

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

MAYO CLINIC HEALTH SYSTEM,

and

Case No. 18-CA-168834

**JACKIE LUBAHN, INTERNAL ORGANIZER,
SEIU HEALTHCARE MINNESOTA.**

MAYO CLINIC HEALTH SYSTEM,

And

Case No. 18-CA-174200

SEIU HEALTHCARE MINNESOTA.

Counsel:

Joseph H. Bornong, Esq. (NLRB Region 18)
of Minneapolis, Minnesota, for the General Counsel

Douglas R. Christensen, Esq. and Benjamin D. Sandahl, Esq.
(Littler Mendelson, P.C.)
of Minneapolis, Minnesota, for the Respondent

Brendan D. Cummins, Esq. (Cummins & Cummins, LLP)
of Minneapolis, Minnesota, for the Charging Party

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a health care organization that entered into collective-bargaining negotiations with one of its many union-represented employee bargaining units. Throughout the negotiations it maintained proposals that provided it the right to unilaterally change employee benefits during the term of the agreement to match those offered to employees at other facilities of the employer. The union opposed the inclusion of such so-called “me too” provisions in a new contract. As of the date of the hearing in this matter, no agreement had been reached.

Based on the record, there is no question but that the employer has insisted on acceptance of the “me-too” proposals as a condition of a bargaining agreement and otherwise treated its “me-too” proposals as mandatory subjects of bargaining. The union argues that the employer cannot do this. It argues that the employer’s “me too” benefits proposals are permissive subjects of bargaining over which it cannot condition agreement and cannot insist to impasse.

The problem—apart from the problem that the National Labor Relations Board (Board) has never endorsed the union’s theory—is that the General Counsel of the Board, neither in the complaint nor his brief, and obviously by intention, does not advance or endorse the union’s theory of the employer’s violation. Under settled precedent, the General Counsel, not the union, is the master of the complaint.¹ Here, the General Counsel eschews any claim that the “me too” proposals are permissive, or that it is ipso facto unlawful for the employer to insist upon them. Rather, the General Counsel alleges a theory of violation that asserts overall bad-faith bargaining by the employer, with “rigid insistence” by the employer on the me-too proposals merely one of several indicia of bad-faith bargaining designed to undermine the union. My judgment is that there is no there there, or more accurately, not enough there to demonstrate that the employer was bargaining in a manner that failed to meet the statutory standards. In essence, the General Counsel’s case avoids the only possible violation—the contention that it is unlawful to insist as a condition of agreement on these “me too” proposals—but attempts to manufacture a bad-faith bargaining case based on the employer’s overall conduct in support of its bargaining proposals. The problem is that the employer’s conduct was not objectionable, if, as the General Counsel grants, insisting on me-too proposals is not per se unlawful. Accordingly, I recommend dismissal of the complaint.

STATEMENT OF THE CASE

On February 1, 2016, Jackie Lubahn, Internal Organizer, of the SEIU Healthcare Minnesota (Union or SEIU), filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Mayo Clinic Health System (Mayo or Employer or Hospital). Region 18 of the National Labor Relations Board (Board) docketed this charge as Case 18–CA–168834. On April 13, 2016, SEIU filed another unfair labor practice charge against Mayo alleging violations of the Act, docketed by Region 18 of the Board as Case 18–CA–174200.

Based on an investigation into these unfair labor practice cases, on December 29, 2016, the Board’s General Counsel, by the Regional Director for Region 18 of the Board, issued an order consolidating these cases, and a consolidated complaint and notice of hearing alleging that Mayo had violated the Act. On January 11, 2017, Mayo filed an answer denying all alleged violations of the Act. A trial in these cases was conducted on April 11–12, 2017, in Minneapolis, Minnesota. Counsel for the General Counsel and the Charging Party filed posttrial briefs in support of their positions by May 17, 2017. The Respondent’s brief was filed May 18, 2017.²

On the entire record, I make the following findings, conclusions of law, and recommendations.³

¹The General Counsel controls the theory of the case, which the charging party is powerless to enlarge upon or otherwise change. *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999); *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

²Mayo’s brief was filed with the Board’s regional office and served on all parties on May 17, 2017, which was the date set for the filing of posttrial briefs. The brief was not filed with the Division of Judges until the next morning, May 18, 2017. No party has objected to receipt of this brief. The Respondent represents that the error was inadvertent. There is no prejudice. I find the Respondent’s brief timely filed under the circumstances.

³On my own motion, I correct two errors in the transcript. On p. 6, line 8, “174” is changed to “198” and “175” is changed to “199”. On p. 69, line 16, “2013” is changed to “2003”.

Jurisdiction

5 Mayo is a nonprofit nationwide healthcare organization engaged in medical care, research, and education at medical campuses throughout the United States, including its operation of a hospital and clinic in Albert Lea, Minnesota. During the calendar year of 2016, Respondent, in conducting its operations described above, derived gross revenues in excess of \$250,000, and purchased and received at its Albert Lea, Minnesota hospital goods and services valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota. At all material times, Mayo has been an employer engaged in commerce within the meaning of Section 10 2(2), (6), and (7) of the Act. At all material times, SEIU 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

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Findings of Fact

Background

20 Mayo is engaged in medical care, research, and education at medical campuses throughout the United States. Mayo employs an estimated 60,000 employees in over 70 different communities in six states. The vast majority of Mayo employees are not union-represented. However, union density is sufficient to result in Mayo being party to 27 collective-bargaining agreements at many different facilities and with many labor organizations.

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In these cases, the Union represents a small unit of 6–7 skilled maintenance employees who work at Mayo’s Albert Lea, Minnesota facility. The Union also represents a separate unit at the Albert Lea facility composed of approximately 120 housekeepers, janitors, dietary employees, and nursing assistants.⁴ In addition, the Union represents two larger units (approximately 1200 and 600 workers respectively) of technical, skilled maintenance, and service and maintenance workers at Mayo’s St. Mary’s Hospital and Mayo’s Methodist Hospital, both located in Rochester, Minnesota. Until losing a decertification election in March of 2016, the Union also represented a unit of Mayo LPN and technician employees at Mayo’s Red Wing, Minnesota facility.⁵

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35 The most recent collective-bargaining agreement between the Union and Mayo covering the skilled maintenance employees at Albert Lea was in effect from October 1, 2012, until September 30, 2015 (the 2012 Agreement). According to union negotiators Jackie Lubahn and Jamie Gulley, in past years the negotiations between this unit and Mayo were typically concluded in a month or two, after three to five bargaining sessions. Mayo negotiator Monica Fleegel testified that more typical was 8–10 days of negotiating sessions to reach agreement. In any event, if necessary, the expiring contract was usually extended by the parties until a new agreement was reached. Mayo negotiator Monica Fleegel described “a good working relationship” with the Union through the years of negotiations. As discussed below, negotiations for the successor agreement have not been successful, and their failure—to date—forms the

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⁴In addition, between 130 and 150 registered nurses at Albert Lea are represented by the Minnesota Nurses Association.

⁵The Red Wing unit also included employees employed at Mayo’s Zumbrota, Minnesota and Ellsworth, Wisconsin clinics.

basis for the instant dispute. These negotiations began August 27, 2015. As discussed below, the parties met eight times for negotiations in 2015. The parties met six times through May 2016, and twice in September 2016, and then ceased meeting in any substantive way through the date of the hearing in April 2017.

5 The central dispute in the negotiations was Mayo's demand for, and the Union's resistance to, Mayo's "me too" or "bargaining waiver" proposals. The "me too" proposals were advanced by Mayo with regard to the subjects of paid time off, short-term disability, funeral leave, pension, and health and welfare (i.e., health, dental, and life insurance, accidental death and dismemberment, adoption assistance and long term disability plans). These proposals provided that during the term of the new contract, for the above-listed benefits, unit employees would be eligible to participate in the Employer's plans on these subjects on the same terms as offered to Mayo's "non contract" (i.e., nonrepresented) employees "as modified from time to time by the Employer."

10 15 These proposals were called "me too" proposals because they essentially provided that the unit employees would receive the same benefits that Mayo provided its nonunion employees across the employer's system. If and when changes were made to those standard benefits for nonunit employees, the change would be made for unit employees. These proposals were called "bargaining waivers," because Mayo's right under these proposals to make unilateral modifications to the benefits amounted to a waiver of the Union's statutory right to bargain changes in benefits that the Union would have in the absence of such contract provisions.

20 25 In some instances acceptance of the proposals would result in a significant but not necessarily adverse change in benefits received by unit employees. In particular, the pension proposal provided for moving employees from the "Medical Center's" defined-contribution retirement plan to the standard Mayo-sponsored defined benefit plan. Without detailing the specifics of each plan, it is fair to say—and, as discussed below, the Union said it on numerous occasions—the Union did not object to the substantive benefits offered by the Employer in these proposed benefits plans. Rather, the Union's objection was to the "me-too" component of the proposals. That is, the granting of Mayo the right to "modify]" the benefits during the term of the agreement.

30 35 While these proposals were resisted by the Union in the 2015–2016 bargaining negotiations, such "me too" proposals were not new to Mayo, to other unions representing employees in the Mayo system, to this particular Union, or even to the Albert Lea skilled maintenance unit.

40 45 At the hearing Mayo witnesses testified that the benefit standardization across the Mayo system provided by "me too" contract clauses was part of a more general and "larger integration and standardization that we've been doing across Mayo clinic" in an effort to "create efficiencies" and "reduce redundancies wherever we can." Mayo has moved toward standardization in benefits and combining of human resources administration. These standard benefit programs are applicable to the vast majority of nonunion employees, but also increasingly to union-represented employees too. Mayo Senior Labor Relations Specialist Jeffrey Vomhof testified that in the last 3–4 years "We've been very successful" obtaining "me too" language in labor agreements with various units of union-represented employees. Vomhof testified that of the 27 labor agreement across the Mayo system, all 27 of them have "me too" provisions for health and dental care, and 24 of 27 have "me too" provisions applicable to short-term disability and PTO. Vomhof estimated that 21 of 27 have "me too" language applicable to pensions and a majority of the contracts have "me too" provisions for long-term disability and life insurance benefits.

The unions in the Mayo system that have negotiated “me too” provisions in their contracts include the SEIU, which, in addition to the Albert Lea units, also represents bargaining units at Mayo’s Rochester, Minnesota St. Mary’s and Methodist hospitals. The collective-bargaining agreement between the Union and Mayo at St. Mary’s contains numerous “me too” provisions (e.g., holidays, PTO, STD, medical insurance, reimbursement account, adoption reimbursement, LTD, life insurance, scholarship plan, and professional development assistance), as does the collective-bargaining agreement between the Union and Mayo at Methodist (e.g., holidays, PTO, STD, medical insurance reimbursement, life insurance, LTD, accidental death).

Indeed, the Albert Lea skilled maintenance unit also has experience with “me too” provisions. As of January 2004, and continuing in successive contracts through and including the 2012 Agreement, the Albert Lea skilled maintenance unit’s health insurance has been provided on a “me too” basis. Indeed, union employee and negotiator Nate Johnson testified that dissatisfaction with the adoption of this provision in 2004, contributed to the Union’s current resistance to expand the “me too” provisions to other benefits in 2015–2016 bargaining.

In addition to the me-too health insurance, in October 2014, the Union agreed to amend the Albert Lea skilled maintenance unit’s 2012 Agreement to provide for a me-too provision to cover employees’ dental insurance coverage. The parties signed a letter of understanding in October 2014 that, effective January 1, 2015, amended the 2012 Agreement to provide for the unit’s dental insurance on a me-too basis.

Negotiations for a successor agreement to the 2012 Agreement

During the term of the 2012 Agreement, in early spring 2014, Mayo approached the SEIU at its Albert Lea units (and at Red Wing) and proposed the adoption of numerous benefit plans with the me-too provisions, similar to what Mayo was implementing with the Minnesota Nurses’ Association at the Albert Lea facility. After some discussion and meetings between the parties, on May 30, 2014, the Union’s internal organizer, Jackie Lubahn, wrote to Mayo indicating that the Albert Lea membership did not want to bargain a change at this time and that it would continue with the contractual language in the extant labor agreement. However, the issue resurfaced in negotiations for an agreement to replace the 2012 Agreement.

The 2012 Agreement was scheduled to expire no earlier than October 1, 2015. On June 23, 2015, the Union’s Lubahn wrote to Monica Fleegel, then Albert Lea’s director of human resources, indicating a desire to negotiate a successor collective-bargaining agreement for the skilled maintenance unit. Lubahn stated that she would be serving as chief union spokesperson for the negotiations. Her note contained an extensive information request that Fleegel testified was a usual bargaining request. Fleegel’s un rebutted and credited testimony is that the information request was satisfied by the Employer.

The parties met for the first time to bargain a new agreement on August 27, 2015, and also met August 28. The union’s bargaining committee was led by Lubahn. Also in attendance for the Union was Union Steward and Albert Lea employee Nate Johnson (Johnson is chief engineer at the facility). In addition Bill Johnson, also a unit employee, represented the Union. Mayo’s side was led by Fleegel. Accompanying her was Kylene Schaefer, then a human resources official for Mayo.

At the first meeting, the parties exchanged proposals. First the Union presented its opening proposal and the parties went through it, with the Union answering questions. Then the

Employer presented its proposal and the parties went through it, answering questions from the Union.

The Union’s proposal included a range of economic increases, including a wage raise of 5 percent each year, an increase in on-call pay, an increase in shift premium, a longevity bonus, increases in overtime pay, and an additional holiday, among other proposals. Mayo’s most significant proposals were to have me-too contractual language for many of the benefits provided in the contract. Thus, Mayo’s August 27 proposals included the following Employer proposals 5, 6, 8, 9, and 10:

- 5. Article XI—Paid Time Off (PTO): Delete Sections 1–4 and 6 and replace with the following language:

Effective January 1, 2016, benefit eligible employees shall be eligible to participate in the Employer’s PTO plan on the same terms and conditions as such plan may be offered to other Mayo Clinic Health System in Minnesota non-contract employees and as may be modified from time to time by the Employer.

- 6. Article XII—Salary Continuation: Revise section and replace with the following language and edit Article XII title to Short Term Disability Plan:

Effective January 1, 2016, benefit eligible employees shall be eligible to participate in the Employer’s short term disability plan on the same terms and conditions as such plan may be offered to other Mayo Clinic Health System in Minnesota noncontract employees and as may be modified from time to time by the Employer.

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- 8. Article XX—Funeral Leave: Revise section and replace with the following language:

Funeral leave eligible employees shall be eligible for funeral leave on the same terms and conditions as such leave may be offered to other Mayo Clinic Health System in Minnesota non-contract employers and as may be modified from time to time by the Employer.

- 9. Article XXI—Pension Plan: Revise section and replace with the following language:

Effective January 1, 2017, benefit eligible employees shall be eligible to participate in the Employer’s retirement plans on the same terms and conditions as such plans may be offered to other Mayo Clinic Health System in Minnesota non-contract employees and as may be modified from time to time by the Employer.

- 10. Article XXII—Health and Welfare: Revise section, incorporate the January 2015 Letter of Understanding into the contract, and replace as follows:

Benefit eligible employees shall be eligible to participate in the Employer's health insurance, dental insurance, life insurance, accidental death and dismemberment, adoption assistance and long term disability plans on the same terms and conditions as such as such plans may be offered to other Mayo Clinic Health System in Minnesota non-contract employees and as may be modified from time to time by the Employer.

(underlining in original; I have omitted the original bolding that accompanied the underlined proposed language).

The Union's agreement to these proposals would have meant that the unit employees would be covered by benefit plans and terms applicable to the vast majority of Mayo employees (nonunion and many union too) instead of their current plans and terms.

The parties reached a number of tentative agreements on August 27 and 28, mostly on noneconomic issues, but including tentative agreement on having a three-year term for the contract. See, GC Exh. 23. Numerous other proposals were withdrawn by both sides after discussion. Id. On wages, Mayo and then the Union each countered with multiple proposals. By the end of the August 28 session, the Union was proposing annual increases of 4.5%, 4.25%, and 4%, while Mayo was offering annual increases of 1%, 1%, and 0.75%.

The me-too benefits proposals quickly became the central and divisive issue in the negotiations. As union negotiator Johnson explained, "[e]arly on" in negotiations, "it became apparent the main issue was going to be the waiver of our bargaining rights." Mayo negotiators asserted that there was no present intention to make changes in these benefit plans, but that "there was no guarantee," and that Mayo was intent on achieving contract language that gave it the discretion to make changes.

For its part, the Union remained adamant from the outset that it was opposed to these waiver provisions and would not accept them. It was not the substance of the various benefit proposals to which the Union was opposed, but rather, the "last sentence," i.e., the me-too provisions. In letters to the employer, through internal employee votes, through a union executive board resolution, and in repeated comments at the table, the Union made it known that the "me too" or "bargaining waiver" proposals sought by Mayo were unacceptable to the Union, repeatedly calling them "deal-breakers."

After the August 27-28 meetings, the parties met again on September 14. During the late morning, the Union's President, Jamie Gulley came into the meeting, attending for the first time. Gulley testified that he "was there to deliver a message on behalf of the entire union that the comprehensive bargaining waivers that were being proposed were not going to be acceptable to our union." Gulley told the Mayo negotiators "on behalf of the Union, that we would not be giving up our bargaining rights under any circumstances." He said, "And let me make it crystal clear. We are not going to agree to it, and you need to drop these proposals."

Gulley made clear at later negotiations that the Union's objection was not to the level of benefits presently provided under Mayo's proposals, but "our objection was entirely about the waiver of our statutory bargaining rights for the future." This distinction—that the Union was not, in general, opposed to the substance of the current benefit plans offered by Mayo, or even the substance of the new plan standard pension plan Mayo proposed—but only to the proposed right of Mayo to change these benefits during the term of the contract without bargaining—was repeated throughout negotiations. See, e.g., October 9, 2015 letter from Lubahn to Fleegel ("I

want to repeat that the Union actually is agreeable to the substance of most, if not all, of the employer's proposals as to plan benefits—just not to the related demand by the employer that the Union waive all rights to bargain over any future changes to the plan benefits”). For Mayo's part, its negotiators responded to Gulley by talking to the negotiators about the fact that “we actually have 60,000 employees at Mayo Clinic and most have these benefits,” including “SEIU in Rochester, that have—had very similar ‘me too’ language.”

During the September 14 meeting, the parties continued bargaining on other issues. During this meeting, Mayo first moved on annual offers of wage increases to 1%/, 1%, and 1%. The Union countered by moving to 4.5%, 4%, and 4%. Mayo countered that by proposing 1.25%, 1%, and 1%.

In a September 24 meeting, the parties further discussed where they stood on the various proposals. Lisa Weed, a union executive vice-president also attended for the Union, along with Lubahn, and the Johnsons. Gulley was not present. Fleegel and Schaefer were there for the Union. The parties discussed the numerous open issues, and which issues had been withdrawn from the original proposals. There was discussion of uniforms, and boot coverings. As to benefits, Lubahn stated “that the Union was not interested in any language that allows the Employer to modify those benefits or change them at any time.” Lubahn told the Employer negotiators that the employees were “a hundred percent in agreement and were not interested in changing those benefits.” Weed provided the negotiators with an executive board resolution passed by the Union that accused Mayo of “attempting to gut benefits” at Albert Lea [u]nder the guise of standardization” and proposing “major take backs and to eliminate the right to collectively bargain over them.” The resolution stated: “After numerous sessions, Mayo has made no movement and the membership is at a crossroads. They can accept the concessions or they can fight back.” The resolution ended with the declaration that the Union's executive board would “support the Mayo Albert Lea maintenance members in their fight” by providing strike assistance if the employees went out on a “3–5 day ULP strike.”

Mayo responded by arguing that it did not agree that it was “gutting benefits,” that “the new benefits were, for almost everybody, much, much, better.” Mayo agreed that it was “standardizing,” but denied that it was a “guise.” Fleegel testified that the claim that Mayo had made no movement “was a surprise to me,” as she believed that “for the first two [or] three sessions, we'd gotten a lot of TAs and agreements on things.”

The parties broke to await the arrival of a mediator, Jo Romer, who had been called into the negotiations. Once the mediator arrived at about 10:30 a.m., the parties met separately with the mediator and did not get back together that day. At this session, the parties agreed to further meetings in October, with a mediator. The parties entered into an agreement extending the expiring labor agreement through October 31, 2015.

It should be noted that already by this point in negotiations, five of the six “open” proposals from Mayo involved benefits proposals with me-too provisions. In addition, Mayo proposed eliminating the “superior privileges” provision of the 2012 Agreement.⁶ By this point, the Union's “open” proposals involved wages, shift differential, jury pay, and a longevity bonus proposal. Thus, the negotiations were overwhelmingly over “economic” issues by this point. Approximately 14 tentative agreements (TAs) had been agreed to from the parties' initial proposals, primarily on noneconomic language issues.

⁶Article XVI of the 2012 contract was the “superior privileges” provision. It provided that additional wages or benefits provided to employees that were “superior” to those in the labor agreement would not be changed or discontinued based on the terms of the new agreement.

5 In a series of correspondence between the Union and Mayo in the fall of 2015, the parties argued over Mayo's insistence on the "bargaining waiver" proposals. The Union maintained that "you cannot insist on such proposals to impasse" and argued that it evidenced bad faith for Mayo to tie the bargaining waiver proposals to mandatory subjects of bargaining. The Union threatened to file unfair labor practice charges with the NLRB. Mayo responded by asserting that, contrary to the Union's claims, it had the right to insist upon these proposals to impasse, and that its bargaining conduct had not "in any way been unlawful or improper." In response to further union correspondence arguing that Mayo did not have a right to unilaterally implement its bargaining waiver proposals, Mayo wrote that it recognized that "current Board law does not permit an employer to unilaterally implement a 'me too' . . . provision . . . after impasse has been reached [and] we do not intend to unilaterally implement any of our proposals."

15 While the Union remained adamant that it would not accept these "bargaining waiver" proposals, Mayo remained adamant on proposing them.

20 The parties met October 7. Mediator Romer announced she would be retiring next year and brought a replacement mediator, Laura Poppendeck, who began attending the parties' meetings. At this meeting, Mayo offered revised me-too proposals but the changes were limited to adding language to the proposals that made clear that each proposal would only be in effect "During the term of this agreement," or continue only "through the term of the agreement." Other than this clarification, designed to rebut any implication that the waiver inherent in the proposals was intended to continue beyond the term of the agreement, the Employer remained committed to the benefits "waiver" proposals.⁷

⁷The amended Mayo benefits proposals read as follows:

Effective January 1, 2016, through the term of the agreement, benefit eligible employees shall be eligible to participate in the Employer's PTO plan on the same terms and conditions as such plan may be offered to other Mayo Clinic/Mayo Clinic Health Systems in Minnesota non-contract allied health employees and as may be modified from time to time by the Employer.

Effective January 1, 2016, through the term of the agreement benefit eligible employees shall be eligible to participate in the Employer's short term disability plan on the same terms and conditions as such plan may be offered to other Mayo Clinic/Mayo Clinic Health Systems in Minnesota non-contract allied health employees and as may be modified from time from time to time by the Employer.

During the term of this agreement, funeral leave eligible employees shall be eligible for funeral leave on the same terms and conditions as such leave may be offered to other Mayo Clinic/Mayo Clinic Health Systems in Minnesota non-contract allied health employees and as may be modified from time to time by the Employer.

Effective January 1, 2017, through the term of the agreement benefit eligible employees shall be eligible to participate in the Employer's retirement plans on the same terms and conditions as such plans may be offered to other Mayo Clinic/Mayo Clinic Health Systems in Minnesota non-contract allied health employees and as may be modified from time to time by the Employer.

5 Fleegel responded to the Union's executive board resolution raised by Weed at the last meeting, summarizing the progress that had been made, and the TAs reached. Fleegel said that the "me too's" were important for Mayo and were part of an "excellent package" that Mayo was providing to most of its employees. At this meeting, Nate Johnson mentioned that the (predecessor) Union's agreement to health insurance in late 2003 with bargaining waivers was followed by "skyrocket[ing]" premiums and that this informed the Union's opposition to extending the reach of me-too provisions to other benefits. Johnson also mentioned that the absence of any Mayo bargainers from Rochester—Mayo's headquarters—"showed how much they cared."

10 At the next meeting, on October 22, Jeff Vomhof, a Senior Labor Relations Specialist, who works in Mayo's Rochester, Minnesota headquarters, joined the negotiations. Fleegel was moving to Colorado—this was the last session she participated in—and Schaefer took over at this meeting as lead negotiator. Vomhof testified that his main role was to support Schaefer, but also testified that his presence was a response to union negotiator Johnson's reference to the absence of anyone from Mayo's central administration. "Corporate representatives" from Rochester would normally attend bargaining for the Rochester hospitals, but in the past bargaining for Albert Lea units "was always done locally." Vomhof testified that he was able to speak about the "big picture," meaning offer "context about the overall standardization that we were engaged in across the Mayo Clinic." Vomhof testified that he "was able to explain . . . that the majority of other unions had accepted this language."

25 At this meeting, Mayo maintained its position on the me-too benefits. Mayo counterproposed that if the Union accepted the me-too proposals, the unit employees would be able to receive certain new and additional benefits that nonunit and me-too union-represented employees were slated to receive beginning January 1, 2016. These were the tuition reimbursement benefit (PDAP) and the dependent scholarship benefits, a tuition benefit for employees' dependents. Vomhof indicated, in response to a question from Lubahn, that he had no authority to agree on a benefits proposal that did not have the me-too language. Union negotiators contended that the Union "was not interested in me-too," that this was "a bad way to start off" with Vomhof in negotiations. The union negotiators told the Mayo negotiators that there "is absolutely no way we are backing down." During this session Mayo made no move on wages, but the Union lowered its wage proposal to 4.25%, 4%, and 4%.

35 The 2012 Agreement, which had been extended until October 31, 2015, was not further extended. The Union suggested extending the agreement beyond October 31, but Mayo was not amenable to further extension of the contract. However, the parties continued bargaining, and the record indicates that there was neither a lockout nor strike at any time through the date of the hearing.

40 During the term of this agreement benefit eligible employees shall be eligible to participate in the Employer's health insurance, dental insurance, life insurance, accidental death and dismemberment adoption assistance, and long term disability plans on the same terms and conditions as such plans may be offered to other Mayo Clinic/Mayo Clinic Health System in Minnesota non-contract allied health employees and as may be modified from time to time by the Employer.

On November 23, the parties met with the mediator in a meeting that was limited to “side-bar” meetings. No notes were taken at the mediator’s request. Vomhof described it as a “brainstorming” session. Vomhof, attempting to correct any suggestion from the previous meeting that he “lacked authority,” began the meeting by stating “I just want to clarify I’ve got full authority to negotiate at the table. I have parameters to negotiate under, which I’m sure you do as well.” There was a lot of discussion about the me-too proposals at this meeting. The Union’s Nate Johnson told the Mayo negotiators that there were “too many” of the me-too provisions. Johnson suggested to Mayo that “if they compromised and maybe we compromised, somewhere there was a middle ground and we could come up with something I could take back to my guys that would be ok.”⁸ Vomhof suggested that Mayo could be “open to other language if they could propose something that would work,” and Vomhof even mentioned the possibility of spelling out some of the benefits language in the contract as had been done at the Rochester contracts. But Vomhof was clear that “at the end of the day, there needs to be clear ‘me too’ language.”

On December 8, Mayo’s Schaefer, along with benefits specialists Miranda Stroup and Tony Lehrman, made a benefits presentation to the unit employees regarding the Mayo-wide benefits that Mayo was offering to extend to the unit in the negotiations. Six of the (then eight) unit employees attended, along with Lubahn. The employees asked questions about the proposed benefits and the Mayo representatives answered them. At the end of the meeting one employee told Schaefer “something along th[e] lines” of, “I wish these guys would figure out what a great benefit this is. I’m missing out on money.”

The parties met to bargain again on December 14. Mediator Poppendeck was present for this meeting and the parties bargained through the mediator. Mayo’s bargainers included for the first time Keri Slegh, a Mayo HR official, and Jeff Zahnle, a Mayo employee and labor relations consultant.

In this meeting Mayo made a new wage proposal, increasing the offer for year two. While offering more of a wage increase than its earlier wage proposal, this wage offer, which would go into effect without retroactivity upon ratification, was conditioned on acceptance by the Union of the me-too proposals being advanced by Mayo. This new proposed wage increase was 1.25%, 1.25%, and 1%. In addition, Mayo offered to accept a jury pay proposal that had been advanced since the opening of negotiations by the Union, but sought to add an additional sentence (that was in the St. Mary’s and Rochester Methodist contracts and that required an employee dismissed from jury service before the end of a work shift to contact his/her supervisor to see if the employee needed to report for work). However, this move on the jury pay proposal was also conditioned on the Union accepting the full me-too proposals. The “superior privileges” proposal was still open.

In response (all of this through the mediator) the Union, in Mayo’s view, showed some openness to some of the me-too proposals, albeit not on pension. As Vomhof put it in his testimony, “It wasn’t a yes, wasn’t a no, but they’d be willing to continue the conversation.” The Union was clear that it would accept Mayo’s pension plan, but not with the me-too language. Slegh’s notes indicate that the response from the Union included that if pension was worked out,

⁸Johnson recalled this conversation as occurring in December. However, that month was suggested by counsel, and my conclusion from observing the testimony was that Johnson was not sure of the date. This is reasonable. He was not relying on notes or other documentation in recalling this conversation. I find that this conversation occurred during the November 23 meeting. That meeting was conducted “entirely in sidebar,” and there were no notes introduced into evidence (unlike for all other sessions).

the Union was willing to “look at Health,” perhaps indicating a willingness to accept me-too language, which was currently in place, on health insurance. Generally, the Union was willing to accept the standard package of benefits but without me-too language. But Vomhof told the mediator that “all me-too’s must be part of [the] Final Package.” Mayo remained firm that it wanted the “the core benefits” of PTO, STD, pension, and health, in the next contract on the me-too basis. Mayo did not mention funeral leave, although at all times that remained on the table as a me-too. The Union indicated that it was willing to agree to “standardization” of current benefits, but not the “me too’s.”⁹

None of this discussion led to any resolution or even actual movement on the me-too proposals. Thus, to summarize discussions during 2015, while the parties reached tentative agreements on a number of subjects, the inability to move on the me-too provisions remained unchanged. By December 18, the Union was calling the standoff an “impasse” and complained that Mayo was making a contract contingent on a proposal “that is absolutely unacceptable” to the Union.

2016 bargaining

Bargaining continued in 2016—but little progress was made with regard to the parties’ respective positions on the bargaining waiver proposals.

In the January 12 meeting, the parties met face-to-face. For Mayo, the negotiators were Schaefer, Vomhof, and Zahnle. The union negotiators were Nate Johnson, Bill Johnson, and Lubahn. Gulley also attended this meeting as well. The mediator, Poppendeck, was also present. The Employer reiterated that while it was willing to continue negotiating, it was committed to the bargaining waivers being in any final agreement. It indicated again that it would agree to a disputed proposal about jury duty that the parties had discussed, but that this agreement was contingent on the Union accepting the me-too proposals.

The Union asked many questions about the me-too proposals. Gulley asked a number of questions about the pension, and why the employer’s pension proposal did not provide for unit employees to enter Mayo’s systemwide defined benefits plan until January 1, 2017. Vomhof’s answer related to “testing that our benefits folks had told us is necessary to be able to put new people on the pension plan.” Gulley asked what the pension benefits would look like in 2017. Vomhof said that he could not “predict the future” but that in the past changes to the plan had been “announced 5 years in advance.” Zahnle mentioned that changes to other benefits, such as disability, were done without much notice, and Mayo was asking the Union to trust it by accepting

⁹I do not credit the claim by Vomhof that Mayo “made clear” (Tr. 401) that a me-too on funeral leave wouldn’t “necessarily” need to be part of a final agreement. The overall record does not support that claim. As to whether this exchange on December 14 (and a similar one on April 11, 2017, see supra) was intended to suggest Employer flexibility on the funeral leave me-too proposal, I conclude maybe it was, maybe it was not. Possible signaling aside, the fact is the Employer never removed or changed the me-too funeral leave proposal.

the me-too format. Zahnle told the Union, in response to a question from Gulley, “that there were no changes being contemplated currently.”¹⁰

5 Mayo negotiators described certain new benefits, including identity theft protection and tuition reimbursement, that were available to other employees and that it would be willing to provide to the unit employees if the Union would agree to the proposals with bargaining waivers. Vomhof said that “nobody got the new benefits w/out the ‘me too.’” Gulley asked if other units also had to wait to enter the larger standard plan. Gulley asked if Mayo would include the Union on a me-too basis in the St. Mary’s or Methodist union pension plan, which were different plans from the standard nonunion Mayo plan. Vomhof said that Mayo was not considering that. Gulley 10 asked whether, on the me-too proposals, Mayo could “piecemeal this out.” Mayo indicated that the me-too benefits were being proposed together as a package deal, and that tentative agreements reached in bargaining were contingent upon a whole package deal being reached.

15 Gulley, for the Union, reiterated that the parties were at impasse on the benefits issues. After a caucus, the Union told Mayo that it would prefer to leave the benefits as they were in the contract. As Gulley put it, “We were not interested in going into the global benefit package if it required bargaining waiver, and we were fine with the benefits as they existed.”

20 At some point during this meeting, the Employer suggested a six-month “cooling off” period during which the parties would not bargain. The Union rejected this but expressed some interest in a one-year contract with all terms the same. The Employer rejected that.

25 Later on January 12, the Employer proposed adding 5-cents per hour to the shift differential in the second year, proposed the jury duty language, and offered the same wages that it had on the table, but with no retroactivity. But everything was contingent on the me-too proposals being accepted. The Union proposed keeping all benefits as they currently were, accepting all TAs except for jury duty, and moved its wage proposal to 4%, 3.5%, and 3.5%. Earlier in the meeting, in the morning, Schaefer had told the negotiators that “she heard after the benefits meeting [on December 8] that there w[ere] people that wanted that [pension] benefit.” 30 Nate Johnson told Mayo that “they vastly misread his group, that his group was all on board as far as what we were doing with negotiations.” Johnson told Mayo something to the effect that “[w]hile some of the group may have an interest in the benefits they are offering, not at the expense of giving away our rights.”

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¹⁰There is also a dispute, which carried into subsequent correspondence between the parties in January (GC Exhs. 12 and 13) about whether Gulley asked at this meeting about the costs attributable to Mayo’s pension plan proposal in years two and three. Gulley testified that he asked this, and Mayo said it did not know. Vomhof testified that this question was not asked by the Union, but that it would be difficult to estimate the cost savings attributable to the relief from administrative burdens attendant to standardization of the pension benefits. Based on the bargaining notes and the demeanor of the witnesses, I find the question was not asked, at least not as directly as asserted by Gulley. (It does appear that a question was asked about the actuarial costs to “retest” the Mayo pension plan if the unit employees were added.) More generally, however, Gulley’s questions seemed to be directed toward pointing out that the Mayo negotiators were unable—because of the bargaining waiver aspect of their proposals—to provide certainty of what the benefits would be in the future. This point was made by Gulley in numerous ways at this meeting, and, essentially, Mayo agreed that lack of certainty about what the benefits would be in the future precluded any kind of meaningful anticipated future cost analysis.

The Union expressed disappointment in Mayo's proposal, and indicated that the "ball is in your court" for the next meeting. Mayo negotiators said that, no, the ball was in "your court." The meeting adjourned.

5 The parties met again on January 29. In addition to Lubahn, and Nate and Bill Johnson, Union Representative Lisa Weed attended for the Union. (Attorney Justin Cummins was present with the Union during caucuses and when the parties met separately from each other). Slegh, Schaefer, Zahnle, and Vomhof, were present for Mayo. The parties started in separate rooms with the mediator, Laura Poppendeck, conveying messages. Weed testified that the mediator
10 told the Union that the Employer "has trust issues" with the Union when they sit across the table so they "prefer shuttle diplomacy." The Union suggested the parties meet to discuss all issues except for the me-toos. The Mayo negotiators rejected that. Then Mayo, through the mediator, asked about its proposal to delete the "superior privileges" language from the next collective-
15 bargaining agreement. The Union told the mediator that "they would have to come down and talk to us if they wanted to talk about that." The Employer agreed to meet face-to-face to discuss the "superior privileges" language. Although the Mayo negotiators attempted to limit discussion to the superior privileges issue, the Union raised other issues, and asked to talk about the benefits—but wanted to put the "me-too" issues aside. Zahnle told the union that "you are limiting how we
20 negotiate based only on your terms." Zahnle said, "you want us to bargain over your parameters and your parameters only. The whole thing is a package deal." At this point, the Mayo negotiators said they wanted to do "shuttle diplomacy" again. Vomhof testified that he felt that the Union had violated an agreement to meet face-to-face just for the purpose of talking about the superior privileges issue.

25 The parties caucused. The Union gave a modified proposal to the Employer through the mediator. The Union modified its longstanding proposal for double time on holidays by limiting the proposal for double time to Thanksgiving, Christmas Eve and Day, with other holidays remaining at pay and a half. Mayo responded through the mediator, who brought a handwritten document to the Union that reflected the Employer's position. In it, the Employer stated that:
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 Proposals regarding compensation and benefits are economic items. Economic items are very difficult to separate as one impacts the other. There is cost to administering multiple benefit plans, those costs have to come from somewhere so they limit our ability to make any movement on wages. One impacts the other; to
35 separate and negotiate in isolation will benefit neither party and especially the staff who will not benefit from the new benefits that other staff enjoy.

 The employer's note also stated that was agreeable to moving on the shift differential to \$1.80, in response to a Union proposal on this subject. The Employer indicated that it would
40 agree to the Union's proposal on jury pay, with an additional sentence that the Employer had provided to the Union previously. It also stated that it was "willing to discuss movement on wages," but that it was "All contingent to acceptance of the enhanced benefit package with the full me too language."

45 The Union sent a note to the Employer asking "Does the Union have to accept employer's me too language before further bargaining over terms will occur?" The Employer responded, "We have given a proposal[,] we are willing to listen to a counter proposal." The Union instructed the mediator to secure a yes or no answer to their question. The mediator returned and told the Union that the Employer "does not have a 'yes' or 'no' response, they are open to meet again. If
50 you want to meet." The Union told the mediator that the Union was willing to accept the Employer's proposals to change benefits and enter into the more standard Mayo benefits plans,

but without the me-too language. The Employer responded through the mediator that it was considering the offer and was available to meet February 22 and March 10.

5 The parties met again on February 22. They met through the mediator. This meeting did not last long, only about 45 minutes. At this meeting, the mediator conveyed a note from Mayo to the union negotiators that stated:

10 We have shared with the Union which of their open proposals we still have room for movement on as well as which of their open proposals we will not agree to under any arrangement. With respect to the open proposals that we have room to move on, if the Union is willing to agree to all of our “me too” proposals, in exchange for that agreement, we have room to move on those proposals. If the Union is unwilling to accept our “me too” proposals, we have no further room for movement on wages or any other of the open proposals that we might be prepared to otherwise move on. We intend to continue bargaining in good faith as we have done to date and are open to further discussions, but without the Union agreeing to our “me too” proposals, we don’t presume to see a means to bridge the gap between the parties.

20 The Union continued to reject Mayo’s me-too proposals and sent a note back through the mediator back to the Employer to that effect. The Union requested a counterproposal from Mayo, asking if Mayo would be willing to provide proposals today. Mayo sent a note back stating that it stood by its statement.

25 On March 10, the parties met in separate rooms with the mediator shuttling between them. Lubahn and the Johnsons were present for the Union. Zahnle, Schaeffer, and Slegel were present for Mayo. Mayo sent the Union the same February 22 note again. The Union decreased its wage offer to 3.75%, 3.5%, and 3.5%, but according to Lubahn, “that was contingent on the Employer removing the me-too language from their benefit package.” Similarly, as to the Union’s holiday proposal, the Union removed Christmas Eve from the list of holidays to be paid at double time, but, according to Lubahn, “We also went on to say this movement is contingent on the Employer removing the ‘me too’ language from their benefit package.”

35 Mayo asserted that it had room to move on some proposals, particularly wages, but also made clear that it was “not willing to show [its] hand” “without agreement on the me-toos.” “Without acceptance of me too’s no more room to move.” The Union indicated it would bargain over benefits, but would not agree to the me-too language. Mayo sent the February 22 note to the Union once more. The Union asked if Mayo had a last-best-final offer. Mayo answered by asking the Union if it had one.

40 The parties met again on April 11, beginning in separate rooms with the mediator shuttling between them. The mediator indicated to the Union that the Employer had said that “the window” on wage retroactivity—i.e., on the Union’s demand that any wage increase in the new contract be retroactive to October 2015—“was beginning to close” if the parties did not soon reach agreement. The Employer also indicated through the mediator that there would need to be an agreement by June 1, if the employees were to begin as participants in the Mayo-wide pension plan by January 2017. The mediator also conveyed that the Employer had again suggested a “cooling off” period of six months, but the Union said it was not interested.

50 Mayo sent a note just stating that it “plan[ned] to continue negotiations through the mediator.” Schaefer suggested in her testimony that the reluctance to meet in person was

motivated by the news from the mediator that Gulley had rejoined negotiations. The Union sent a note demanding face-to-face bargaining and informing Mayo, through the mediator, that the Union would file an unfair labor practice charge if Mayo did not meet face-to-face. After this Mayo acceded and met face-to-face.

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At the face-to-face meeting, Gulley asked a series of questions about the waivers. Gulley asked if Mayo would “bargain with the Union about wages if the Union does not first agree to ‘me too’ language regarding other terms.” Vomhof read the prepared statement previously (and repeatedly) given to the Union stating that the Employer had “no further room to move on wages without movement on the bargaining waiver language and they were unable to . . . bridge the gap.” Gulley asked, “What terms must have ‘me too’ language . . . before they will agree to bargain over wages.” Vomhof responded by mentioning the issues of PTO, short term disability, pension, and health and welfare benefits, and stating, “We need acceptance on all of these benefits with bargaining waiver before we can move on wages.” Vomhof did not mention funeral leave in responding to this question (which was also a benefit for which Mayo was seeking “me-too” language, and which at all times remained in Mayo’s proposal). Gulley asked whether the Employer would agree to terms that are not subject to the “‘me too’ language”? Vomhof responded by mentioning, “PTO, STD, Pension, H&W,” and queried, that he was “not sure what other terms you are talking about.”¹¹ Gulley asked whether that meant that Mayo would not agree to the PTO, STD, pension, or health and welfare without the me-too language. Vomhof told Gulley that was correct. Gulley asked which of the tentative agreements reached on other proposals were not subject to the bargaining waiver language. Vomhof was about to go through each one, and Schaefer pointed out that union security was a tentative agreement. Vomhof added that “It’s a package deal, the proposal depends on agreeing to the entire package.”

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At this point the meeting degenerated into an argument with Mayo negotiators contending that Gulley’s questions had been answered, and Gulley claiming, with voice raised, that Zahnle was refusing to answer his questions. Many of the Mayo representatives were yelling and stood up angrily. As they stood, Zahnle’s chair fell backwards and “flew on the floor.” In the argument that ensued Zahnle said that “this is why we don’t want to be in the room with you.” He accused Gulley of “trying to trap us.” Other Mayo negotiators, referencing a recent decertification of a bargaining unit at Mayo’s Red Wing unit, said “no wonder 40 people were trying to leave you.” The mood was angry, and the Mayo negotiators were yelling over one another. The mediator called for a break. The Mayo negotiators filed out of the room and the self-closing door “shut heavy,” slamming loudly behind them.¹²

¹¹This response adds to my uncertainty, noted above, about whether Vomhof was signaling anything of significance to the Union about flexibility on funeral leave.

¹²The account of events at the end of this April 11 meeting were pointedly disputed at trial. I have carefully considered all of the testimony, particularly witness demeanor and also notes about this incident. The text represents my findings. I discredit all other accounts. I specifically discredit Gulley’s testimony that “[t]he chair was thrown,” and that the incident was—at least as an objective matter—“very threatening” or “incredibly threatening.” These claims were not corroborated by any other witness. I accept that the anger expressed by the Mayo negotiators was unusual, even unprecedented for these negotiations, and startling. But I reject the assertion that their conduct was objectively physically threatening. I do not believe the chair was intentionally knocked over and find, in accordance with Zahnle’s credible testimony, that it was not. I discredit the suggestion that the reference to 40 employees wanting to leave the union was stated as being associated with bargaining waivers.

This incident occurred at about noon. The parties returned and met in a sidebar for several hours that afternoon that involved only Lubahn and Vomhof. The Union provided some “supposals” for Mayo to consider. These included (1) extending the 2012 labor agreement for a year, the tentative agreements, and a 1.5% pay raise (retroactive to October 1, 2015); (2) putting the employees on the St. Mary’s or Rochester Methodist pension plan with no “me too” on pension, but accepting the other proposed me-too benefits proposals, keeping superior privileges, and accepting all other TAs with, with wages to be determined; or (3) agreeing to Mayo’s proposal (including the me toos), with the parties coming to an agreement on wages (and some uncertainty on the outcome for superior privileges). At 4 p.m., after meeting internally, Mayo responded, saying it had no interest in 1 or 2, its preference was 3. The parties left this side bar agreeing to discuss it with their respective committees. No date for a future meeting was set at this time.

The parties met next on May 19. Weed, Nate and Bill Johnson, and Lubahn were present for the Union. Slegh, Vomhof, and Zahnle were present for Mayo. Vomhof stated that he was going to be lead negotiator as Schaefer had left to work in a different capacity for Mayo.

The Union provided a package proposal #1 to Mayo. The package proposal agreed to accept the Employer’s proposal 10—i.e., the me-too provisions for health and welfare (as long as employees eligible for this benefit included employees hired to work 20 or more hours per week). On pension and PTO it accepted the Employer’s current retirement plan and current nonunion PTO, but not the me-too language. The proposal called for the Employer to withdraw its proposal for STD and its proposal to delete superior privileges. It called for acceptance of the union’s counter on funeral leave which called for the current terms and conditions offered to nonunion employees (with eligibility for all employees working at least 20 hours per week).

In addition the Union’s package proposal contained the withdrawal of a number of union proposals (on overtime, paid time off earnings, shift differential, and longevity bonus). The package proposed agreeing to the employer’s counter on jury pay that added the sentence requiring a day shift employee dismissed from jury service before the end of the work shift to call his/her supervisor to see if they needed to report for remainder of shift. The Union package proposal also involved the Employer agreeing to the union’s proposal on New Member Orientation. The proposal also called for an annual wage increase of 4%, 3.5%, 3.5%, and 4%, beginning and retroactive to 10/1/2015. In addition, the proposal provided for acceptance of all previous TAs.

Mayo caucused and then provided a written counterproposal in which it maintained its demand for all me-too proposals and stated that “if the Union is willing to agree to all of our ‘me-too’ proposals, we continue to have room to move on wage proposals.”

The Union made another package proposal, package proposal #2. This chiefly modified its prior proposal by proposing acceptance of the current “non-contract” PTO, STD, funeral leave, and Employer pension (delaying participation until January 2017, in accordance with Employer proposal), but instead of requiring that these plan remains the same for the duration of the contract, proposed that a plan “substantially similar to the current plan for non-contract employees” remain in effect. The Union referred to this in discussions later that afternoon as a “middle ground” between set benefits and the Employer’s right to make changes. As Lubahn explained at the hearing, requiring that the plan remain “substantially similar” would give the Employer “flexibility to change the plans, but if there was a major change to them, it gave us the right and reassurance that we could go through the grievance procedure if we had to.”

5 However, Mayo made clear to the mediator that there was “no more room for movement until union agrees to me-too language.” Vomhof rejected what he referred to as a “watered down” version of the Employer’s proposal for benefits. Mayo wanted me-too language for all the proposed benefits, not just for health and welfare, as the Union was now proposing. Vomhof stated that the Employer’s position remained that “it’s a package proposal in total,” and said that “our position all along is that we aren’t going to implement anything in the proposals until we have a ratified contract.” The meeting ended with no resolution and no future meeting set.

10 The parties did not meet again until September 15. That day, they began by meeting separately with the mediator. The mediator suggested that the Union wanted Mayo to “throw out a number” in terms of wage increase that it would give to “buy” the me-too language. Although Vomhof said at the September 15 meeting that the Employer was not “at the end of the road on wages,” he reiterated that for Mayo to move further on wages it needed a commitment on the bargaining waiver proposals from the Union. He said the “ball is in the Union’s court.”

15 When the parties met jointly this was discussed again, as the Union pressed Mayo to tell it the wage increase it would be willing to give the employees if the Union accepted the “me-too” language. The Union indicated it wanted a number to take back to discuss with employees. Gulley asked, what about “5/5/5 contingent on me-too”? Vomhof said that this was higher than Mayo would give, but refused to put forward a number. Mayo told the Union that it did not “trust you,” and was unwilling to provide in advance a figure on wages that it would offer if the Union accepted the me-toos. Mayo first wanted indication that the Union was open to accepting the me-toos. The Union reiterated that the bargaining waivers were not agreeable to the Union. Mayo shared that it was not open to “buying” the me-toos, believing it would send the wrong message to the other Mayo units that had accepted the me-toos. The meeting ended with Vomhof reiterating that “we have been very clear about our need for the me toos.”

20 The parties last met on September 27, 2016, where they met through the mediator. There was little discussion related to negotiations. The Employer “reinforced [that] retro[activity on wages] is not on the table.” Neither party expressed interest in a face-to-face meeting that day. No further dates have been arranged for bargaining.

Away-from-the-table events

35 In support of its case, the General Counsel cites the following “away-from-the-table” events.

40 In anticipation of a March 31, 2016 decertification election in Mayo’s Red Wing unit, the Employer, through a human resources official, sent the following letter to those employees:

45 As we forewarned, SEIU has been known to take liberties with the facts. The undated letter and flyer you received from them earlier this week fully illustrates this point. It is so full of outrageous claims that we feel the need to set the facts straight.

50 Approximately 95% of the employees (that’s over 50,000) across Mayo Clinic are non-union, and Mayo Clinic has been consistently named one of the Top 100 Employers in Fortune’s ‘100 Best Companies to Work For’ survey. Each year, hundreds of companies go through a competitive selection process hoping to make Fortune’s list which includes a survey of randomly selected employees that accounts for two-thirds of a company’s score. This ranking would be impossible if

5 you believed the union's claims that all of your pay and benefits would be taken from you the moment you become non-union. This is complete nonsense! These things were not taken away from any of the several other groups who chose to decertify from their union at various Mayo Clinic sites, and exactly none of them have decided to re-enlist with ANY union since they made their decisions. Ask yourself honestly: What incentive would Mayo Clinic have to do as SEIU suggests? Believing the false unsubstantiated claims is playing right into SEIU's hands in their attempt to keep dues-paying memberships.

10 The fact is unions have been declining nationally for 50 years. They are desperate to sell memberships to replace those they have been losing. In its flyer, the union urges you not to gamble on decertification, but in reality the gamble is having a union represent you. Bargaining during negotiations is the true gamble. You could get more, you could get less. You may be required, against your wishes, to go out on strike! A union contract does not guarantee your jobs despite the union's implication that it gives you immunity. If this were true, why are there lay-off provisions in the contract? Nationally, layoffs and strikes are a hard reality of unions that they like to ignore. All of our jobs are made more secure by the success of our business, working together for excellent patient care, NOT being represented by a third party union.

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25 The union has apparently prompted some to repeatedly state that Mayo Clinic cannot guarantee any particular benefits or compensation advantages should you choose to decertify from the union. This is also mentioned in their flyer. This is true, but not for the reasons they are insinuating. It's not because we wouldn't prefer to do so, or because we would be unwilling to do so, but rather because it is the law that we not make any promises or comment on what might happen if a decertification is successful! Management is much more restricted in what it can say and do than the union is. We are prohibited from making such promises as the union can, empty or otherwise.

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35 Decertifying a union is a very difficult and fairly rare process that takes extraordinary courage on the part of employees to initiate since the employer may not assist in that process. Employers are allowed to participate in a campaign only AFTER a petition has been successfully filed. According to statements from some employees, and also acknowledged in the letter from SEIU, there has been a lack of attention to members shown by the union until now when there is a risk of losing the dues of its members. That is a telling fact.

40 You have an extraordinary opportunity here. We invite you to give us a chance and educate yourself on the true facts. It is your choice to rejoin a union, this one or another one, in the future if you're disappointed. Our experience has been that this doesn't happen, and we're confident you won't go back either if successful. As mentioned last week during the compensation and benefit meetings, we are committed to providing you with facts and education. Please see the attached documents for true facts and information to help guide you. As a reminder, there are drop-in sessions in the HR offices at the Medical Center daily through next week. Please stop by if there is anything else that needs clarification or if you need more information. Thank you.

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Attached to this letter was a chart purporting to compare “Union Claim” with “Non-Union Facts.” These included, among other “Non-Union Facts,” the following:

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

On March 31, 2016, the employees in the Red Wing unit voted to decertify the Union.

25 In addition, the General Counsel cites a letter that Mayo sent to the Albert Lea skilled maintenance employees, from officials (Mark Ciota, M.D. CEO, Steve Waldhoff, Chief Administrative Officer, and Keri Slegh, Regional director of Human Resources) at Mayo’s Albert Lea and Austin facilities dated April 20, 2016, and identified as a “SEIU Negotiations Update.” The letter stated:

30 As you are aware, negotiations between the Mayo Clinic Health System and the Albert Lea SEIU Maintenance members have been on-going since last August. We are not sure how much information you are receiving regarding what has been discussed during negotiations, so we wanted to take this opportunity to provide an update on how the negotiation sessions are progressing.

35 During the first several sessions the union and the medical center exchanged proposals. The medical center has agreed to several of the union’s proposals, including an increase in call pay and shift differential pay. In addition there is agreement in concept related to jury duty pay. These are tentative agreements that would be implemented when the full contract is ratified. In addition, the medical center has offered a generous set of new benefits which include: a defined benefit pension plan and 403(b) employer match, a short term disability plan and a paid time off plan. The plans being offered are the same plans enjoyed by the majority of employees across the Mayo Clinic, including many of your other union co-workers. Several of you have expressed interest in receiving these new benefits, and the union has also expressed a willingness to accept these new benefits. All we are asking is that the benefits be taken under the same terms as are applied to all other employees across Mayo Clinic who are on these plans. Unfortunately, the union is asking that these benefits be provided under different terms and conditions than what is provided for everyone else. Essentially, the union is asking for a “special deal” for just this group of employees. This is despite

5 the fact that most unions across Mayo Clinic have agreed that the benefits we are offering are generous, in some cases above market, and have agreed to our proposals. Others in Albert Lea, including MNA members, went into Mayo's pension in January of 2015 and have been building pension credit and receiving matching funds in their 403(b) plans ever since. In addition these employees now also enjoy other benefits that are not currently offered to your group, including the Professional Development Assistance Plan (tuition reimbursement), the Dependent Scholarship program and Identity Theft protection. We would also like to remind you that this "me-too" language that is in question was already part of your contract for health and dental coverage, in which some of you likely benefited from the reduced premiums in 2015.

15 We also wanted to take this time to share with you an important upcoming deadline that would impact when your group would be eligible to Join the Mayo Clinic pension plan. This deadline has been shared with the union but we wanted to ensure you receive this information. Due to the process involved with putting a new group of new employees on to Mayo's pension plan (extensive testing to ensure accuracy), we have been given a deadline of June 1, 2016 to be able to get your group on the Mayo pension plan effective January 1, 2017. **If we do not have a ratified contract by June 1, 2016, the earliest your group would be able to join the Mayo pension plan would be January 1, 2018.** This deadline is beyond our control and is not subject to negotiation.

25 It is important to note that our benefit proposals are part of a much larger benefit standardization project across all of Mayo Clinic. It simply isn't efficient or the best use of Mayo Clinic resources to administer many different sets of benefit plans to various employee groups across Mayo Clinic. Instead, we are able to provide more generous benefits through the efficiencies gained by providing standard core benefits across all employees. We are very proud of the significant investment the organization has made to the benefit plans including those being offered to your group.

35 Please take time to consider the fact that changing benefit plans is something we would have to do for nearly the entire population of the organization. That is not a decision that is made lightly and as Dr. Ciota said on April 18, it impacts our ability to recruit and retain good employees. It is worth reflecting on whether SE1U is truly looking out for your individual best interests by refusing to accept the benefits that you have said you wanted, or are they are just looking out for their own interests.

40 We would like to emphasize that the medical center is committed to negotiating a fair and sustainable contract for our maintenance staff, just as we have collaboratively done with the union for many years. If you have questions regarding any of the medical center's proposals, please feel welcome to reach out to Keri Slegh, HR Regional Director, at [XX-XXX-XXXX]. Thank you for all the hard work and dedication you provide each and every day. [Emphasis in original.]

50 An undated response from the "SEIU Maintenance Staff," included a reaffirmation of the unit's support for the union's positions:

In reading your letter however, it seemed that perhaps you might not be getting full or accurate updates regarding the proposals or our support for our bargaining team. Nate and Bill have great ideas. We want you to know that we stand behind our bargaining team and our proposals 100%. We also want you to know that we have fully considered Mayo's proposal to voluntarily give up our Union rights to bargain over benefits forever into the future. We are simply not interested in any trade-offs that may be provided to us today in exchange for giving up our bargaining rights forever into the future. We know that Mayo wants a special deal that would allow it to change or even reduce our benefits in the middle of our contract. To make such an agreement is short term thinking.

Our opinions matter. Our work is important. We do a good job. Before any changes are made that will affect our jobs or our benefits and the lives of our families we deserve to be consulted. We deserve to have a say and a vote in what happens to our work in the future. We remain hopeful that we can reach an agreement on a new contract that covers our wages, benefits and working conditions, but we want you to know that we have no intention of giving up our bargaining rights to do so.

Analysis

The complaint contends that Mayo violated Section 8(a)(5) and (1)¹³ of the Act by engaging in bad-faith bargaining.

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 performance of 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, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.

The Supreme Court has observed that “[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of ‘take it or leave it’; it presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract. . . . in a process that look[s] to the ordering of the parties’ industrial relationship through the formation of a contract.” *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 485 (1960). The parties are “bound to deal with each other in a serious attempt to resolve differences and reach a common ground.” 361 U.S. at 486. The Act requires that the parties “enter 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).

“In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table.” *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001) (internal citations omitted), enfd. 318

¹³An employer’s violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Southcoast Hospitals Group, Inc.*, 365 NLRB No. 100, slip op. at 22 fn. 20 (2017); *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956).

F.3d 1173 (10th Cir. 2003). “From the context of an employer’s total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Public Service*, supra at 487.

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It is a statutory requirement that good-faith bargaining “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. §158(a)(5). At the same time, the employer is “obliged to make some reasonable effort in some direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.” *Atlanta Hilton & Tower*, 271 NLRB at 1603, citing *NLRB v. Reed & Prince, Mfg.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953). “Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining.” *Public Service Co.*, supra at 487–488, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991); *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993) (in assessing bad-faith bargaining, “an examination of the proposals is not to determine their intrinsic worth but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement”).

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In this case, the General Counsel argues (GC Br. at 20–21) that the Respondent “rigidly insisted” on the me-too proposals “without legitimate and substantial business reasons,” communicated “to employees that a contract will not result in terms and conditions of employment any better than those of non-represented employees,” and that its “apparent intent is to reach agreement only on terms that will demonstrate to employees that union representation is of no benefit.” These are claims without support, and in some cases without legal significance.

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As to the me-too proposals, the General Counsel argues that Mayo’s explanations for advancing the me-too proposals are not “legitimate and substantial business reasons,” and thus, purportedly create an “inescapable” (GC Br. at 26) and “natural inference” (GC Br. at 30) that its “intent” (GC Br. at 21) and “motivation” (GC Br. at 30) is to undermine the concept of union representation to employees. This argument is drawn directly from the complaint,¹⁴ and consistent with this, at trial counsel agreed that Mayo would be within its rights to insist on the me-too proposals if it had a legitimate business justification for the proposals. (See, Tr. 24–26.) However, this allegation is unsupported in its premise or conclusion. As to its premise, I am unaware of any precedent, and none is cited, that suggests that an employer’s proposals are vetted for “substantial business” purpose lest an inference of antiunion motivation, or, more pertinently, bad-faith bargaining, be drawn. While patently unreasonable proposals, or proposals for which untrue and false rationales are advanced may form part of a bad-bargaining claim, the application of a legitimate and substantial business test is misplaced. In any event, in this case, the General Counsel does not show there to be any subterfuge, much less lack of legitimate business reason for the Respondent’s position that its me-too proposals are motivated by a desire for standardization of benefits across its system. Indeed, the General Counsel concedes that “flexibility to modify” health benefits and standardization of pension (GC Br. at 26) “serves the

¹⁴Paragraph 11 of the complaint states:

Respondent lacks a legitimate and substantial business reason for its rigid insistence that the Union agree to waiver language allowing Respondent to make unilateral changes to virtually all fringe benefits offered to Unit employees, thereby sending the message to its employees, including Unit employees, that the Union, or any other labor organization, cannot effectively represent employees.

legitimate interest of both labor and management.” The General Counsel contends that the same may not be said for PTO or funeral benefits. However, I do not see that. The fact that a pension carries federal filing requirements that PTO and funeral benefits do not does not suggest bad-faith in the Employer’s pursuit of me-too provisions for these benefits.

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The General Counsel also argues that Mayo’s bon fides are undercut by the fact that it currently does not have standard benefits throughout its system. See, Table 1 attached to the General Counsel’s brief. But this does not rebut in any way the demonstration of increasing standardization and adoption of me-too provisions in recent years. The General Counsel also points out that in recent negotiations for a unit of 600 employees at a Mayo hospital in Rochester, Mayo did not propose “additional waivers.” Of course, this shows nothing of interest. It may reflect differences in bargaining power Mayo has with the Albert Lea unit compared to the Rochester unit, it may reflect, as Mayo asserts (Tr. 408), that the presence of an interest arbitration clause in the Rochester agreements counseled, as a strategic matter, foregoing the demand. Whatever set of tactical and strategic considerations led Mayo to forego the proposal in Rochester, it does not support an inference that the seeking of me-too proposals at Albert Lea—proposals that the Employer convincingly demonstrated that it has implemented at many facilities, union and nonunion alike—hides or evinces hostility to union representation.

Similarly, the claim (GC Br. at 29) that “the Employer disclaimed any ability to estimate the cost-savings that would result in its Pension Plan if the Union accepted its waiver proposals” is not accurate. First of all, I have credited the Mayo negotiator’s assertion that in negotiations the Union never asked for the economic value of administrative savings that would come from accepting Mayo’s proposals. Second, Mayo indicated at trial that savings from administrative efficiencies related to putting this small Albert Lea unit in Mayo’s larger sponsored pension plan was not ascertainable. As to savings related to the cost of the pensions, there is no reason to believe there is any, and, in any event, that would depend on what if any changes would be made in the future. It is a mystery how these exchanges show that Mayo is advancing its proposals in bad faith. Notably, there is no claim or allegation that the Respondent failed to provide the Union with requested and relevant information, a straightforward and per se breach of the Act that one would expect to find alleged if there were evidence of such misconduct.¹⁵

The General Counsel also raises Mayo’s dangling of additional wage and other proposals, conditioned on the Union’s agreement to the me-too proposals. As noted, the General Counsel does not argue that this is an independent violation, but rather, evidence of overall bad faith.

Certainly, conditioning a willingness to meet and bargain on the opposing party’s agreement to your proposals would support a finding of bad-faith bargaining. Indeed, it would be an independent and per se violation of the Act to flatly refuse to bargain over a mandatory subject of bargaining. But in order to effectuate the policies of the Act, an unlawful refusal to bargain over mandatory subjects of bargaining must be distinguished from an unwillingness to make concessions in the absence of the opposing party making movement on a mandatory issue over which the parties are divided.

I think the record is clear that the Respondent’s position was not a refusal to bargain, but a refusal to make further movement in the absence of union acceptance of the me-too proposals.

¹⁵The General Counsel also contends (GC Br. at 28–29) that Mayo’s proposals were not really me-too proposals—but, rather, proposals allowing Mayo discretion to change its benefit plans just for Albert Lea. I am not sure I agree with that, but it certainly is an issue that the Union could have joined at the bargaining table. As far as I can see in the record, it was not.

Although initially making repeated movement on a number of subjects, including wages, the Respondent's movement ground to a halt as it began stressing that it had further movement to make on certain issues, including wages, but that movement was dependent on the Union accepting the "me-too" proposals. At times the Respondent suggested that even union
 5 movement on the me-too proposals would suffice, but other times, and in the statement it sent over to the Union through the mediator on Feb 22 and March 10, it made clear that further movement was conditioned on acceptance of its me-too proposals. This said, there are also moments in the record where the Employer suggests that the Union's agreement to some me-too proposals (the "core" four PTO, STD, pension, health & welfare, but not funeral leave) might be
 10 enough, while in other parts of the record it appears to be insisting on acceptance of all of them as a condition of agreement or further movement. For the Union's part, there are moments in the record where the prospect of movement on the me-too proposals is suggested, and on May 19 the Union proposed a "package offer" that accepted the Employer's health and welfare proposal, which included me-too on these subjects. But for the most part, throughout negotiations, Union
 15 remained adamant that it would not agree to any me-too proposals, and never went beyond its movement on the health and welfare proposal.

As noted in the introduction, the General Counsel does not allege that the me-too proposals are permissive subjects of bargaining. Understood as mandatory subjects, the
 20 Respondent's conduct is not unlawful, and its conditioning of movement on wages and other subjects on the Union's acceptance of the me-too proposals cannot support a finding of bad-faith bargaining. The Respondent's conduct cannot—as the Union argues—be equated with a refusal to bargain over a mandatory subject of bargaining. The Respondent did not refuse to meet. It did not refuse to discuss. Rather (after repeated movement on wages) it refused to make further
 25 *movement* unless the Union accepted the "me-too" proposals. This is the clear weight of the record evidence.¹⁶

¹⁶See e.g., GC Exh. 25 at 1 (April 11, 2016: "We have no further room to move on wages w/o movement on 'me too' language"); GC Exh. 25 at 2 (April 11, 2016, "need to get acceptance on all benefits with 'me too' before we can move on wages"); GC Exh. 34 (January 29, 2016, "Economic items are very difficult to separate as one impact the other . . . to separate and negotiate in isolation will benefit neither party. . . . willing to discuss movement on wages. All contingent to acceptance of the enhanced benefit package with full me too language"); GC Exhs. 41-43, Tr. 187, 191-193 (Employer statement read to Union on Feb 22 and March 10, and April 11: "With respect to the open proposals that we have room to move on, if the Union is willing to agree to all of our 'me too' proposals, in exchange for that agreement, we have room to move on those proposals"; "If the Union is unwilling to accept our [bargaining waiver] proposals, we have no further room for movement on wages or any other open proposals that we might be prepared to otherwise move on"); Tr. 179 (Lubahn on December 14 meeting: "whenever the Employer did present a different proposal to us, everything was contingent on agreeing to their waiver language with the benefits"); Tr. 407 (Vomhof on January 29, 2016 meeting: "We stated we had further room for movement on wages but we needed agreement with the—from the Union on the 'me too's' before we can move further on wages"; "we stated that everything was going to be contingent on us getting a final package, which, in our view, needed to include the 'me too's'"); GC Exh. 25 at 2 (On April 11, 2016, Gully asked "what terms must have me-too language before [employer] will further bargain over wages?"—the answer included Vomhof's statement that "Need to get acceptance on all these benefits with 'me too's' before we can move on wages"); R. Exh. 195 at 5 (April 11 Vomhof response: "Acceptance on me too before able to move on wages"); See also, Tr. 55 (April 11 Vomhof response: "We need acceptance on all of the these benefits with bargaining waiver before we can move on wages"). R. Exh. 197 at 2 (May 19 written counterproposal from Mayo states that "if the union is willing to agree to all of our 'me too' proposals, we continue to have room to move on wages"); GC Exh. 26 at 2 (Vomhof on September 15, 2016: "commitment on

Although not often as pointedly stated as it was by the Respondent here, the type of tradeoffs offered by the Respondent goes to the essence of the bargaining process. Indeed, the Union engaged in the very same process. Thus, on March 10, the Union made a new wage proposal, further reducing its demand for wages, but “that was contingent on the Employer removing the ‘me too’ language from their benefit package.” Similarly, as to the Union’s holiday proposal, the Union removed Christmas Eve from the list of holidays to be paid at double time, but, according to Lubahn, “We also went on to say this movement is contingent on the Employer removing the ‘me too’ language from their benefit package.” It is axiomatic that movement in one area may beget movement in another. The conditioning of wage and other movement on acceptance of the Respondent’s me-too proposals is not unlawful, unless insistence on the me-too proposals is unlawful. But as noted, that is not a claim the General Counsel advances.

The Union cites *Carey Salt Co.*, 358 NLRB 1142 (2012) in support of its argument on “conditional bargaining.” In the first place, it should be noted that *Carey Salt* was decided by a Board panel consisting of two members whose appointments the Supreme Court later determined not to be valid in *NLRB v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2550 (2014). Hence, the *Carey Salt* decision is not valid Board precedent. In any event, in *Carey Salt* the Board found that an employer violated the Act by conditioning *bargaining* on the union’s acceptance of the employer’s demands. While some of the Employer’s isolated conduct in *Carey Salt* echoes in Mayo’s conduct, in *Carey Salt* the Board and the court rejected the employer’s assertion that it had not conditioned bargaining on the union’s acceptance of its proposals. See, *Carey Salt v. NLRB*, 736 F.3d 405, 429–430 (5th Cir. 2013). But in this case, while Mayo conditioned reaching agreement on acceptance of its me-too proposals, it did not refuse to meet to bargain or refuse to discuss. The Union also cites *Vanderbilt Products, Inc.*, 129 NLRB 1323 (1961). However, that case merely highlights the distinction between, on the one hand, an employer that refuses to discuss bargaining subjects unless and until its demands are granted—found to be a violation in *Vanderbilt Products*—and, on the other hand, an employer that insists on agreement to a mandatory subject as a condition for further movement or/and for a contract. Here we have the latter not the former.

I do agree that the Respondent’s position on further movement, as well as the Union’s response, lends support to the contention—not directly at issue in this proceeding—that the parties were at impasse. It is certainly clear that the Respondent and Union’s positions on the me-too proposals were and are a central dispute that has kept the parties from moving forward. But even assuming that the parties were at impasse at various times in these negotiations does

me-too’s [] before we move on wages. Ball is in Union’s court”). I recognize that on cross-examination Slegh answered “correct” to Union counsel’s question: “And in fact that there will be no further bargaining about wages unless the Union first agrees to the waiver language?” This question got the answer it sought but it does not overcome the sheer weight of record evidence from multiple witnesses’ notes, and testimony that the Respondent’s position at the bargaining table, repeatedly expressed, was that it had further movement to make on wages (and some other items), but would not do so unless the Union accepted the me-too portion of the benefit proposals.

I also note the Union’s misquoting of the record (U. Br. at 8) in support of its position when, citing to General Counsel’s Exhibit 34, it argues that the “Respondent also reiterates in writing that Respondent is **‘willing to discuss wages, all contingent [on] acceptance of the . . . full [bargaining waiver] language.’**” (Union’s emphasis, bracketing and ellipses.) This quote omits the word “movement,” and thus, the accurate quote from GC Exh. 34 is: “Willing to discuss movement on wages. All contingent to acceptance of the . . . full me too language.”

nothing to change the outcome. Notably, Mayo did not prematurely or falsely declare impasse—often an indicia of bad-faith bargaining.¹⁷ To the contrary, the Union repeatedly argued that the parties were at impasse and it was Mayo that resisted that conclusion. Notably, as well, at no point did Mayo threaten to implement upon impasse, any of its proposals, including its me-too proposals. Indeed, Mayo has recognized and acknowledged that Board precedent does not permit it to implement proposals such as its me-too proposals, even in the event of a lawful bargaining impasse. *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), enfd. in part and review granted in part, 131 F.3d 1026 (DC Cir. 1997).

In still one more argument advanced by the General Counsel, he attempts to make a lot (GC Br. at 31–33) of the nonissue that the Employer’s negotiators were wary of and did not fully trust the union bargainers. That may or may not reflect on the union negotiators, but it amounts to exactly nothing as evidence in support of a claim that the Employer bargained in bad faith. Mayo’s desire, after many unsuccessful bargaining sessions, to meet separately from the union, with a mediator shuttling between the parties, is a permissive and permitted position for it to take. *Quality Roofing Supply Co.*, 357 NLRB 789, 796 (2011). While a party cannot insist to impasse or as a condition of agreement to meeting separately through a mediator, the evidence shows that the Union acceded to use of the mediator. While the Respondent clearly showed a preference for meeting separately, there is no evidence that Mayo insisted to impasse on meeting separately. Indeed, when the Union said it would file an unfair labor practice if Mayo would not come into the room and meet face-to-face, Mayo came into the room and met face-to-face.¹⁸

Much is made by the parties over who is to blame for the shouting and tempers that flared in the April 11 meeting. But getting angry over the Union’s refusal to agree to the me-too proposals does not provide evidence of bad-faith bargaining, and is not, in any event (and contrary to the General Counsel’s claim (GC Br. at 30)), what Mayo’s negotiators got angry about. They became enraged over the manner of questioning by the union’s negotiator. I am not weighing in on whether the Union did anything wrong, and I’m not suggesting that the employer negotiators should have gotten angry and yelled. What I do conclude is that an argument in collective bargaining—especially a one-time heated exchange—does not register on a scale weighing indicia of bad-faith bargaining. I note that I have rejected, as a matter of factfinding, that anyone threw a chair or created an objectively threatening environment. Similarly, the reference to the recent decertification election at Red Wing made during the heated incident (“no wonder 40 people were trying to leave you”) was not a reaction to the Union’s refusal to agree to the me-too proposals, but to the questioning from the union’s negotiator. I do not think the statement supports a bad-faith bargaining claim.

As to the Union’s claim that taken as a whole, Mayo’s proposals would leave the union and the employees with fewer rights and less protection that would be provided by law without a contract, this case lacks, even as allegations, the ingredients necessary for the claim. See *Regency Service Carts, Inc.*, 346 NLRB 671, 675 (2005); *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487–488 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

¹⁷*Grosvenor Resort*, 336 NLRB 613, 615 (2001), enfd. 52 Fed. Appx. 485 (11th Cir. 2002); *CJC Holdings, Inc.*, 320 NLRB 1041, 1044–1046 (1996), enfd. 110 F.3d 794 (5th Cir. 1997).

¹⁸Related to this, while Mayo once, on January 29, tried to limit face-to-face discussion to the superior privileges issue, Mayo was unsuccessful in doing this. The parties discussed other issues in addition to superior privileges during their face-to-face meeting on January 29.

Mayo bargained insistently for its “me-too” proposals. But cases that find bad-faith bargaining based on an employer’s proposals typically involve a panoply of wide-ranging proposals that as a whole evidence hostility to union representation. Thus, the Board finds indicia of bad-faith bargaining when an employer’s proposals “[t]aken as a whole . . . required the Union to cede substantially all of its representational function.” *Regency Serv. Carts*, 345 NLRB at 675–676. Such cases include a range of proposals that not only seek to reserve discretion for the employer on substantive benefits, but limit the use of the grievance-arbitration procedure, involve onerous and one-sided no strike/no lockout provisions that waive all manner of protected activity and harshly punish violations, and provide the employer with the discretion to effectively eliminate the bargaining unit’s work, or involve extreme versions of management-rights and zipper clauses that, if accepted, would essentially put the union outside the ambit of a meaningful representative role. See, *In re Liquor Industry Bargaining Group*, 333 NLRB 1219, 1221 (2001) (proposals that had effect of giving employer unrestrained ability to transfer work away from unit employees and “effectively dissipate unit work” provided evidence in support of overall bad-faith bargaining), *enfd.* 50 Fed. Appx. 444 (D.C. Cir. 2002); *American Meat Packing Corp.*, 301 NLRB 835, 837, 838 (1991) (“there was no protection against the work’s being assigned or contracted away; and the broad zipper clause . . . would prevent the Union from attempting to bargain over the ramifications of such an impact on the bargaining unit during the contract term. . . . Under [the no-strike] proposal, for example, if the Respondent at various times during the year failed to pay the contractually specified wages to an employee or employees, or to comply with contractual holiday provisions, and if it rejected the Union’s grievances on these subjects, the injured employees would not even be able to communicate their protest in handbills to other employees or to the public during periods outside of their regular working hours”).

Here, the Respondent’s bargaining involved no such proposals. The Respondent’s proposal sought renewal of the 2012 Agreement’s entirely unremarkable and broad grievance-arbitration provisions (GC Exh. 2 Art. 2). It sought renewal of a one-sentence provision on strikes and lockouts (GC Exh. 2 Art. VI (“There shall be no strikes or lockouts during the life of this agreement”). Union security, recognition, the use of seniority for layoffs, leaves of absence for union service, checkoff (including voluntary employee checkoff for voluntary union political activity), were all unchallenged and willing to be renewed by Mayo. All of this stands in opposition to the claim that Mayo was bargaining with an intent to undermine the union’s representational status.

None of this, in my estimation, offers support for the claim that the Respondent was motivated by a desire to show employees that union representation was without value. The Employer met, it bargained, it discussed a multitude of proposals. There were no false declarations of impasse by the employer, no threats to implement the me-too proposals upon impasse.

The General Counsel has also scoured the record looking for “away-from-the-table” evidence to support its argument in favor of bad-faith bargaining. The cited evidence is unconvincing. The General Counsel argues that the March 15, 2016 letter sent to employees at the decertifying Mayo clinics—not the unit at issue in these cases—casts “a revealing light” on Mayo’s “mindset.” (GC Br. at 24). How? Allegedly because the letter sent the message “that a union contract would not guarantee any advantages that the Employer would not equally provide to non-union employees without a contract.” *Id.* at 25. In fact, the letter doesn’t say that, though, I am not sure it would demonstrate anything probative about Mayo’s bargaining attitude if it did. The letter did tout examples of nonunion units at Mayo having good or better terms and conditions than represented units, and argued that collective bargaining is a “gamble. “You could

get more, you could get less.” This is a staple. There are no guarantees in collective-bargaining. It does not provide evidence that Mayo was bargaining in bad faith with the Albert Lea unit.

5 The General Counsel also relies upon Mayo’s April 20 letter to the Albert Lea skilled
 maintenance employees as evidence of bad-faith bargaining. This letter, which is not alleged to
 be a violation of the Act, laid out the proposal Mayo had made to the Union and advocated for it.
 The General Counsel takes issue with the Respondent’s assertion that the “the union is asking for
 a ‘special deal’ for just this group of employees” by refusing to accept the benefits plans “enjoyed
 10 by the majority of employees across the Mayo Clinic, including many of your other union co-
 workers,” and its questioning of “whether SEIU is truly looking out for your individual best
 interests by refusing to accept the benefits that you have said you wanted, or are they just looking
 out for their own interests.”

15 I agree that “disparaging [of] the Union [by] casting doubt in the minds of the membership
 as to the bona fides of the efforts of union representatives in advancing the interest of its
 membership” may evidence of a violation of Section 8(a)(5). *General Athletic Prods. Co.*, 227
 NLRB 1565, 1575 (1977). But the cases that find such a violation, or even rely on such
 disparagement as an indicia of bad-faith bargaining, involve wide-ranging and repeated
 20 campaigns of disparagement of the union and/or its representatives by the employer. While
 Mayo skirts the law here, Mayo’s isolated criticism of the Union’s representation simply does not
 compare. The General Counsel relies on *Safeway Trails, Inc.*, 233 NLRB 1078 (1977), and the
 decision enforcing it, *Safeway Trails, Inc. v. NLRB*, 641 F.2d 930 (D.C. Cir. 1979), in support of
 his argument. However, that case demonstrates the disparity between the isolated comment
 25 made by Mayo and the vituperative and systematic campaign against a union’s bona fides that
 the Board will find to support a finding of bad-faith bargaining. Thus, in *Safeway*, the employer
 sent multiple letters to employees attacking the union negotiators for being “not prepared” for
 bargaining, for “insist[ing] upon ridiculous demands,” for lacking “responsibility and sincerity,” for
 misrepresenting and not presenting proposals to the membership, and “considered taking action
 30 to secure the removal of [the] chief negotiator for the Union.” *Id.* at 1079–1080. And this was the
 conduct in the time-barred pre-10(b) period in *Safeway*. Within the 10(b) period there was much
 more: repeated and direct incitements to the bargaining unit to turn on the union’s negotiator. *Id.*
 at 1080–1081. While I agree that Mayo should not write letters to employees questioning the
 SEIU’s motives in carrying out its representational duties, this one line from this one letter cannot
 carry the weight of a bad-faith bargaining case against Mayo.

35 Finally, as to the Union’s contention that the me-too proposals are permissive, not only is
 this theory not advanced by the General Counsel, but the theory has yet to be endorsed by the
 Board. The Union’s argues (U. Br. at 21) that “a bargaining waiver of the sort demanded by
 Respondent has long been recognized as a permissive rather than mandatory subject.” This is
 40 not so. For this proposition, the Union cites *In re ServiceNet*, 340 NLRB 1245, 1247 (2003). But
 in that case the Board found permissive a contractual duration clause that required adherence to
 the contract—including waiver of the no-strike and no-lockout prohibitions—even after expiration
 of the contract. The clause at issue in *In re ServiceNet* bears no similarity to the me-too
 proposals at issue here, which do not purport to waive rights after expiration of the labor
 45 agreement. The Union also cites *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220,
 1224 (D.C. Cir. 1990). However, that case, to the extent relevant, supports the opposite
 conclusion from the one the Union seeks to draw. In *Toledo Typographical*, the D.C. Circuit—
 rejecting the Board’s contrary conclusion—found that a contractual provision permitting an
 employer to bargain directly with its employees was a permissive subject of bargaining because it
 50 “intrudes into the relationship between the employees and their Union” in a manner similar to
 permissive proposals that require the union to hold an employee vote on an employer’s last offer

before calling a strike. In reaching its conclusion—which has never been accepted by the Board other than as the law of that case (see, 301 NLRB 498 (1991))—the Court specifically distinguished between what it viewed as mandatory clauses, such as the one at issue in the instant case, where “[t]he employer’s subsequent decisions would be made unilaterally,” and the clause at issue in *Toledo Typographical*, which “contemplates direct negotiations between employer and employee.” 907 F.2d at 1224. In other words, *Toledo Typographical* supports the opposite of what the Union claims: it supports the conclusion that the me-too proposals at issue in this case, which contemplate unilateral employer action, are mandatory, not permissive. (To be clear, I am not suggesting that the Board has adopted the reasoning of the *Toledo Typographical* court as precedent, only that the case does not advance the Union’s claim here.)

Unless and until the General Counsel advances and the Board finds that me-too proposals of the nature and scope insisted upon by Mayo here are permissive subjects of bargaining, there is no violation of the Act on this record. Accordingly, I recommend dismissal of the complaint.¹⁹

CONCLUSIONS OF LAW

The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

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¹⁹At trial, I received into evidence, and accepted as direct evidence—albeit not exclusive or necessarily conclusive evidence—contemporaneous bargaining notes taken by union and employer bargainers describing what was stated at the bargaining table. *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963). With one exception, these notes were received into evidence without objection. I accepted Lubahn’s bargaining notes conditionally, and over objection, and reserved ruling on their admissibility. The version of Lubahn’s notes offered into evidence were not the notes taken at the bargaining table but a recopied version with editing, created usually a day or two, but in one instance “a month or so later.” After consideration of the arguments of counsel, and review of the above-cited cases, I am ruling to admit the notes, GC Exh. 39. I have fully considered them in my decision. Although I remain concerned by the unavailability for inspection of the underlying notes originally taken by Lubahn, I do not believe there was any intent to deceive or otherwise recopy the notes inaccurately. I would add that the admission or nonadmission of Lubahn’s notes makes no difference in the outcome of my decision.

²⁰If 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.

ORDER

The complaint is dismissed.

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Dated, Washington, D.C. September 20, 2017.

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Handwritten signature of David I. Goldman in black ink.

David I. Goldman
U.S. Administrative Law Judge

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