.

This is where my review of the record convinces me that the Hospital's motives in issuing the March 9 regressive proposal, although nearly obscured by the discredited arguments it advances, do not constitute or reflect bad faith. I think that the record and the Hospital witnesses' testimony demonstrate that, although never proposed and never conveyed to the Union, the Hospital did, in fact, always intend for there to be a step freeze along with no wage increase in the new contract. I believe that it dawned on the Hospital sometime just before March 9, that it had not, in fact, ever proposed a step freeze to the Union, and that, without doing so in a fashion consistent with the parties' practices in this negotiation, it would have no chance convinc-

[23] I note that the meaning of a "pay freeze" or "wage freeze" is a highly ambiguous term in labor negotiations and subject to multiple plausible interpretations. For instance, Arbitrator Morris Shanker ruled in *Cuyahoga Metropolitan Housing Authority*, 108 (BNA) Labor Arbitration 824 (1997), that the parties' agreement to a "wage freeze" did not preclude the continuation of anniversary pay increase where union believed the term to mean entry wages were frozen but anniversary wage increases continued, while management believed the term meant entry and anniversary increases were frozen. Arbitrator Shanker ruled that "the parties had quite different understandings regarding what the words 'wage freeze' meant. And, each of these meanings is a plausible one."

[24] While the letter was also sent to the unit employees, the concept of a merit pay increase was inapplicable to them, and more to the point, an employer cannot bargain with a union by making proposals directly to unit employees. A union need not read employer mail to employees in order to glean what the employer is proposing or going to propose in bargaining.

[25] Finally, it is worth pointing out that, in any event, the March 9 step freeze was indisputably new in that it proposed that the step freeze would begin in three weeks' time and last until April 1, 2016, beyond the proposed term of the labor agreement.

ing the Union or anyone else that the step freeze was legitimately part of its offer. (And that would queer implementation, even in the presence of an impasse.)

To correct this, the Hospital made its March 9 proposal. Other than its subsequent interest in rushing to implementation—a separate matter discussed below—I see no bad faith in the mere making of the proposal.[26] Unless the ground rules operate as a straightjacket, putting an important proposal on the table that has been overlooked or neglected is all a party can do. Just as regressive proposals should not be used to thwart negotiations, the Board should not permit ground rules to be used to thwart a party from making legitimate proposals upon realization that it has failed to address an issue of importance to it. It is not bad faith to correct a bargaining error, or oversight, even a big one, and even one that is upsetting to the other party. As unhappy and as surprised as the Union may have been to see the Hospital's step freeze proposal on March 9, I believe the evidence suggests that the Hospital proposed it, not to frustrate bargaining, but in a tardy effort to make a proposal it had long anticipated making. Just as I have found that the Respondent did not convey its step freeze proposal to the Union in November and December in a manner that it can be said that the proposal was made, I also find the Respondent's witnesses convincing in their belief that it was always their intent to propose a step freeze. So, on March 9, they did it. But that does not show that the step freeze proposal was offered in order to frustrate the chances of agreement. This was not a situation—sometimes the case with bad-faith regressive bargaining—where the regressive proposal was made to avert the looming prospect of settlement.[27]

The Respondent's submission of the March 9 step freeze proposal did not independently violate the Act.

III. THE RESPONDENT'S UNILATERAL IMPLEMENTATION OF ITS FINAL OFFER (COMPLAINT PARS. 12, 13, AND 15)

The General Counsel and Union contend that the Respondent's unilateral implementation of its outstanding bargaining proposal on April 15, 2015, and dates thereafter, constituted a violation of its bargaining obligations. The Respondent's defense is that it implemented only after reaching a valid bargaining impasse that privileged the unilateral implementation.

Board precedent has long been settled that, as a general rule, an employer with an obligation to collectively bargain may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). Indeed, a unilateral change in a mandatory subject is a per se breach of the 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith.[28]

Where, as here, the parties are engaged in negotiations for a new collective-bargaining agreement, in general, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991) (fn. omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994).

However, Board precedent also recognizes that "overall impasse may be reached based on a deadlock over a single issue." But for the Board to find a single-issue impasse there are three requirements:

> [t]he party asserting a single-issue impasse has the burden to prove three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of "overriding importance" in the bargaining; and (3) that the impasse as to the single issue "led to a breakdown in overall negotiations—in short, that there can be no progress *on any aspect of the negotiations* until the impasse relating to the critical issue is resolved."

Atlantic Queens Bus Corp., 362 NLRB No. 65, slip op. at 1 (2015) (Board's emphasis) (quoting *CalMat Co.*, 331 NLRB 1084, 1097 (2000)).

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.*, 241 NLRB 40, 46 (1979), enfd. mem. 615 F.2d 917 (5th Cir. 1980). "Whether a bargaining impasse exists is a matter of judgment." *North Star Steel, Co.*, 305 NLRB 45, 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). "The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

However, "[i]t is not sufficient for a finding of impasse to simply show that the employer had lost patience with the Union. Impasse requires a deadlock." *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 9 (2014). In order to find an impasse, "both parties must believe they are at the end of their rope." *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); See also *NLRB v. Powell Electrical Mfg.,* 906 F.2d 1007, 1011–1012 (5th Cir. 1990).

"Impasse is a defense to the charge of unilateral change. It must be proved by the party asserting impasse—in this case the

[26] Unfortunately, it seems that an effort to strengthen its argument for impasse has led the Hospital to claim that its step-freeze proposal was always on the table, even before March 9.

[27] See, e.g., *Latino Express, Inc.*, 360 NLRB No. 112, slip op. at 13 (2014) ("sudden unveiling of the regressive, tentative-agreement breaking, and unlawfully provisioned final offer on April 2, 2012, represented a purposeful and conscious effort by the Respondent to undermine the possibility of progress at the negotiating table. . . . [I]t strikes me as no coincidence, but rather, a goal of the Respondent to foreclose any possibility of reaching an agreement before the upcoming end of the certification year. The Respondent's final offer made sure of that").

[28] *Katz*, supra at 743 ("though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end . . . an employer's unilateral change in conditions of employment under negotiation is [ ] a violation of § 8(a)(5)"). "For it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. at 743.

Respondent." *North Star Steel, Co.*, 305 NLRB at 45; *Atlantic Queens Bus Co.*, 362 NLRB No. 65, slip op. at 1 ("party asserting single-issue impasse has the burden" to prove its elements).

In this case, the Respondent does not advance the contention that the parties were at a traditional overall impasse on the bargaining agreement as a whole. Therefore, I do not consider that issue. Rather, the Respondent's argument (R. Br. at 52, 58–68) is that the parties were at deadlock over what the Respondent calls the three "critical issues": its wage (and step), holidays, and pension proposals. Relying on *CalMat*, and related cases, the Respondent argues that the bargaining circumstances meet the requirements of the "single issue" impasse doctrine and that on that basis the parties were at an impasse.

For the reasons set forth herein, I reject the Respondent's contention that the parties had reached a good-faith bargaining impasse as of April 15, when it declared impasse and began implementing its proposal.

As stated, an employer relying on a "single issue" impasse theory must prove (1) a good-faith impasse on the particular issue—in this case the issues—over which it claims impasse; (2) the "overriding importance" of the issues in the bargaining; and (3) that the impasse on these specific issues led to "a breakdown in overall negotiations," such that "there can be no progress *on any aspect of the negotiations* until the impasse relating to the critical issue is resolved." *Atlantic Queens Bus Corp*, supra (Board's emphasis) (citing *CalMat, Co.*, supra).

In this case, assuming (2) that the wages, pension, and holidays were "of overriding importance," the Respondent has failed to show either (1) that a good-faith impasse existed as to these issues, or (3) that there was a "breakdown in overall negotiations" and that "no progress on any aspect of the negotiations" could be made until impasse relating to the critical issues was resolved.

a. There was no breakdown in overall negotiations

Beginning with factor 3, the facts demonstrate that—quite apart from whether there was an impasse on what the Respondent terms "the critical issues" of wages, holiday, and pension—there was not a "breakdown in overall negotiations." The Respondent has failed to prove that "no progress on any aspect of the negotiations" could be made until impasse was broken as to the critical issues.

Through and including April 15, the parties met for eight substantive bargaining sessions.[29] Putting aside for the time being the issues (across-the-board wages, steps, pension, and holiday) that the Respondent claims there was deadlock on, the fact is, in those meetings, up to and including the final April 15 meeting when the Respondent declared impasse, there was significant movement, and on significant issues. Indeed, as to its own movement, the Respondent highlights these moves in an effort to show that it bargained in good faith. As the Respondent explains in its brief:

> Nothing required Southcoast to make concessions, but it did. From November 25th through March 20th Southcoast moved repeatedly. On December 5th Southcoast withdrew its Dental Proposal. On December 17th, Southcoast countered MNA's Floating Proposal and Recall Proposal. On January 30th, Southcoast moved on the Floating Proposal again, it amended its DTU Proposal, and it withdrew its Weekend Proposal. On February 12th, Southcoast withdrew its Daily Overtime Proposal.
>
> The concessions that Southcoast made on March 9th and March 20th, the date of its Final Position, were substantial and represented significant efforts on its part to shake MNA loose on the Critical Issues. Southcoast made a contingent offer to withdraw its DTU Proposal, and it countered on the Floating Proposal, the [Mandatory] Overtime Proposal, the Scheduling Proposal [UP 9], and the [Reduction in Force] Recall Proposal [for the first time in writing]. Furthermore, on March 20th—for the first time since November 25th—Southcoast countered MNA's Successorship Proposal. Previously, Mr. Gordon had characterized successorship as a "key priority" for MNA; the "most important proposal that they had."

R. Br. at 60 (fns. and case citation omitted).

In addition, on March 9, the Hospital added a contract duration date. On March 20, it again countered a part of the Union's floating proposal and proposed for the first time floating per diem nurses before regular nurses in two units of the hospital.

The Union also made movement. On January 30, the Union withdrew the evening and weekend differential, and reduced the night, on–call, charge nurse, and preceptor differential proposals. (UP 2-6). On floating (UP 7), the Union rejected the Hospital's overall counterproposal, but agreed with the Hospital's prior counter on bullet point 3 of this proposal (proposing that a 6-month restriction on floating should apply to "new graduates" and not "[n]ewly hired" nurses. Tentative agreement was reached on the Hospital's on-call pay proposal, HSP 1 regarding pay beginning when the nurse arrives at the hospital (Article II, Section 2.4). As to UP 11, the Union agreed to withdraw the request for (e). It agreed that the Hospital had a right to implement HP 6, the proposed increase in health care contributions.

On March 20, the Union countered the Hospital's new floating proposal (from that day), agreeing with the Hospital's language amending the union proposal, but proposing that it be in the contract (not in a letter as proposed by the Hospital) and that it apply to the whole hospital (and not just two units as proposed by the Hospital). The Union promised to develop a counterproposal on successorship.

And finally, on April 15, the Union again adjusted the night, on-call, charge RN, and preceptor differential. The Union dropped its proposal to eliminate flex-up (UP 10) and instead proposed completely new language amending the existing provision. The Union officially countered (it had done so orally on March 9) the Hospital's latest counter to UP 12 (reduction-in-force), proposing a 1-year recall period for bumped employees (countering the Hospital's 3-month proposal). It reiterated

[29] November 25, December 5, and 17, 2014, January 30, February 12, March 9, 20, and April 15, 2015. The November 10, 2014 meeting was an introductory meeting during which the parties agreed to ground rules. The April 8, 2015 meeting was devoted to the parties' financial experts.

acceptance of the Hospital's amendment to the on-call pay proposal from March 9 and March 20. The Union told the Hospital that "we could probably live with" the Hospital's March 9 counter to the Union's UP 8 on mandatory overtime, but sought clarification. The Union accepted the language of the floating proposal—the language that the Hospital had proposed on March 20—but proposed that it be in the floating section of the contract, and apply to the whole hospital (not be in a side letter and applicable to only the med/surg floors as proposed by the Hospital). On successorship, the Union, counterproposed, accepting the language proposed by the Hospital at the previous March 20 meeting, but adding a new sentence to the proposal.

Thus, on the very day, indeed, in the same meeting that the Respondent declared impasse, the Union made significant movement on a number of issues including providing the Hospital responses to movement made by the Hospital for the first time in the previous two bargaining sessions. This included significant movement on issues of undisputed importance such as floating,[30] flex,[31] and successorship.[32]

On this record, it seems untenable, and wholly unproven, that there was "a breakdown in overall negotiations," and no chance of "progress on any aspect of the negotiations" until the claimed impasse over the "critical" issues was broken.

The Board's recent decision in *Atlantic Queens Bus Co.*, is instructive. That case involved a group of bus company contractors that traditionally bargained together for identical contracts with their employees' union. The bus companies provided K-12 bus services for the New York City Department of Education (DOE).

The expiring labor agreement contained a most-favored nations (mfn) clause that provided that if the union entered into an agreement with another employer that provided terms more favorable to the employer than with these bus companies, the bus companies had the right to adopt the more favorable terms. This was suddenly a looming prospect. For the first time in over 30 years the DOE had announced that it would be seeking bids from contractors that would not contain mechanisms effectively requiring the matching of wages and benefits paid by existing contractors. The prospect of new contractors undercutting the existing contractors was "a profound change" that "dominated" the successor negotiations and was greatly "feared" by both the existing contractors and the union.

During the first seven bargaining sessions, from October 23 to February 12, which included a month long strike, the parties made "limited headway." After the strike the parties held five more bargaining sessions through March 19. At a March 11 meeting the union "said it would never agree to a contract with a [mfn] clause, and the [employers] replied that they would never agree to a contract without it."

However, on other issues, such as wages, there was movement, although the employers continued to propose significant wage reductions and the union significant wage increases. On March 19, the Union lowered its wage increase demand to 2 percent for the first 2 years of the contract, and 3-percent increase for the third. The employers responded that day with a "final" proposal to cut wages 7.5 percent for drivers, 3.75 percent for assistants with a small increase in the third year. The employers then declared impasse and implemented their final offer based on an asserted deadlock over the parties' hardened positions on the mfn clause.

Relying on the three-part "single issue" impasse test set forth above, the Board, without reaching the first two parts of the test—i.e., whether a good-faith impasse existed as to the mfn proposal, or whether it was a critical issue—held that the employers had violated the Act by implementing their final proposal. Although still far apart on wages, the movement on the issue led the Board to conclude that "[t]he evidence does not support a finding that, at the time the Respondents declared impasse, the parties were unable to make 'progress on any aspect of the negotiations' until they resolved any impasse that existed regarding the most-favored-nations clause issue." *Atlantic Queens Bus Co.*, supra, slip op. at 2. The Board explained:

> We recognize that the parties had taken opposing and potentially irreconcilable positions regarding the most favored-nations clause issue. The record demonstrates, however, that these positions—though starkly different—had not frustrated the progress of further negotiations as of March 19. . . . Regardless of whatever importance the parties may have attached to the most-favored-nations clause issue, and even if the parties were at an impasse regarding that issue on or before March 19, the record does not permit a finding that, as of the afternoon of March 19, the parties were unable to make further "progress on any aspect of the negotiations." *CalMat Co.*, 331 NLRB at 1097. Accordingly, we find that the Respondents violated Section 8(a)(5) and (1) of the Act by declaring impasse and implementing the terms of their final offer.

362 NLRB No. 65, slip op. at 3. See also, *Sacramento Union*, 291 NLRB 552, 556–557 (1988) (finding that even if there was a deadlock over a single critical issue, there was no overall breakdown in negotiations where the parties had reached "agreement on many issues as a result of concessions by both sides" the day before the employer declared impasse), enfd. w/o op. 888 F.2d 1394 (9th Cir. 1989).

This is dispositive of the Respondent's argument here. Without regard to the Hospital and Union's differences over wages, pension, and holidays, as in *Atlantic Queens Bus*, the parties continued through the very day that impasse was declared to make movement and progress on other aspects of negotiations. This included indisputably significant issues such as floating, on which steady process had been made throughout bargaining; flex-up, on which the Union now offered an entirely new approach based on the current language desired by the Hospital, and successorship, an issue that recent progress had been made on and that the Hospital characterizes in its brief as

[30] Floating was "something that the nurses despise" and was "a huge issue for them."

[31] Flex "was causing a lot of problems within the bargaining unit. The nurses were really upset over it" and the current policy was "causing some nurses to leave the hospital they hated flex so bad. We said that to [the Hospital bargainers."

[32] "The most important proposal that [the Union] had."

a "key priority" for the Union, and "the most important proposal that they had."

Instead of responding to the package proposal offered by the Union at the April 15 meeting, the Hospital declared impasse and told the Union it did not want to talk about the issues raised by the Union, which included responses to proposals made to the Union for the very first time at the previous bargaining session. When Gordon told Whelan "you're not even responding to our package offer," Whelan responded, "your package offer doesn't address the issues that we want to talk about."

This is not impasse, this is a refusal to bargain.

Without more, the Respondent's "critical issue" impasse argument fails. Negotiations on other significant issues had not broken down. There was not only the prospect of progress on some of these "non-critical" issues, there was, in fact, progress. Accordingly, the Respondent's declaration of impasse was false, and its implementation of its pending final offer violated the Act.[33]

b. There was no impasse on the "critical issues"

Although the Respondent's failure to satisfy point 3 of the "single issue" impasse test is dispositive, the evidence is also that it failed to prove point 1: on April 15, there was not a good-faith impasse on what the Respondent calls the "critical issues," the issues on which it claims the parties were deadlocked.

From the first, the Hospital made clear to the Union that it rejected and always would reject the Union's proposal for an across-the-board wage increase, thereby, in effect, insisting on an across-the-board wage freeze. The Hospital also made clear from the start that its demand to eliminate the two holidays (Patriots' Day and Columbus Day), and its demand to change the pension contribution formula would not change. But without regard to whether its adamancy was consistent with the statutory duty to bargain, it does not obviate the duty to bargain.[34]

Here, the record is clear that throughout the negotiations the overriding "problem" with regard to the gulf in the parties' financial proposals was the Union and Hospital's differing views on the existence and interpretation of the Hospital's financial situation. This debate repeatedly dominated and animated the parties' discussions over the Hospital's demands for concessions and the Union's demands for wage increases. Gordon and the Union read the publicly available Hospital financial information to show a $45-million surplus and pay increases for executives. The Hospital, however, raised financial alarms, cited recent operating losses of $30 million, and argued that the Hospital System was "not in a healthy place" and "struggle[ing] financially."

To this point, the evidence shows that the financial disputes between the parties involved the Hospital's contradictory insistence that its intransigence on all of its concessionary proposals was borne of financial necessity, but, at the same time, that it was not claiming an inability to meet the Union's demands. At the trial, and at the bargaining table, the Hospital and its witnesses emphatically stressed that their position on the financial issues was borne of financial necessity.[35] At the same time, again, both at trial and at the bargaining table, the Hospital was emphatic that it was not pleading poverty or claiming an "inability to pay" for the Union's proposed increases. As Whelan stated at the December 5 meeting, he "was not saying we have an inability to pay." Gordon said he was "taken a[b]ack" and said but "you['re] saying you don't have an inability to pay"? Whelan stated, "no [,] we have ability to pay." Whelan explained, "we made it very clear that we have the money if we had to make those payments? Yes, we did. . . . The money was there, yes." DeJesus testified that Whelan "made it clear we were not talking about an inability to pay."[36]

[33] In addition, although no progress had been made on the issue of the Hospital's adamant and unyielding proposal to eliminate four weeks of FMLA leave, this must, in the first instance, be attributed to Hospital's many months long (unlawful) failure to provide the Union with requested information regarding this proposal. See, above.

[34] The resoluteness with which the Hospital advanced its position on these (and others of its) proposals, from day one, certainly calls into question whether, as required by the statutory duty to bargain, the Hospital "entered into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). However, a claim of overall bad-faith bargaining throughout the full course of negotiations is not advanced by the General Counsel (Tr. 541–542), and I make no finding in that regard. I recognize that the General Counsel does argue (GC Br. at 115) that the Respondent's failure to approach negotiations with an open mind is evidence of bad faith that adds to its argument that there was no impasse on April 15. However, based on my decision, I find it unnecessary to reach or rely upon that argument.

[35] Dejesus testified: "We had been clear from Day 1 that we – we wanted a pay freeze. We needed a pay freeze." (Tr. 514); "So my point in saying that was to share with them that we don't take these decision lightly. That we would not be asking for a pay freeze if it truly wasn't necessary." (439–440). "I wanted to be clear, because the Union was taking the position that we were not in bad financial shape; that we wouldn't be taking action like this unless we were in tough financial shape." (Tr. 439); "[E]conomic proposals are key to us. That we had to right the ship. And that the downward trend could not continue." (Tr. 424); "These are critical to us. We need the pay freeze. We need the pension. We need the holidays." (Tr. 453); Pierce testified: "our position was that we weren't in a position to provide increases." (Tr. 646). Gordon testified that "[Whelan] made the statement that Southcoast was not in a healthy place" (Tr. 120); "Mr. Whelan was trying to make an argument to support his position that they weren't in the position to talk about our first six proposals. He was saying that the hospital, the organization, was not in a healthy place." (Tr. 128); Bodenmann told the Union: "Moody's downgrading them; their rate. Big decrease in volume. No flu season. A growing doctor's group. This was -- she was just going over telling us this is why they felt they didn't have the ability to give us our financial increases that we were requesting through our proposals." (Tr. 186); Whelan's opening statement explained that the Hospital "struggled financially." (Tr. 23); "That trend [of losing money] continued in a very frightening way in 2014." (Tr. 24); This was the hospital and the system having to make changes to correct a very precipitous problem in its operating expenses" (Tr. 24); The hospital made a decision at the outset of negotiations . . . that it was going to be honest, and direct, and upfront with the union about its financial position." (Tr. 25); "there's no mystery to where we are, we are asking for a complete wage freeze." (Tr. 25.)

[36] At trial, Whelan was candid that a motive for the Hospital's position was "not want[ing[to trip that whole discovery and discussion about the books in the hospital." This was clearly a reference to avoid-

Thus, all the while affirmatively denying an inability to pay, the Hospital continuously cited and relied on economic losses that "required" Union "givebacks." Meanwhile, the Union looked at data that showed the Hospital operating with a comfortable surplus. The merits of these competing claims are not the point. The point is that this contradiction and the debate over the hospital's finances generally, reasonably, predictably, and inexorably drove the negotiations where they went: toward analysis of the situation by competing financial experts.

While careful to avoid any admission that it was required to provide the Union financial information, by February the Hospital began to make information available, albeit on its own terms. In an effort to makes its case, on February 12 it brought in COO Bodenmann to make a financial presentation to the Union, in the hopes that it would help bring the Union along. DeJesus believed it had helped the parties in the SEIU-Hospital negotiations (which were successfully completed in October 2105, approximately 10 months after negotiations began).

At the February 12 meeting, the Union requested a copy of Bodenmann's presentation. Whelan sent Gordon a copy of the powerpoint slides used by Bodenmann in the presentation on February 27. This was the first time Gordon had been provided with this information for the Union's use. Gordon passed this information on to union researchers to evaluate.

Whelan then offered to bring the financial discussions to a higher level, saying that "we would be happy" to have Bodenmann "get together with anybody [on the Union] side to walk through the financials and prove their understanding of our financial positions." The Union accepted this offer when on March 20 Gordon told the Hospital bargainers that the parties needed to get their "financial people together."

At this meeting, Whelan committed to have a financial meeting with Bodenmann and the Union's financial expert. At the same time, he made clear that such a meeting would not change the Hospital's mind—its purpose was to change the Union's mind.[37]

Gordon, for his part, allowed that that might happen. Gordon said, "well, we need to know the facts. We're willing to take zeros at other places, but we don't see that here on our financials. And there's floating and successorship." DeJesus testified that Gordon said on March 9: "when it's financially necessary that they've taken zeroes elsewhere, but it's not financially necessary here, so there's no need for them to take zeroes at Tobey."

Gordon said that the Union "[m]ay take a softer stand with [its] proposals," it "[d]epends on [the] financial positions." Hospital employee and union committeewoman Miksch described the bargaining situation as follows:

> [A]s far as the money thing, they sort of kept saying that there was no room to discuss. And we were still waiting for the financial report. So it kind of—sort of tied our hands a little bit not being able to verify an of their information moving forward. . . . [I]f we knew really what the financial report was and could look at it and evaluate it, then moving forward we could know how to negotiate.

Thus, at this point, by March 20, the parties, at the Hospital's invitation, had committed to a meeting of the financial experts, the outcome of which Gordon told the Hospital would be critical to the Union's positioning. Indeed, Gordon cancelled the next negotiating session, March 30, "until our financial people sit down and meet with the hospital's financial people." Whelan objected, complaining that the Union had taken too long to arrange a financial expert, but Gordon replied:

> As I have stated both at the table and to you on the phone the union cannot respond to any package offer until we have reviewed the Hospital[']s finances. In regards to your statement that the process has gone on long enough, what is long enough? We have had a total of seven (7) sessions, while requesting mediation after only five (5) sessions, something I've never seen in my thirty plus years of doing this.

The Union took the search for an expert seriously, engaging the Union's executive director to retain an expert with significant experience and multiple credentials. The "financial" meeting occurred April 8. It was not an easy meeting, but new Hospital financial information and opinions were shared. Whelan demanded dates for further meetings. Gordon told Whelan,

> I can give you a tentative date, but until I have the report back from Mr. Hyde I don't know where I can go with this. Because I wanted to get the report from him. . . . So I asked [Whelan] to wait, but [Whelan] said no, we need to get a date.

Before the tentative meeting date of April 15, Gordon told Whelan "I won't have the report till next week. Not sure it's worth meeting tomorrow." Whelan responded: "we need to meet. We will see you in the morning." Gordon responded, "Why do we need to meet? I explained when we set this meeting it was tentative." Gordon also testified that he orally told Whelan that he "needed the report" from Hyde before he could negotiate further.

On this record, it is impossible to say that the parties were at a good faith impasse on the financial issues when, on April 15, the Hospital declared impasse and announced its intention to implement. With the differing views of the Hospital's finances squarely at issue, the Union, at the Hospital's invitation, had gone down the path of retaining an expert, having a meeting with the Hospital devoted to the Hospital's finances, and was awaiting the experts' report. The fact that this was over issues on which the Hospital had made clear were the price of an agreement only increases the importance of the Union being provided the opportunity to complete the review process as part of good-faith bargaining.

Impasse is "that point in time in negotiations when the parties are warranted in assuming that further bargaining would be futile." *Pillowtex Corp.*, 241 NLRB at 46. Impasse requires

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ing the Board's longstanding doctrine, approved by the Supreme Court in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956), requiring that when an employer pleads an inability to pay in the context of collective bargaining, that employer has an obligation under Sec. 8(a)(5), upon request, to provide financial data substantiating its plea.

[37] Whelan testified that he knew "the financial talks were important to help [the Union] understand, but we knew the financials and the financial discussion would not change our position." Whelan told Gordon this: the "[r]eality is the reports will not change our position. We know what we know."

that "[b]oth parties must believe that they are at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). That the Hospital had reached its final position does not demonstrate that the Union has, and therefore, that there was impasse. *Grinnell Fire Protection*, 328 NLRB 585, 586 (1999) (even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so"). Moreover, "[t]he fact that Respondent believed that the Union would never agree to Respondent's . . . proposals does not establish an impasse." *The Ford Store San Leandro*, 349 NLRB 116, 121 (2007).

Under the circumstances, the Union's retention of an expert, bringing him to the meeting, and awaiting his report renders the assumption that further bargaining would be futile, mere unwarranted speculation. It rebuts the claim that "*both* parties believe that they are at the end of their rope" (emphasis added). Indeed, it also rebuts the argument that, reasonably, the Hospital should have been at the end of *its* rope, as it could not know whether—and, if it was bargaining in good faith it should have been hoping—that the consideration of the experts' views would serve to move the Union to or dramatically toward its position.[38]

I note that the Respondent contends (R. Br. at 2, 40–41, 52, 65) that throughout negotiations Gordon repeatedly signaled that the Union was inflexible in its rejection of the wage freeze by stating that the Union would never "take zeros." This is wrong. First of all, such unequivocal statements are absent from the numerous witness bargaining notes offered into evidence. Gordon denied ever saying any statement to the effect that he would never take zeros, or wouldn't take zeros in the future (he admitted complaining that he had taken them in the past). Most important, the bulk of the testimony attributed to Gordon on this score makes clear that Gordon's statements about zeros were statements indicating that what he saw in the Hospital's finances did not warrant the Union "taking zeros."[39]

Thus, the record evidence of Gordon's talk of zeros does not reflect intransigence, but the heightened important of the parties' ongoing discussions to reveal and explain the Hospital's financial situation to the Union. Gordon's message was the opposite of what the Hospital claims: he was open to "zeros" if the Hospital's claims of need could be substantiated and explained. And this is precisely the exercise the parties were engaged in when the Respondent declared impasse and implemented.

Here, both parties engaged in but did not complete a process—suggested by and committed to by the Hospital—which was designed specifically to provide the Union information on the rationale for the Hospital's bargaining position. Although the Union was not waiting on information from the Hospital (as to wages, pension, or holiday), the Hospital *knew* that the Union was waiting on a report being prepared based on the significant amount of information the Hospital had provided to the Union-retained expert for the first time in the April 8 meeting. This is more than analogous to—it is precisely the same reasoning behind—the well-settled rule that the failure to provide a union information on a core issue precludes a valid bargaining impasse.[40]

On April 15 there was no impasse. Rather, there was impatience and determination to declare impasse and implement by a date certain, for reasons unrelated to the bargaining process. In this April 15 meeting Whelan admitted, what is easily inferred from the record: the Hospital was determined to implement before April 20 in order to deny the nurses premium pay for the Patriots' Day holiday. Accused of this by Gordon, Whelan agreed ("exactly right" or words to those effect).

There is nothing wrong with this motivation for the holiday proposal. But it does not justify prejudicing and short circuiting the statutory bargaining process. It does not justify declaring impasse and implementing when there is not one, when the Hospital knows that the Union is awaiting the report from the financial expert that it hired to meet with the Hospital over the Hospital's finances. The Hospital created an artificial deadline for bargaining that was inconsistent with its statutory obligation to bargain in good faith. See *Whitesell Corp.*, 352 NLRB 1196, 1197–1198 (2008) (no impasse where employer sought substantial changes, but put artificial deadline on negotiations, and where parties had exchanged proposals day before employer declared impasse), affirmed and adopted, 355 NLRB 635 (2010). See also, *CBC Industries*, 311 NLRB 123, 127 (1993) (no impasse where "Respondent was determined to abandon certain terms of the contract at its expiration irrespective of the

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[38] And, of course, in the absence of impasse, notwithstanding the Hospital's insistence that it would never alter its position on these issues, the requirements of good-faith bargaining must leave some legally-required possibility that reason, discussion, and movement by the Union could lead to compromise on the Hospital's end.

[39] See, e.g., DeJesus' testimony: "John [Gordon] said, well, we need to know the facts. We're willing to take zeros at other places, but we don't see that here on our financials," and DeJesus testified that it was a "theme" of Gordon's that he would say "when it's financially necessary that they've taken zeroes elsewhere, but it's not financially necessary here, so there's no need for them to take zeroes at Tobey." Jezierski agreed that in the first two meetings Gordon said that "the union should not have to take a zero" because "the Union's feeling is that Southcoast was making plenty of money." Miksch testified, "I recall him saying that we had taken zeros before, [but] . . . you had shown a profit." Gordon testified about having discussions at the bargaining table about "the Union's feeling that Southcoast was making plenty of money so why should we have to take a zero."

Mangini testified in sweeping fashion that Gordon "[r]epeatedly said he would not take zeros." However, when challenged on cross-examination, she declared that "it was stated on a couple of occasions where I did write it down, because it was notable." But it was not in her notes. I believe that she remembers him saying the word zero, but I believe she left out the context—Gordon made it clear in his statements that it was the discussions of the Hospital's financial condition that was going to be central to the course of these negotiations and his willingness to "take zeros."

[40] *E.I. du Pont de Nemours & Co.*, 346 NLRB 553, 558 (2006) ("It is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse"), enfd. 489 F.3d 1310, 1316 (D.C. Cir. 2007) ("Board and court precedents reflect the principle that a denial of information relevant to the core issues separating the parties can preclude a lawful impasse" (internal quotation omitted).

state of negotiations").[41]

The Hospital's defense, essentially, is that it had "waited long enough" (R. Br. at 62) for the Union to come around.

In the first place, this contention is meritless given that the Hospital had willingly participated in the process of meeting with the Union-retained financial expert, a meeting that had occurred 1 week before the declaration of impasse and implementation.

But equally, there is an unconvincing highhandedness to the Hospital's contention that it has suffered long enough with the collective-bargaining process. Its complaints about union delay in the bargaining process are extremely one-sided. To be sure, Gordon cancelled a number of meetings, for a variety of reasons, but follow-up meetings were always quickly held (except when the Hospital could not meet for an extended period).[42]

However, it was the Hospital that by all record evidence did not respond to the Union's June 2014 notice seeking to begin successor negotiations in July, until September 24. It was the Hospital, not the Union that suggested extending the 2012 Agreement beyond September 30 because of the delay in starting negotiations. It was the Hospital, not the Union that was too busy

to meet and bargain during the entire month of October resulting in the first introductory meeting occurring November 10. It was the Hospital, not the Union that did not want to meet between January 7 and January 30, as it attended to other pressing matters. The sum is nearly 4 months of delay directly attributable to the Hospital. The Respondent declared impasse less than 5 months after the first substantive bargaining session on November 25.

And, of course, it was the Hospital that did not put its full wage proposal on the table until March 9, at which time it made a significant regressive wage proposal in the form its step freeze. The Hospital is in no position to blame the Union for the fact that the parties were still negotiating as its artificial deadline of April 20 approached.

Moreover, there is simply nothing to the Hospital's claims that the Union unreasonably delayed negotiations in a manner that justified the Hospital calling it quits, or that suggests bad faith. The Hospital suggests that union cancellations were a way to extend negotiations and points out that the Union had an interest in delay, as the status quo worked to the employees' economic advantage. Putting aside the fact that the Hospital was responsible for as much or more delay than the Union, it is true, without a doubt, that in concessionary bargaining, a union has an incentive to delay. Equally, and conversely, an employer has an incentive to move quickly to impasse. The issue is whether either party acted on their "incentive" in a manner that undermined the bargaining process. The record does not support it with regard to the Union. But it is vividly demonstrated by the Hospital's premature declaration of impasse on April 15.[43]

It is axiomatic that impasse or good faith cannot be measured solely by the number of bargaining sessions or the overall length of negotiations. One can (and the parties do) cite cases where impasse is reached in a couple of months after only a few bargaining session, and cases where impasse is not found after much longer periods and many bargaining sessions. Having said, that there is nothing in the length or pace of these 4-1/2 months of negotiations, with no more than eight meetings, that suggests an objective basis in the Union's conduct for the Hospital's impatience. As noted above, the Hospital's impatience was rooted in an artificial deadline that interrupted the bargaining process.[44]

In sum, I reject the Hospital's claim that declaring impasse was justified because the bargaining moved too slowly. The Hospital had a significant hand in the pace, and agreed to the consultation and review of the finances by a union-retained expert. It may well be that the parties would have reached impasse in due course, but we cannot say. As the Board stated in *Powell Electrical Mfg.*, 287 NLRB 969, 973 (1987), enfd. in relevant part, 906 F.2d 1007 (5th Cir 1990)

> That there was no impasse when the Company declared is not to suggest that if the parties continued their sluggish bargaining indefinitely there would have been agreement on a new contract. Such a finding is not needed, nor could it be made without extra-record speculation, to find on this record that when the Company declared an impasse there was not one, even as far apart as the parties were. They had most of their work ahead of them, and judging by the opening sessions clearly had different goals in mind for a contract. Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem—getting a contract—together, not to quit the table and take a separate path.

[41] The Hospital makes no claim that "dire financial emergency" or other "extraordinary events which are an unforeseen occurrence" justified its unilateral implementation." *RBE Electronics*, 320 NLRB 80, 81 (1995). Of course, such an argument could not even be mounted with regard to the need to implement the holiday proposal. Although Whelan testified that "the savings was significant," neither he nor DeJesus had calculated the cost of the proposal and they did not know the cost.

[42] Gordon cancelled a December 11 meeting to attend another union meeting at his boss's direction; a January 6 meeting to attend an unrelated arbitration, a February 17 meeting for unspecified reasons, a February 27 meeting because the Hospital had failed to arrange in advance to release his committee members from work (which Gordon assumed was for good reason relating to the patient care needs of the Hospital. a March 4 meeting due to a family health emergency, and the March 31 meeting because he wanted the financial meeting before there were further meetings.

[43] It is notable that the Hospital complained about Gordon's cancellations even in 2013–2014 during the reopener negotiations. Whether the Hospital liked Gordon's bargaining style or not, his style was not any different in the spring of 2014 than it was in previous negotiations. The Hospital's suggestions that in the spring of 2014 Gordon was engaged in a bad-faith attempt to delay to avoid impasse is unsupported.

[44] I reject the Hospital's assertion (R. Br. at 62) that it "did not declare impasse until it was clear—after 18 months that [the Union] would not make meaningful movement." This kind of overstatement does not serve the Respondent well. It is based on the parties' failure to reach an agreement during the 2013 reopener negotiations. Of course, not only was that a different negotiations, with a different legal context, but it involved a different array of proposals.

I find that the there was no impasse on the critical financial issues on April 15, when the Hospital falsely declared impasse and announced and began implementation of its final proposal. The implementation violated Section 8(a)(5) and (1) of the Act.[45]

CONCLUSIONS OF LAW

1. The Respondent Southcoast Hospitals Group is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Charging Party Massachusetts Nursing Association (Union) is the designated exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees

> All registered nurses employed by Southcoast for its Toby Hospital site, excluding the Director of Nursing, the Assistant Director of Nursing, Nurse Managers, Administrative Supervisors, managerial employees, supervisors, confidential employees, and all other employees.

3. The Respondent violated Section 8(a)(5) and (1) of the Act, since on or about March 9, 2015, by failing and refusing to furnish the Union with requested information regarding the number of nurses who have utilized the extended FMLA leave, information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

4. The Respondent violated Section 8(a)(5) and (1) of the Act, beginning and since on or about April 15, 2015, by unilaterally implementing its bargaining proposal without first bargaining to a valid bargaining impasse.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent shall provide the Union with the information that it has to date failed and refused to provide that was requested by the Union regarding the number of nurses using the extra four weeks of FMLA leave, as described in the decision in this matter.

The Respondent shall be ordered, upon the request of the Union, to rescind those changes encompassed within the implementation of its final offer and restore the status quo ante, and shall be ordered to make whole any bargaining unit employees for losses suffered as a result of the Respondent's unlawful actions. The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate any employees adversely affected by the unlawfully changed policies for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file with the Regional Director for Region 1 a report allocating the backpay awards to the appropriate calendar year for each employee.

The Respondent shall be ordered, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, to notify and, on request, bargain with the Union.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 1 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[46]

ORDER

The Respondent Southcoast Hospitals Group, Inc., Wareham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Refusing to collectively bargain with the Union by

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[45] To the foregoing, it can be added that the Union's reduction in its wage demand in the April 15 meeting (along with several other significant changes to its position), even while it was still awaiting the expert's report, points away from impasse. This was not a promise of movement on critical issues—it was movement. *Larsdale, Inc.*, 310 NLRB at 1319 ("Union's counterproposal on this date, containing a number of concessions, was a sign that the Union was willing to modify its proposals. Given this movement by the Union, the Respondent was not justified in concluding that negotiations were at impasse simply because the Union's concessions were not more comprehensive or sufficiently generous"). But clearly, the Hospital was determined to quit the bargaining process on April 15, regardless of circumstances.

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

changing the terms and condition of employment of its unit employees without first bargaining to a lawful impasse with the Union.

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

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

(a) Furnish the Union the information requested March 9, 2015, regarding the number of nurses that have used the FMLA benefit.

(b) Upon the Union's request, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on and after April 15, 2015, as part of the implementation of its final bargaining offer.

(c) Make employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral implementation of changed terms and conditions of employment, in the manner set forth in the remedy section of the decision.

(d) Compensate any employees adversely affected by the unlawfully unilaterally implemented terms and conditions for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file with the Regional Director for Region 1 a report allocating the backpay awards to the appropriate calendar year for each employee.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> all registered nurses employed by Southcoast for its Tobey Hospital site, excluding the Director of Nursing, the Assistant Director of Nurses, Nurse Managers, Administration Supervisor, managerial employees, supervisor, confidential employees, and all other employees.

(f) Within 14 days after service by the Region, post at its facilities in Wareham, Massachusetts, copies of the attached notice marked "Appendix." [47] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to furnish the Union with information requested by the Union that is relevant and necessary for the Union to fulfill its role as your collective-bargaining representative.

WE WILL NOT change your terms and conditions of employment without first bargaining to a lawful impasse with the Union.

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

WE WILL furnish the Union in a timely manner the information requested by the Union on March 9, 2015.

WE WILL, upon the Union's request, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented as part of our bargaining offer, beginning on April 15, 2015.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of our unlawful implementation of bargaining offer, plus interest.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 1 of the NLRB a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit

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

Case: 17-1740 Document: 00117182609 Page: 39 Date Filed: 07/27/2017 Entry ID: 6109061

all registered nurses employed by Southcoast for its Tobey Hospital site, excluding the Director of Nursing, the Assistant Director of Nurses, Nurse Managers, Administration Supervisor, managerial employees, supervisor, confidential employees, and all other employees.

SOUTHCOAST HOSPITALS GROUP

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01–CA–150261 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.