

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

**TRINITY HEALTH – MICHIGAN
d/b/a ST. JOSEPH MERCY OAKLAND
HOSPITAL,**

Respondent

and

Case 07-CA-161375

**COUNCIL 25, MICHIGAN AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,**

Charging Party

**GENERAL COUNSEL’S ANSWERING BRIEF IN RESPONSE TO THE
RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respectfully submitted:

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RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, the General Counsel, through attorney Renée D. McKinney, respectfully files this Answering Brief to Respondent’s July 24, 2017 Exceptions to the May 25, 2017 Decision of Administrative Law Judge Christine E. Dibble.¹

¹ In this Brief, the Administrative Law Judge will be referred to as “the Judge,” the National Labor Relations Board will be referred to as the “Board,” Council 25, Michigan American Federation of State, County And Municipal Employees (AFSCME), AFL-CIO will be referred to as the “Union” or “Charging Party,” and Trinity Health – Michigan d/b/a St. Joseph Mercy Oakland Hospital will be referred to as “Respondent.” Citations to the Judge’s decision will be referred to as “ALJD” followed by the page and line numbers specifically referenced. Transcript references will be referred to as “Tr. ___.” The General Counsel’s exhibits will be referred to as “GCX.” The Respondent’s exhibits will be referred to as “RX.” Respondent’s Brief in Support of Exceptions will be referred to as “Respondent’s Brief.”

SUMMARY OF ARGUMENT

On May 25, 2017, Judge Christine E. Dibble issued her decision finding, as alleged in General Counsel's Complaint, that Respondent violated Section 8(a)(5) of the Act by unilaterally removing the classification of pharmacy technicians and the work performed by those employees from the recognized bargaining unit. (ALJD 13: 18-22.)

Respondent has excepted to the Judge's credibility resolutions (Exceptions 1, 3-5, 6, 9, 10, and 20); findings of fact (Exceptions 2, 7, 8, 11, and 23); evidentiary rulings (Exceptions 1 and 13); and legal reasoning and conclusions of law, including her recommended order and remedy. (Exceptions 12, 14-19, 21-22, 24-30). All of Respondent's Exceptions should be overruled. Respondent's Exceptions are chiefly rooted in its basic misunderstanding of the Board's law on timeliness, waivers, and an employer's bargaining obligations with regard to removing a job classification from the bargaining unit.

Further, a preponderance of relevant record evidence supports the Judge's credibility determinations and findings of fact. The Judge's evidentiary rulings are free from prejudicial error. The Judge's legal reasoning and conclusions are supported by the record and consistent with Board precedent. Finally, the Judge's recommended order and remedy are appropriate for the violations found and supported by Board precedent.

I. A Clear Preponderance of the Relevant Record Evidence Supports the Judge's Credibility Determinations and Findings of Fact

Respondent's Exceptions 1, 3-5, 6, 9, 10, and 20 amount to challenges of the Judge's resolution of un rebutted or competing evidence presented at hearing.² The Judge's credibility

² Respondent's Brief (p. 5 n. 3.) made a post-hearing objection to the Judge's receipt of GCX 3 into evidence and asked that the exhibit be excluded. Respondent's counsel specifically waived his objection to this exhibit at hearing

resolutions are well-grounded in record evidence and therefore, in accordance with the Board's established policy, should not be overruled. Further, the Judge's findings of fact challenged in Respondent's Exceptions 2, 7, 8, 11, and 23 are also supported by substantial evidence in the record.

A. The Legal Standard

Standard Drywall Products, Inc., 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951), sets forth the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces the Board that the resolutions are incorrect. In this case, each of the excepted-to credibility resolutions made by the Judge is supported by the record—as are the Judge's findings of fact.

B. Respondent's Exceptions to the Judge's Credibility Determinations Lack Support in the Record

1. Exception 1: Local Union President Carlos Bass' gave un rebutted testimony³ that Respondent proposed that it would agree to the pharmacy technicians remaining in the bargaining unit if the Charging Party Union would agree to consent to allow Respondent to subcontract the work of medical transcriptionists. (Tr. 49.) Although Respondent excepts to the Judge's crediting Bass, Respondent failed to enter any contrary evidence into the record. The Judge's credibility resolution (ALJD 9: 10-14.), therefore, must stand and Respondent's Exception 1 should be overruled.

(Tr. 42.) Further, no corresponding Exception was filed. Matters not having been specifically excepted to, have, pursuant to the Board's rules, been waived. See Section 102.46(b)(2) and 102.46(c) of the Board's Rules and Regulations; *A-1 Door*, 356 NLRB No. 76 (2011), slip op. at 2 (citing *Engineered Comfort Systems*, 346 NLRB 661, 661 (2006)).

³ This section of the Brief in Response addresses the credibility issue in Exception 1; admissibility will be addressed below in Section II.

2. **Exceptions 3-5:** The record fully supports the Judge's credibility resolutions regarding the similarity of pharmacy technicians' duties before and after licensing. Specifically, the Judge credited (ALJD 7: 25-27.) Pharmacy Technician Mindy Mazurek that, as a licensed pharmacy technician, her IV compounding duties (Tr. 220.), delivery of medications (Tr. 221.), PYXIS duties (Tr. 222.), and steps for handling narcotics inventory (Tr. 223.) remained the same as before she was licensed. The Judge credited (ALJD 7: 29-31.) the corroborating testimony of Pharmacy Technician Barbara Harrington that she had always done perpetual inventory with regard to narcotics and controlled substances (Tr. 215.) and that although the ordering process had been changed by Respondent, she still placed medication orders. (Tr. 215-16.) The Judge also credited the corroborating testimony of Pharmacy Technician Jennifer Little that Respondent informed employees that their duties would not change (Tr. 69.) and she had not experienced a change in her duties after licensing. (Tr. 70.) Given this corroborated testimony by three credible witnesses, the Judge reasonably found (ALJD 7: 29-31.) that the testimony of Kathleen Gaither, Director of Pharmacy Services for the Eastern Market, that the use of PYXIS was a significant change in the pharmacy technicians' job duties (Tr. 113.) was in direct contrast⁴ with that of Mazurek, Little, and Harrington. Therefore, Respondent's Exceptions 3-5 should be overruled.

3. **Exceptions 6 and 10:** The record fully supports the Judge's credibility resolutions regarding changes to pharmacy technician's training requirements before and after licensure. The Judge credited (ALJD 7: 36-38 and 8: 2 n. 13.) Harrington's undisputed testimony (Tr. 218.), elicited on cross-examination, that pharmacy technicians have been required to take

⁴ Further, Gaither admitted on cross-examination (Tr. 110-12.) that, after licensure, the pharmacy technicians continued to work with baggies to fill the PYXIS machines, delivered IVs, looked for returns, and that the pharmacy technician who works in the narcotics vault continued to prepare the doses for the PYXIS machine.

20 hours of continuing education classes for the past 10 or 12 years—prior to licensure. Gaither’s generalized testimony that training was not previously required “in most cases” and “in a large number of institutions” (Tr. 94-95.) does not rebut Harrington’s testimony that Respondent’s pharmacy technicians were required to complete training. Nor does Gaither’s testimony that the USP 797 standards for pharmacy technicians require training (Tr. 90.) conflict with Harrington’s testimony. Thus, the Judge appropriately determined that Gaither’s testimony was unrebutted. Respondent’s Exceptions 6 and 10 should be overruled.

4. **Exceptions 7-8:** The record supports the Judge’s findings of fact regarding the safety and cleaning procedures followed by pharmacy technicians before and after licensure. The Judge found (ALJD 7: 39-41.) that the pharmacy technicians were required to follow more stringent safety and cleaning procedures following licensure but these changes were not a significant change in their job duties. In fact, with regard to safety procedures, Respondent’s witness Gaither testified (Tr. 107.) that prior to licensure pharmacy technicians washed their hands, put on an over gown, and wore a mask. After licensure, Gaither testified (Tr. 107.), the pharmacy technicians *working in the IV compounding room* wear hospital-issued scrubs rather than just an over gown. They use special sterile gloves to do their work and have to fingertip test their washed hands three times. (Tr. 107-8.) The record does not reflect what changes, if any, have occurred regarding safety precautions for pharmacy technicians who are not doing IV compounding.

With regard to cleaning, prior to licensure, pharmacy technicians *who performed IV compounding* cleaned the hood in the IV room (Tr. 107.). After licensing, those pharmacy technicians are also required to wash the room’s walls, which task was previously performed by environmental services. (Tr. 108.) Again, as with safety precautions, the record does not reflect

what changes, if any, have occurred regarding cleaning procedures for pharmacy technicians who are not doing IV compounding.

The record discloses that, in addition to IV compounding, both before and after licensure, pharmacy technicians also functioned in the roles of delivery tech, counter, PYXIS refill, and narcotics inventory. (Tr. 20.) IV compounding is just one of five job functions performed by the pharmacy technicians. The record does not disclose how much time is spent in each job function. Given that the record only supports the conclusion that IV compounding was affected, the Judge reasonably found that the more stringent safety procedures and cleaning techniques are not a significant change to the pharmacy technicians' job duties. (ALJD 7: 39-41.)

Likewise, the record supports the Judge's observation (ALJD 7: 41-43.) that a license is not required to implement stricter protocols for donning clothing and cleaning medical equipment. In fact, Respondent's witness Gaither admitted (Tr. 110.) on cross-examination that the changes to safety protocols and cleaning procedures that she had described pursuant to USP 797 were not mandated by the State of Michigan's pharmacy technician licensing law, Public Act 285. Respondent's Exceptions 7 and 8 should be overruled.

5. **Exception 9:** The record supports the Judge's credibility determination (ALJD 8: 1-2.) that the evidence is undisputed that Respondent did not train the newly-licensed pharmacy technicians in any new responsibilities. Respondent's witness Gaither referenced "retraining and recertification," not training in new responsibilities. (Tr. 90.) She also made reference to USP 797's training requirements. (Tr. 90, 91.) However, the record is devoid of evidence that any pharmacy technicians were trained on new responsibilities following licensing. Respondent's Exception 9 should be overruled.

6. **Exceptions 2, 11, and 23:** Taking all of the relevant, credible evidence into account, the Judge concluded in several places of her decision that there had been no significant changes to the pharmacy technicians' duties after they became licensed. (ALJD 7: 19-20; 8: 4-5; 11: 34-35⁵.) Indeed, as the Judge observed (ALJD 11: 35-40.), Respondent's witness Gaither generally phrased her testimony regarding new duties as that which was under consideration, anticipated — or even to be performed by a newly-created job classification in the future. (Tr. 94, 96-101, 103-104.) In contrast, three credited employee witnesses testified that their job duties had not undergone significant changes following licensure. (Tr. 70, 215, 220-23.) Thus, the Judge's conclusion was supported by the record. Respondent's Exceptions 2, 11, and 23 should be overruled.

7. **Exception 20:** The September 15, 2015 FAQ distributed by Respondent to pharmacy technicians (Tr. 76-77, 149, 210.) provides in pertinent part:

Q: Will my pay change?

A: If you apply for the Licensed Pharmacy Technician position on - line, there is no change in pay. You will be however be [sic] eligible for the non - union merit increases which are processed in early 2016.

Note: In reviewing market data across the Southeast Michigan market, SJMO is paying above market average, therefore no additional compensation will be provided outside of the merit increases.

If you do not apply for the Licensed Pharmacy Technician position by September 25, 2015, you will not be selected for one of the Non-Union Licensed Pharmacy Technician roles, effective October 1, 2015. Therefore depending on which option you select as a displaced AFSCME colleague, your compensation may change.

(RX 11.) The collective-bargaining agreement provides for set wages for each year of the contract, 2015 – 2018, for unit employees, including the pharmacy technicians, in Article XIX.

(GCX 10.) It does not contemplate merit increases or any other change in compensation. (GCX

⁵ Mis-cited in Respondent's Exceptions as "ALJD pp. 11-12, lines 34-7."

10.) Thus, the Judge’s credibility determination, characterized by Respondent as a legal conclusion, is correct: Respondent acknowledged in its Exhibit 11 that its reclassification of the pharmacy technicians might have an effect on employee wages and benefits. Respondent’s Exception 20 should be overruled.

Respondent’s exceptions to the Judge’s evidentiary rulings and legal conclusions fare no better than its exceptions to the Judge’s credibility resolutions and findings of fact.

II. The Judge Properly Allowed Testimony Regarding the Parties’ Bargaining to be Admitted into Evidence

Respondent’s Exceptions 1 and 13 challenge the Judge’s reliance on testimony from the General Counsel’s witness, Carlos Bass (Tr. 49.), who is a Supply Chain Technician and Local Union President (Tr. 41.). Respondent objected to that testimony as “settlement negotiations” at hearing. (Tr. 44, 45, 48.) As the Judge’s decision (ALJD 6: 9-13.) sets forth, Bass testified that, about June 2015—prior to the filing of the charge on October 5, 2015 and during bargaining over the impact of the State of Michigan’s new licensure requirement on the pharmacy technicians—Respondent proposed that it would agree to the pharmacy technicians remaining in the bargaining unit if the Charging Party Union would agree to consent to allow Respondent to subcontract the work of medical transcriptionists. (Tr. 49.) The Union rejected Respondent’s proposal about October or November 2015. (Tr. 49.) The Judge’s admission of this relevant, probative testimony was proper and her reasoning for admitting the evidence was also proper. Respondent’s Exceptions 1 and 13 lack merit.

A. The Legal Standard

Evidence of conduct or statements made during settlement negotiations is generally inadmissible to prove liability. Fed.R.Evid. 408. However, the rule “does not require exclusion when the evidence is offered for another purpose.” *Id.* Thus, the Board allows relevant evidence

of grievance settlement discussions to be admitted where the evidence is offered for purposes other than to prove liability. See *Miami Systems Corporation, Shelby Division, and CC Direct, a Single Integrated Enterprise*, 320 NLRB 71, 71 n. 2 (1995) (citing *Jenmar Corp.*, 301 NLRB 623, 631 n. 6 (1991); *Vulcan Hart v. NLRB*, 718 F.2d 269, 276-277 (8th Cir. 1983)), enfd. in pertinent part, *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1294 (6th Cir. 1997). In this case, Counsel for the General Counsel offered the evidence in question for the purpose of showing bargaining over the continued inclusion of the pharmacy technicians' classification in the unit. (Tr. 44, 46-47.) Thus, as the Judge properly determined, Bass' testimony was admissible and offered to show bargaining and when the Union had knowledge of the violation. (ALJD 6: 13 n. 11.)

B. Respondent's Exceptions to the Judge's Admission of Relevant, Probative Evidence are Meritless

Respondent did not address its Exceptions 1 and 13 in its Brief in Support of Exceptions. Nor did Respondent address the cases relied upon by the Judge in her discussion on the issue of the admissibility of Union President Bass' testimony. Exception 1 complains that the Judge allowed and credited Bass' testimony. Exception 13 complains about the Judge's rationale for admitting Bass' testimony—namely that it was part of a bargaining proposal and offered to show when the Union had knowledge of the violation.

The Judge was warranted in both rationales. Her conclusion that Bass' testimony was relevant to Respondent's timeliness defense has support in the record. Bass' un rebutted testimony establishes that as late as June 2015, Respondent proposed that it would not unilaterally remove the pharmacy technicians from the bargaining unit if the Union agreed to subcontract the medical transcriptionists. (Tr. 49; ALJD 6:11-13.) That is to say: the parties were bargaining. The Union therefore did not have unequivocal notice that Respondent would

unilaterally remove the pharmacy technicians from the bargaining unit until Respondent took the step of ceasing dues deductions for those unit members on October 1, 2015 without the Union's consent. (Tr. 170; ALJD 8: 7-8.) At that point, the Union knew that the bargaining over the impact of Michigan's new licensing requirement on the pharmacy technicians' inclusion in the unit was exhausted. No unfair labor practice charge had been filed at the time of these discussions—as Respondent's counsel admits. (Tr. 47.) The substantive bargaining discussions from June – October 2015 are therefore relevant to when the Union had unequivocal notice. (ALJD 6: 13 n. 11.) Under the Board's well-established evidentiary policy, then, Bass' un rebutted testimony about the parties' bargaining was properly admitted.

III. The Judge Properly Analyzed and Rejected Respondent's Timeliness Defense

Respondent's Exceptions 12 and 14-17 all hang on one badly-frayed thread of an argument: that the Union had clear and unequivocal notice of Respondent's decision to remove the pharmacy technicians from the bargaining unit on October 20, 2014, not on October 1, 2015. To succeed in making this argument, Respondent must first succeed in excluding Local Union President Bass' testimony that Respondent continued to consider *whether* to exclude the pharmacy technicians from the bargaining unit as late as June 2015. However, as demonstrated above, because Bass' un rebutted evidence was admissible and credited by the Judge, Respondent cannot establish that the charge was untimely.

Respondent's Exceptions 12 and 16 object to the Judge's findings of fact (ALJD 9: 7-11.) that the rehired pharmacy technicians were removed from the unit and Respondent ceased to deduct and remit union dues for those employees on October 1, 2015. Exception 16 also objects to the Judge's conclusions that the charge in this case was filed on October 5, 2015 within the 10(b) period. Exceptions 14, 15, and 17 flow from those findings of fact. With regard to

Exception 14, Respondent objects to the Judge's citation (ALJD 9: 2-4.) to *Leach Corp.*, 312 NLRB 990, 991 (1993) (quoting *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1983)) in her analysis. In Exception 15, Respondent complains (ALJD 9:6-7.) of the Judge's legal conclusion that late September 2015 or October 1, 2015 is when the unfair labor practice occurred. Respondent's Exception 17 challenges the Judge's rejection (ALJD 9: 13-14.) of its timeliness defense. However, as discussed below, each of the Judge's legal conclusions has support in both the record and Board law.

A. The Legal Standard

Section 10(b) of the Act prohibits complaint from being based upon an unfair labor practice that occurred more than six months from the date the charge was filed. 29 U.S.C. § 160(b). Citing *Leach*, the Judge correctly set forth (ALJD 9: 2-4) the Board's well-settled case law as to when the statute of limitations begins to run. To quote the *Leach* Board more fully:

'[A] statement of intent or threat to commit an unfair labor practice does not start the statutory six months running. The running of the limitations period can begin only when the unfair labor practice occurs.' *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1983). It is also firmly established that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. E.g., *Desks, Inc.*, 295 NLRB 1, 11 (1989). 'Further, the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b).' *Chinese American Planning Council*, 307 NLRB 410 (1992).

Leach, 312 NLRB at 991.

B. Respondent's Exceptions to the Judge's Analysis of its Timeliness Defense Lack Support in the Record and Board Law

In summary, the facts as found by the Judge (ALJD 4-8.) established that on October 20, 2014, Regional Vice President and Chief Human Resources Officer Ane McNeil and Human Resources Business Partner Victoria Chambo met with Union Vice President Toni Jordan to discuss the impact of Michigan Public Act 258 of 2014 (PA 2014) on the pharmacy technicians.

(Tr. 20, 139.) Chambo informed the Union's representative that upon receiving their licenses, the pharmacy technicians would be excluded from the bargaining unit pursuant to Article I of the CBA, which excludes "licensed associates." (Tr. 28; GCX 10.) Respondent and the Charging Party met again for a special conference on November 7, 2014. (Tr. 21.) At the special conference, Respondent maintained its position that the CBA mandated that the pharmacy technicians, once licensed, could not remain in the bargaining unit; the Union insisted that the pharmacy technicians should remain in the bargaining unit. (Tr. 21, 61.) The parties agreed to expedited arbitration. (Tr. 61; RX 7.) The parties met again on December 19, 2014. (Tr. 158, RX 8.) Respondent also prepared and distributed a FAQ to pharmacy technicians in November 2014 and on December 23, 2014, June 13, 2015, and September 15, 2015. The June 13 and September 15 FAQ's stated that Respondent would utilize non-union licensed pharmacy technicians. (RX 11.)

On March 10, 2015, the Union filed a grievance regarding the announced removal of pharmacy technicians from the bargaining unit, which Respondent denied on May 4, 2015. (RX 12 and 13.) On May 6, 2015, the Union filed notice of intent to arbitrate. (Tr. 34, 63; RX 9.) In late June 2015, Respondent proposed to the Union it would leave the licensed pharmacy technicians in the bargaining unit if the Union would agree to let Respondent outsource the work of the medical transcriptionists. (Tr. 49.) The Charging Party Union rejected the proposal in August or September 2015. (Tr. 49.)

In *Leach*, the employer informed the union that it would remove certain employees from one location to another as of February 1, 1991 and on several additional occasions over the next several months. 312 NLRB at 990. Employer Leach refused to recognize the union as the representative for the employees at their new location. *Id.* Yet, the employer did not remove a

substantial number of employees from the unit until September 17, 1991. *Id.* at 991. The union filed its charge on January 21, 1992. *Id.* The Board found that the charge was timely because, following the precedent set by *Harte & Co.*, 278 NLRB 947 (1986), the relocation process was not complete until a majority of the employees were relocated. *Leach*, 312 NLRB at 991. Thus the violation did not occur until September 17, 1991, which was inside of the six month statute of limitations. *Id.* at 992.

Respondent attempts (Respondent’s Brief, p. 22.) to distinguish *Leach* on the basis that “nothing was unclear or ambiguous about what was going to happen” in this case, unlike in *Leach*. However, as the credited facts demonstrate, this is not true—nor is it the basis upon which the Board decided *Leach*. Respondent, to resolve the pending grievance, proposed in June 2015 to retain the pharmacy technicians in the bargaining unit as part of a quid pro quo in exchange for removing the medical transcriptionists. (Tr. 49; ALJD 6: 9-13.) The possibility therefore existed that Respondent would not choose to unilaterally remove the pharmacy technicians from the bargaining unit up until the time that Respondent did so on October 1, 2015. Thus, the Union did not have clear and unequivocal notice until October 1, 2015 when Respondent stopped dues deductions: four days before the charge was filed. (GCX 1; ALJD 9: 9-11.)

The legal principle for which the Judge cited *Leach* is consistently applied by the Board in cases such as this one. With regard to a unilateral change to the scope of the bargaining unit, “[n]otice of an intent to commit an unlawful unilateral implementation does not trigger the 10(b) period with respect to the unlawful act itself.” *Howard Electrical & Mechanical, Inc.*, 293 NLRB 472, 475 (1989) (citing *American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983),

enfg. 264 NLRB 1413 (1982). It is the actual unlawful act itself that triggers the 10(b) period. *Leach Corp.*, 312 NLRB at 991.

United States Postal Service Marina Mail Processing Center, 271 NLRB 397, 400 (1984) and *NLRB v. Manitowoc Engineering Co.*, 909 F.2d 963, 971 (7th Cir. 1990) are not to the contrary. These Section 8(a)(3) discrimination cases, like the Title VI and civil rights cases *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 6 (1981) cited by Respondent (Respondent's Brief, p. 18.), simply have no bearing on the instant case. See *Leach*, 312 NLRB at 991 n. 7 ("The 10(b) standard that was employed in *Postal Service* applies to discriminatory discharge cases, but not to situations like those at issue here, involving contract repudiation and refusal to bargain."). Here, the date that the Union had clear and unequivocal notice that Respondent had unilaterally removed the pharmacy technicians from the bargaining unit was October 1, 2015. (ALJD 9: 7-9.) The Judge properly rejected Respondent's timeliness defense. Respondent's Exceptions 12 and 14-17 should be overruled.

IV. The Judge Properly Concluded that the Removal of the Pharmacy Technicians from the Bargaining Unit Violated the Act

Respondent's challenges to the Judge's findings of fact, legal reasoning, and ultimate conclusion that Respondent violated Section 8(a)(5) and (1) of the Act do not withstand scrutiny. Respondent's Exceptions 18 and 19 challenge the Judge's articulation of Board law regarding mandatory and permissive subjects of bargaining. Exception 21 disputes the applicability of two Board cases cited by the Judge to the instant case. And Exceptions 27 and 28 simply challenge the Judge's ultimate conclusion that Respondent violated Act and thereby affected interstate commerce.⁶ The Judge's legal conclusions are, however, well-reasoned and consistent with both

⁶ Respondent's Answer (GCX 1(f)) admitted that it satisfies that Board's interstate commerce standard.

the record and Board law. As the Judge correctly concluded, Respondent unilaterally removed the pharmacy technicians from the bargaining unit without the Union's consent.

A. The Legal Standard

An alteration in the definition or scope of the unit is a permissive subject of bargaining. *Holy Cross Hospital*, 319 NLRB 1361, 1361 n. 2 (1995); *Mt. Sinai Hospital*, 331 NLRB 895 (2000), enfd. *NLRB v. Mt. Sinai Hosp.*, 8 F. App'x 111,115 (2d Cir. 2001) (unpublished). A permissive subject of bargaining is simply a subject that falls outside of the purview of Section 8(d) of the Act; such proposals cannot be implemented by the employer without union or Board approval. *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992). Thus, a bargaining unit may not be altered without the approval of the union. *NLRB v. Mt. Sinai Hosp.*, 8 F. App'x at 114-115 (citing *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1572 (2d Cir.1989) (“[O]nce the bargaining unit is established by the collective-bargaining agreement or by NLRB action, an employer may not remove a job within the unit without either the approval of the Board or consent by the union.”); *Holy Cross Hospital*, 319 NLRB at 1361 n. 2 (once a position has been included in a bargaining unit, by Board determination or consent of the parties, an employer cannot remove the position without consent of the union)). Reclassification of a position from a bargaining unit job to a nonunit job is a mandatory subject of collective bargaining only if the reclassification has an impact on bargaining unit work. *Fry Foods, Inc.*, 241 NLRB 76, 88 (1979), enfd. 609 F.2d 267 (6th Cir. 1979). Here, as the record established, Respondent unilaterally relocated to outside of the bargaining unit both the pharmacy technicians and their work, which was substantially unchanged.

B. Respondent's Exceptions to the Judge's Analysis of the Record and Her Legal Conclusions Lack Merit

Based on the credited facts, the Judge correctly concluded the Respondent unilaterally removed the pharmacy technicians from the bargaining unit. Respondent, however, misunderstands its bargaining obligations with regard to permissive subjects and how the Board analyzes a case where the employer removes a classification from the bargaining unit.

1. The Judge's Analysis and Conclusions are Consistent with Board Law

The Judge began (ALJD 10: 15-36.) her analysis by reviewing the distinction between a mandatory subject of bargaining and a permissive one. She expressed her view—which was, contrary to Respondent's Exception 18, not a legal conclusion—that the distinction was “so subtle that it is imperceptible to the Board, courts, and litigants.” (ALJD 10: 15-18.) Consistent with foundational jurisprudence on the duty to bargain, the Judge defined mandatory subjects as those defined in Section 8(d) of the Act: “wages, hours, and other terms and conditions of employment.” (ALJD 10: 22-32.) The Judge went on to quote the 7th Circuit Court of Appeals' definition of permissive subjects as “those which fall outside the scope of § 8(d) and cannot be implemented by the employer without union or Board approval.” (ALJD 10: 32-34 (quoting *Hill-Rom*, 957 F.2d at 457.)

Respondent did not except to these legal principles, but did except (Exceptions 19 and 20) to the Judge's finding (ALJD 11: 1-3.) that the removal of the pharmacy technicians and the work they performed from the bargaining unit are mandatory subjects of bargaining because of the admitted (RX 11.) impact of the change on wages.⁷

⁷ The Judge also found support for her finding in the undisputed testimony of pharmacy technician Jennifer J. Little that the removal from the bargaining unit resulted in increased costs for medical and dental premiums, which are tied to employee's job classifications. (Tr. 71; ALJD 11: 10-14.)

Based on this evidence, as the Judge reasoned (ALJD 11: 14-20.) in her citations to *Arizona Portland Cement*, 302 NLRB 36, 44 (1991) and *Fry Foods, Inc.*, 241 NLRB at 88, removing the pharmacy technicians from the bargaining unit affected their essential terms and conditions of employment: they were deprived of their representative for collective bargaining and are now subject to different wages. The Judge's findings of fact are well-supported by the record and her analysis of those facts is consistent with Board law. Wages and benefits are unquestionably mandatory subjects of bargaining. See *NLRB v. Katz*, 369 U.S. 736, 742 (1962) (quoting Section 8(d) of the Act). Thus, Respondent's Exception 21 is without merit and should be overruled. Respondent did not satisfy its duty to bargain here.

2. Respondent Did Not Satisfy its Duty to Bargain before Unilaterally Removing the Pharmacy Technicians and Their Work from the Bargaining Unit

Respondent has a fundamental misunderstanding of what its obligations are with regard to bargaining in this instance. Respondent asserts that it has no duty to bargain at all over the removal of the pharmacy technicians from the bargaining unit because the subject is permissive. (Respondent's Brief, p. 21.) Respondent is wrong. *Hampton House*, 317 NLRB 1005, 1005 (1995), cited by Respondent (Respondent's Brief, p. 21.) for the proposition that it had no duty to bargain here, in fact, stands for the opposite proposition:

It is clear that the scope of the bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed on by the parties. Accordingly, once a specific job has been included within the scope of the bargaining unit by either Board action or the consent of the parties, the employer cannot remove or modify the position without first securing the consent of the union or the Board.

A permissive subject is not one over which a party has no duty to bargain; it is a subject over which a party cannot insist on bargaining to impasse. *Hill-Rom Co.*, 957 F.2d at 457. As

explained above, the clear weight of Board authority instructs that an employer must have the union's consent to remove a classification from a bargaining unit. Respondent could not therefore, implement its change to the bargaining unit without the Union's consent, but it did so. (ALJD 6: 13; 13: 12-14.) Respondent thereby violated the Act and its Exceptions 18, 19, 27, and 28 should be overruled.

Although the Judge declined (ALJD 10: 13 n. 14.) to address the applicability of *WETM-TV*, 363 NLRB No. 32 (2015)⁸ to this case because Counsel for the General Counsel's Post-Hearing Brief did not cite the case, Respondent again has expounded at length on the ways in which it believes *WETM* to be inapposite to the instant case. (Respondent's Brief, p. 21-23.) Suffice it to say that Respondent's arguments regarding the applicability of that case to the instant case turn on yet another of its flawed misunderstandings of Board law—this time, regarding waivers.

V. The Judge Properly Analyzed and Rejected Respondent's Waiver Defense

Respondent's Exception 22 argues that the plain language of the collective-bargaining agreement *requires* the exclusion of licensed pharmacy technicians because they fall within the category of "licensed associates." Exceptions 24, 25, and 26 challenge the Judge's legal reasoning and conclusion (ALJD 12: 10-15; 12: 15-26; and 13: 4-10.) that the Union did not waive the exclusion of the licensed pharmacy technicians from the bargaining unit by agreeing in 1971 to the exclusion of "licensed associates." As the Judge correctly concluded (ALJD 11: 22-32; 13: 9-10.), the evidence here does not (1) support the conclusion that the collective-

⁸ The Judge and Respondent referred to this case as "Nexstar Broadcasting."

bargaining agreement required the removal of the pharmacy technicians from the bargaining unit or (2) establish that the Union explicitly waived its rights with the full intent to release its interest in the matter.

A. The Legal Standard

The Board “will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). To satisfy the “clear and unmistakable” standard, “the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (citing *Trojan Yacht*, 319 NLRB 741, 742 (1995)). As the Judge correctly concluded (ALJD 13: 9-10.), the record in this case does not establish that the contract language specifically excludes licensed pharmacy associates so as to “require” Respondent’s removal of them from the bargaining unit. Nor does the contract language establish that to exclude licensed pharmacy associates was fully discussed by the parties and that the Union consciously yielded its interest in the matter.

B. Respondent’s Exceptions to the Judge’s Analysis of its Waiver Defense Lack Support in the Record and Board Law

As found by the Judge (ALJD 3: 32-33.), the record establishes that the current recognition clause has been in place, unchanged, since 1971. (Tr. 51-53.) The recognition clause does not explicitly reference pharmacy technicians. (Tr. 56:18; ALJD 3: 22-30.) However, the recognition clause includes “all classifications set forth in Article XIX.” (GCX 10; ALJD 3: 26-27.) Article XIX includes, among other job titles and pay grades, the classifications “Pharmacy Tech In Pt Cert” and “Pharmacy Tech Out Pt Cert.” (GCX 10; ALJD 3: 33-35.) Thus, while the

collective-bargaining agreement excludes “licensed associates,” it does not explicitly exclude licensed pharmacy associates. (GCX 10; ALJD 13: 5-7.) Further, as the Judge reasoned, the specific inclusion (GCX 10; ALJD 13: 7-9.) of licensed boiler operators and licensed electricians tends to undermine even further Respondent’s argument that the Union consciously waived its right to bargain over the exclusion of licensed pharmacy associates. Nor does the record contain any testimony that establishes that the Union specifically bargained in 1971 over this then non-existent classification of employees.

Respondent’s waiver defenses (Respondent’s Brief, p. 20-23.) purport to rely upon a plain language reading of Article I of the collective-bargaining agreement. Respondent’s first contention is that the plain language of the collective-bargaining agreement *required* Respondent to remove the now-licensed pharmacy technicians from the bargaining unit. Respondent’s second contention is that under the plain language of the collective-bargaining agreement, the Union consciously waived its bargaining rights in this case.

In support of its plain-language arguments, Respondent cites *Mining Specialists, Inc.*, 314 NLRB 268, 269 (1994) and *Gourmet Award Foods, Northeast*, 336 NLRB 872, 873 (2001). Neither of these cases involves the unilateral removal of a job classification from a bargaining unit, but they do involve contract interpretation. In *Mining Specialists*, the Board, finding ambiguous contract language and no extrinsic evidence of the parties’ intent, looked to “the realities of labor relations and considerations of federal labor policy... which make up the background against which such agreements are entered.” 314 NLRB at 269 (citing *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir. 1986)).

In this case, the Judge suggested (ALJD 13: 7-9.) that there may be ambiguity in the recognition clause due to the inclusion of licensed boiler operators and electricians in a unit that

excluded “licensed associates.” Thus, pursuant to *Mining Specialists*, such a contractual ambiguity would necessitate looking beyond the plain language to extrinsic circumstances, which evidence is lacking in this record. However, the realities of labor relations and federal labor policy do not support Respondent’s position, either. Respondent’s contention that the collective-bargaining agreement deprived it of discretion to allow the continued inclusion of pharmacy technicians after they were licensed is belied by Respondent’s June 2015 grievance settlement proposal to trade the pharmacy technicians for the medical transcriptionists. (Tr. 49.) Respondent thus made a conscious, unlawful choice to unilaterally remove the pharmacy technicians from the bargaining unit once they were licensed. Respondent was (and is) aware that its action was not mandated by the contract—or it would not have made its bargaining proposal in June 2015.

Exception 24 complains that the Judge found (ALJD 12: 9-15.) Respondent’s arguments regarding the specific inclusion of licensed boiler operators and licensed electricians in 1971 irrelevant to whether the Union clearly and unmistakably waived the inclusion of licensed pharmacy technicians in 2017. However, Respondent’s brief does not explain how the inclusion of licensed boiler operators and licensed electricians is relevant to this determination. Assuming that Respondent would argue that the specific inclusion of these classifications shows that the Union knowingly waived the inclusion any other licensed associate in the unit, there were, in fact, no licensed pharmacy technicians employed by Respondent until late September 2015. (Tr. 57, 68; 69, 164, 206; ALJD: 6: 26-27.) The Union could not have, therefore, “consciously yielded its interest in the matter” in 1971. See *Allison Corp.*, 330 NLRB at 1365. The Judge’s relevance determination was correct.

Nor does Respondent's Brief explain how *Gourmet Food Awards*' analysis or facts have any bearing on this case. In *Gourmet Award Foods*, the Board applied the well-established and uncontroversial rule that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit. 336 NLRB at 873. There, the Board looked to broadly-worded recognition language to find that temporary employees who performed unit work were included in the unit. Yet, the recognition language in the instant case, according to Respondent (Respondent's Brief, p. 19.), operates in exactly the opposite way: to exclude the now licensed pharmacy technicians rather than include them. This argument is inconsistent with the Board's jurisprudence on waivers because a waiver must be clear and unmistakable. Further, this case does not involve adding new employees to an already-established unit. *Gourmet Award Foods* has no applicability to this case.

Respondent's second contention regarding the "plain language" of the collective-bargaining agreement's recognition clause is equally misguided. Respondent relies on *The Boeing Company*, 212 NLRB 116, 116 (1974), an inapposite case, to argue that the Union waived its right to bargain over the exclusion of the pharmacy technicians from the bargaining unit. In *Boeing*, the Board concluded that the record showed that the employees removed from the bargaining unit had *never* performed work covered by the collective-bargaining agreement despite having been given a title that indicated they were professionals. *Id.* Therefore, the employees were—and had always been—non-unit employees. *Id.* *Boeing's* facts and analysis are thus far removed from the instant case where the pharmacy technicians were indisputably included in the unit and, although only their titles changed, Respondent unilaterally removed them. Board law and the record fully support the Judge's rejection (ALJD 13: 9-10.) of

Respondent's waiver defense because a waiver must be clear and unmistakable, which standard was certainly not satisfied in this case.

Also related to Respondent's argument that removal of the pharmacy technicians was permitted by waiver is the matter of how much, if at all, the pharmacy technicians' jobs changed once they became licensed. Respondent aggressively litigated this issue at hearing and in its Brief (pp. 15-16; 25-29.) In Exceptions 2-11 and 23, discussed above, Respondent futilely challenged the Judge's credibility determinations and findings of fact regarding how licensing affected the pharmacy technicians job duties, from which evidence, the Judge correctly determined that the pharmacy technician's job duties underwent no significant change following their licensure. (ALJD 7: 19-20.)

In Exception 25, Respondent objects to the Judge's analysis of these issues. Respondent maintains (Respondent's Brief, p. 26.) that *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2D 187 (7th Cir. 1983) is distinguishable from the instant case because the recognition clause there "did not expressly authorize the exclusion of licensed jobs." Respondent's distinction, then, hinges on its contention that it did not have any discretion to decide whether to remove the pharmacy technicians and their work from the bargaining unit. Yet, that contention is inconsistent with both the credited facts and Board law regarding waivers, which must be clear and unmistakable.

The Judge's citation (ALJD 12: 16-26.) to *Bay Shipbuilding* is simply her analysis of Respondent's contention that the pharmacy technician's job duties underwent significant change after licensure. The credited evidence shows that in this case there was merely a title change—that is the significance of the Judge's citation. Thus, the Judge explained that, pursuant to *Bay Shipbuilding*, the removal of a job classification must be justified by what amounts to a

community of interest analysis—and not just a title change. See *Hill-Rom*, 297 NLRB at 358 (citing *Bay Shipbuilding*, 263 NLRB at 1139) and *Texaco Port Arthur Works Employees Federal Credit Union*, 315 NLRB 828, 830 (1994) (employer must demonstrate that classification removed from the unit was “sufficiently dissimilar from the remainder of the unit so as to warrant [their] removal.”) (quoting *Bay Shipbuilding*, 263 NLRB at 1139) (internal quotation marks omitted). Respondent’s Exceptions 22 and 24-26 should be overruled.

VI. The Judge’s Recommended Remedy and Order are Appropriate for the Violation Found and Consistent with Board Precedent

In Exceptions 29 and 30, Respondent complains that the Judge’s recommended remedy (ALJD 13: 18-25.) and order (ALJD 14-15.) lack support in the record evidence and Board precedent. Respondent’s brief does not address these exceptions either. Thus, Respondent’s complaints appear to simply be rooted in its disagreement with the Judge’s legal conclusions challenged in Exceptions 27 and 28. However, the Judge’s recommended remedy and order are appropriate for the violation found and consistent with Board precedent. See, e.g. *WETM-TV*, 363 NLRB No. 32, slip op. at 1 n. 3 (adopting the remedy and order of the administrative law judge, as modified); *Holy Cross Hospital*, 319 NLRB at 1361 (adopting the remedy and order of the administrative law judge); *Fry Foods, Inc.*, 241 NLRB at 76 (same). Respondent’s Exceptions 29 and 30 should be overruled.

Conclusion

The Board should overrule all of Respondent’s Exceptions and affirm the Judge’s rulings, findings, and conclusions because (1) the Judge’s findings of fact and credibility determinations are supported by a preponderance of the record evidence; (2) the Judge’s legal analyses, conclusions, recommended remedy, and recommended order were substantially supported by

Board law and consistent with record evidence; and (3) Respondent's arguments are contrary to both the record evidence and Board law.

Respectfully submitted,

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Dated at Detroit, Michigan
this 21st day of August 2017

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

**TRINITY HEALTH – MICHIGAN
d/b/a ST. JOSEPH MERCY OAKLAND
HOSPITAL,**

Respondent

and

Case 07-CA-161375

**COUNCIL 25, MICHIGAN AMERICAN
FEDERATION
OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES (AFSCME), AFL-CIO,**

Charging Party

CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the foregoing GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE to be served upon the following via the NLRB's e-filing system on August 21, 2017:

Gary W. Shinnars, Executive Secretary
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National Labor Relations Board
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I further certify that I have caused a true and correct copy of the above-referenced documents to be served on the following by e-mail or U.S. Mail on August 21, 2017:

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Dated at Detroit, Michigan
this 21st day of August 2017