

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 2, 2015

TO: Peter S. Ohr, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Guitar Center Stores, Inc. 524-3350-2800
Cases 13-CA-130446; 13-CA-140542; 524-3350-8900
13-CA-143904; 28-CA-130447; 530-6067-2050-4200
28-CA-143323; 02-CA-130838 530-6067-2060-0100
and 02-CA-130443 530-6067-2090

These cases were submitted for advice as to whether the Employer violated the Act in its bargaining with the Union, and in its subsequent withdrawal of recognition. We conclude that the Employer violated Section 8(a)(3) and (5) of the Act by its discriminatorily-motivated bad-faith bargaining, and violated Section 8(a)(5) of the Act by withdrawing recognition from the Union after committing these unfair labor practices.

FACTS

Guitar Center Stores, Inc. (the Employer) operates more than 260 retail stores throughout the United States. In early 2013, Retail, Wholesale and Department Store Union, UFCW (the Union) began organizing campaigns in several of the Employer's stores, and filed representation petitions for employees in the Employer's stores in Manhattan, New York, Chicago, Illinois, Las Vegas, Nevada, Knoxville, Tennessee, and San Francisco, California. The first election on one of these petitions took place in May 2013, when the employees in Manhattan voted for the Union to represent them; the Union was certified there in June 2013. The Union continued its organizing campaign at the other locations.

The parties began collective-bargaining negotiations in Manhattan in July 2013. At the outset of negotiations, the Union made a complete proposal, including wages and benefits. The Employer made no written proposals of any kind at that time, and insisted that the parties bargain over the non-economic issues first, not discussing economic issues until after all non-economic issues were resolved. Additionally, the Employer refused to sign off on any tentative agreements the parties might reach. Rather, the Employer's bargaining representative said that the way the parties would

know an agreement was reached was when both parties had no more changes to the proposed language.¹

Prior to July 2013, all the employees at all of the Employer's stores had two paid holidays per year. In July 2013, after the Union's certification in Manhattan, and approximately two weeks before the next representation election took place in Chicago, the Employer increased the number of paid holidays to six for all employees other than those in Manhattan; the Manhattan employees still only had two paid holidays. In bargaining, the Union proposed an increase in the number of paid holidays for the Manhattan employees. The Employer eventually counter-proposed three paid holidays for the represented Manhattan employees, while all of the Employer's other employees had six paid holidays.

In August 2013, the employees in one of the Employer's Chicago stores voted for the Union; the Union was certified there in October 2013. Beginning with bargaining sessions in early November 2013, the parties agreed to include both bargaining units in the same negotiations for most issues. The parties contemplated that each unit would have a separate agreement, which would contain at least some store-specific differences. In mid-November 2013, the Union was certified to represent employees in one of the Employer's stores in Las Vegas. The parties included this unit in the same negotiations as well.

By the beginning of 2014, the parties had finished negotiations on the majority of the non-economic issues, and had begun to bargain over economic issues. Two of the Union's main objectives in this bargaining were to eliminate the current salary-plus-commissions "fade" system² and to increase wages for the employees.

In February 2014, the Union provided the Employer with updated economic proposals; the Employer responded with a counter-proposal that primarily just struck the union's language without any new language or substantive proposals. After the Union protested that the Employer had offered no "real" proposals with regard to hourly wages, the Employer's bargaining representative verbally proposed a wage of \$9.00 per hour, with the current "fade" system. The Union pointed out that the Employer's employees in Las Vegas already made \$9.25 per hour, and objected to

¹ In February 2014, the Employer began marking temporary agreements in contract proposals. In September 2014, the Employer again began refusing to mark temporary agreements.

² Under the "fade" system, sales associates' commissions are offset by the amount of their base wages, i.e., sales associates only earn commissions to the extent that the commissions exceed the amount of their base wages.

keeping the “fade” system. The Employer asked the Union to again re-write its proposal.

In March 2014, the Employer submitted a written wages proposal only applicable to Manhattan. This proposal again did not include any base wage numbers and included the “fade” system. The Union also presented a new wages proposal, pursuant to the Employer’s request, although this time the Union also left the wage numbers blank on the document. At the table, the Union’s bargaining representative stated that the Union did not know what numbers the Employer would accept, and asked the Employer what base wages would work if the “fade” system was eliminated. The Employer’s bargaining representative responded that the Employer was not going to provide numbers, and the Union needed to supply the numbers. The Union reminded the Employer that the Employer had complained in previous sessions that the Union’s numbers were too high; the Employer’s representative responded that the Employer would not tell the Union what the number was. The Employer promised that the Employer would have wages numbers and an economic proposal at the next session in April 2014.

In April 2014, the parties met three times. Despite the Employer representative’s promises at each of these sessions to have an economic proposal, the Employer never presented any; the Employer’s representative told the Union that the Employer did not have an economic proposal and was still reviewing the matter. In April 2014, the parties did reach agreement on several economic provisions, including regarding hours and overtime, advance scheduling notice, vacations, holidays (other than the number of paid holidays in Manhattan), rest and meal periods, bereavement leave, sick leave, and personal leave.

In May 2014, the Employer still did not present its long-promised written economic proposal. In bargaining, the Employer’s representative verbally proposed an \$8.50 hourly wage, with only three paid holidays for employees in Manhattan (three less than the paid holidays given to all other employees), and without “gig leave,” an existing employee benefit of high importance to the Union.³ When the Union representatives pointed out that the Employer’s proposal represented a 50-cent hourly reduction from its previous proposal, the Employer’s representative responded that its proposal was a mistake and that he “could not even remember our last economic proposal.” After a caucus, the Employer immediately increased its verbal

³ “Gig leave” is an existing benefit whereby employees, many of whom are working musicians, are allowed to take leave to perform professionally as musicians, with a guarantee that they can return to their jobs when the leave ends. Since the beginning of negotiations, the Union has proposed the retention of “gig leave,” using language taken directly from the Employer’s current employee handbook.

proposal to \$9.25 per hour. There was no agreement by the parties on the \$9.25 wage proposal.

Also in May 2014, the Employer began implementing its “Phase 3” wage plan in five of its non-union stores, which eliminated the “fade” system and gave higher wages to employees in those stores -- the Union’s top priorities. Three of the “Phase 3” stores were adjacent to the three represented stores, and another one was near the Knoxville store where the Union had filed a representation petition.⁴ In response to the Union’s questions in bargaining about the “Phase 3” plan, the Employer’s bargaining representative stated that “Phase 3” only applied to non-union stores, and that the Employer did not intend to apply the plan to any of the Union stores.

Around this time, Manhattan unit employees began discussing decertification. Employees said that they were tired of waiting for the Union to do something and that other stores which did not have a union had already gotten raises under the “Phase 3” plan, while the union stores had not. In late May, the Employer provided employees at its Manhattan store with a memo stating:

A number of employees have expressed dissatisfaction with the union representation that they have been getting, and have asked how to get rid of the union. This memorandum provides the legal answer to that question.

Employees who no longer wish to be represented by the Union can circulate a petition stating that “The undersigned employees of Guitar’s Union Square store no longer wish to be represented by the RWDSU.” Signatures on the petition should be dated.

In June 2014, the Employer withdrew recognition from the Union at the Manhattan store, based on evidence that the Union had lost majority support.

In July 2014, the Union proposed implementing the “Phase 3” wage plan in the Union-represented stores. The Employer’s bargaining representative again stated that the “Phase 3” plan did not apply to the Union stores, and that he would not discuss the “Phase 3” plan with the Union. Instead, the Employer provided the Union with a document titled “Economic Outline,” which ostensibly set forth two different

⁴ In addition to these four stores, the Region should investigate whether there is any evidence also indicating a discriminatory intent in the Employer’s implementation of its “Phase 3” plan in northern Florida, or explaining its lack of implementation of the plan near San Francisco, the location of the other Union representation petition. Regardless of the result of such supplemental investigation, however, the implementation of the “Phase 3” plan in the four locations discussed above, by itself, establishes a strong inference of the Employer’s unlawful discriminatory intent.

wage plans. Option A was essentially the status quo on wages, including the “fade” system; Option B purported to eliminate the “fade” system, but worked in a similar manner by not paying commissions on any sales below \$30,000. In addition, the Employer’s proposal included performance management language that stated that employees who do not meet commission for any two month period will be subject to immediate termination.

In August 2014, at the next bargaining session, the Union’s bargaining representative said that the Union did not want Option A, because it retained the “fade” system, but instead wanted Option B, and that the Union would also like the “Phase 3” plan. The Employer’s bargaining representative again responded that “Phase 3” did not apply to the Union stores, and promised to have a proposal based on Option B at the next meeting. At the next session, however, the Employer again offered no economic proposal.

In September 2014, the Employer finally submitted a proposal based on Option B which included wage numbers for employees. The parties then continued to exchange proposals on wages and commission rates, without reaching agreement. On the issue of the “fade” system, the Employer’s proposal has remained the same since July 2014, i.e., that employees would not earn commissions on the first \$30,000 of sales.

In October 2014, the Employer implemented the “Phase 3” plan at the Manhattan store (where it had now withdrawn recognition from the Union), eliminating the “fade” system, increasing hourly wages, and maintaining “gig leave” -- the primary issues the Employer had refused to offer the Union during the year in which the parties were negotiating.⁵

In November 2014, the Employer withdrew recognition from the Union at its Las Vegas store, based on evidence that the Union had lost majority support. As in Manhattan, after the Employer withdrew recognition, it announced that it would be implementing the “Phase 3” plan at the Las Vegas store, eliminating the “fade” system, increasing hourly wages, and maintaining “gig leave.”

Beginning in June 2014, the Union filed the charges in the instant cases. In addition to alleging overall bad-faith bargaining and unlawful withdrawals of recognition, the Union also alleges the following specific incidents of regressive bargaining:

- (1) As set forth above, in May 2014, the Employer verbally proposed an \$8.50 minimum wage, a 50 cent reduction from its previous proposal. When the Union

⁵ It is not clear whether the Employer also increased the paid holidays given to employees in the Manhattan store after it withdrew recognition from the Union.

protested the lower wage proposal, the Employer's representative responded that it was a mistake and that he "could not even remember our last economic proposal." After a caucus, the Employer immediately increased its proposal to \$9.25 per hour.

(2) In September 2014, almost a year after entering into a non-Board settlement to allow represented employees to participate in Employer contests, the Employer issued a nation-wide announcement regarding an annual contest that said that represented employees were ineligible.⁶ Within a few days, and before the Union ever raised the issue, the Employer re-posted the announcement of the contest guidelines, omitting the exclusion of represented employees.

(3) In July 2014, approximately six months after the parties had tentatively agreed to provisions addressing grievance and arbitration procedures, disciplinary procedures, and discharges, including a list of the infractions that constitute just cause for discharge, the Employer newly proposed a "performance management" system that would allow it to terminate any employee who does not meet sales goals, and that such termination would not be subject to arbitration. The parties ultimately resolved the issue, tentatively agreeing that failing to meet sales goals would not be grounds for immediate termination.

(4) In March 2014, approximately 8 months after the Employer first said it would be willing to consider putting all bargaining unit employees into the Union's medical plan, but would need to review costs, the Employer refused to agree to the Union's medical plan even though the Employer acknowledged that the costs were good. The Employer stated that it preferred to only have one medical plan for all employees. In May 2014, the Employer announced unilateral changes to the employees' medical plans, to be made in conjunction with the next open season, including a cost increase above both the pre-existing plan and the Union's proposed plan. In July 2014, the Employer requested that the Union make another proposal on the medical plan, even though the Employer had not made any counter-proposals to the Union's previous proposal.

ACTION

We conclude that the Employer violated Section 8(a)(3) and (5) of the Act by its discriminatorily-motivated bad-faith bargaining, and violated Section 8(a)(5) of the Act by withdrawing recognition from the Union after committing these unfair labor practices.

⁶ The Region has determined that the announcement itself constitutes a violation of Section 8(a)(1) of the Act, and has not submitted this issue for advice.

The Employer violated Section 8(a)(3) and (5) of the Act by its discriminatorily-motivated bad-faith bargaining.

Section 8(d) does not compel the participants in a bargaining relationship to reach agreement, but they must exhibit an intent to reach an accord.⁷ Satisfaction of this obligation is not met by a party's commitment to execute a contract only on its own terms.⁸ Rather, there must be "the serious intent to adjust differences and to reach an acceptable common ground."⁹ Determining whether a party had the proper intent requires scrutiny of the totality of its conduct, both at and away from the bargaining table.¹⁰ The objective is to determine whether a party "is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement."¹¹ A determination of whether there was "hard," "good faith" bargaining on one hand, or "surface," "bad faith" bargaining on the other, is made on a case-by-case basis from an examination of the totality of the circumstances.¹² Often a thin line separates the permissible from the impermissible, generally provable through inferences drawn from circumstantial evidence.¹³

Moreover, while an employer, absent unlawful motive, generally may give wage increases to its unrepresented employees without making such wage increases

⁷ *NLRB v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231, rehearing denied 277 F.2d 793 (5th Cir. 1960), enforcing 122 NLRB 168 (1958).

⁸ See *Wal-Lite Div. of U.S. Gypsum Co.*, 200 NLRB 1098, 1101 (1972), enforcement denied on other grounds, 484 F.2d 108 (8th Cir. 1973).

⁹ *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). See also *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

¹⁰ *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *American Stores Packing Co.*, 142 NLRB 711, 720 (1963), enforced 58 LRRM 2635 (10th Cir. 1965); *Modern Manufacturing Co., Inc.*, 292 NLRB 10, 11 (1988).

¹¹ *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enforced 318 F.3d 1173 (10th Cir. 2003).

¹² See, e.g., *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982).

¹³ *Id.*; *Hudson Chemical Co.*, 258 NLRB 152, 154 (1981).

applicable to employees represented by a union,¹⁴ the Board has made it clear that an employer violates the Act by discriminatorily denying represented employees wages or benefits granted to unrepresented employees, while failing or refusing to offer such wages or benefits in negotiations.¹⁵ Thus, for example, in *South Shore Hospital*, an employer gave wage increases to its unrepresented employees, but discriminatorily did not offer the wage increases to the union in collective-bargaining negotiations. In *South Shore Hospital*, as here, the employer initially refused to bargain over economic issues for approximately six months. Unlike here, the employer then offered wage parity to the union, but without applying the wage increases retroactively to make the represented employees whole. The administrative law judge, affirmed by the Board, found that the employer's discriminatorily-motivated withholding of the wage increases and bad-faith bargaining violated Sections 8(a)(3) and (5) of the Act.¹⁶

Similarly, in *Chevron Oil*,¹⁷ the Board found that an employer violated the Act by failing to bargain in good faith and discriminatorily withholding from unit employees wage increases and improved benefits that it granted to its unrepresented employees. The Board emphasized that such conduct unlawfully confronts a union with a Hobson's choice: the union can either capitulate to the employer's discriminatory bad-faith bargaining position, and thereby abdicate in large measure its statutory role as an employee representative, or it can remain without any contract at all while the unit employees continued to suffer the loss of wages and benefits being enjoyed by other employees -- wages and benefits which would have been theirs had they not selected the union. Whichever path the union chooses, it can only lead to undermining it in the eyes of the employees as an effectual employee representative.¹⁸

¹⁴ See, e.g., *Shell Oil Company*, 77 NLRB 1306, 1310 (1948).

¹⁵ See, e.g., *South Shore Hospital*, 245 NLRB 848, 857-62 (1979), *enforced* 630 F.2d 40 (1st Cir. 1980); *Chevron Oil Co.*, 182 NLRB 445, 449-50 (1970), *enforcement denied in pertinent part on other grounds* 442 F.2d 1067, 1074 (5th Cir. 1971); *Fieldcrest Cannon*, 318 NLRB 470, 471, 560-63 (1995), *enforcement denied in pertinent part* 153 LRRM 2617, 2625-35 (4th Cir. 1996); *Eastern Maine Medical Center*, 253 NLRB 224, 241-47 (1980), *enforced* 658 F.2d 1, 7-10 (1st Cir. 1981).

¹⁶ 245 NLRB at 861, citing *Chevron Oil Co.*, 182 NLRB at 450.

¹⁷ 182 NLRB at 449-50.

¹⁸ *Id.* at 450.

In the instant cases, the Employer has done precisely what the Board found unlawful in *South Shore Hospital* and *Chevron Oil*. As in *South Shore Hospital*, the Employer initially refused to bargain over economic issues at all during the first six-months of negotiations, while the Union endeavored to discuss economics from the onset of negotiations. During that time, the Employer increased paid holidays to all unrepresented employees, while only granting (and offering in bargaining) fewer paid holidays to its represented employees.¹⁹ When the Employer finally began bargaining over economics, the Employer continually delayed providing proposals or counter-proposals, despite the Union's efforts to get the Employer to do so. And, as to the most important issues to the Union -- eliminating the "fade" system, increasing hourly wages, and maintaining "gig leave" -- the Employer refused to offer the Union what it granted unrepresented employees. In particular, as the certification year for the Manhattan store was coming to an end, the Employer implemented its "Phase 3" plan at unrepresented stores adjacent to the represented stores, eliminating the "fade" system and increasing hourly wages at the unrepresented stores, while maintaining "gig leave."

Significantly, the Employer's discriminatory motivation for this conduct is amply demonstrated by the timing and store locations selected for the implementation of its "Phase 3" plan.²⁰ Not only did this implementation occur just as the certification year for the Manhattan store was coming to an end, but, of the five stores in which the Employer initially implemented its "Phase 3" plan (out of the more than 260 stores it operates nationwide), three are adjacent to the only three Union-represented stores,

¹⁹ No timely charge was filed over the Employer's discriminatory denial of additional paid holidays to its employees in the Manhattan store. It is well established, however, that the Board may use conduct that occurred prior to the 6-month Section 10(b) period as background evidence to shed light on a respondent's motivation for conduct within the 10(b) period, so long as the General Counsel's case does not rely solely on the evidence proffered as background evidence. See, e.g., *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416-17 (1960); *Grimmway Farms*, 314 NLRB 73, 74 (1994), *enforcement denied in part on other grounds* 85 F.3d 637 (9th Cir. 1996) (the Board considered a work stoppage outside the 10(b) period as background evidence for a respondent's refusal to rehire employees); *Douglas Aircraft Co.*, 307 NLRB 536, 536 n.2 (1992), *enforced* 66 F.3d 336 (9th Cir. 1995) (the Board considered pre-10(b) period discipline as evidence of animus to evaluate a discharge within the 10(b) period).

²⁰ The Board has made it clear that it will examine the circumstances of the granting and denial of wage increases to represented and unrepresented employees in order to determine whether the employer acted discriminatorily. See, e.g., *Fieldcrest Cannon*, 318 NLRB at 562 ("[t]he timing and amount of the increase constitute additional evidence of discriminatory motivation").

and another one is near one of the only two other stores where the Union had filed a representation petition. Further, this implementation occurred at the same time that the Employer refused even to discuss the elements of its “Phase 3” plan with the Union. And, the Employer gave no legitimate explanation for its decision to implement its “Phase 3” plan only in non-Union stores. Rather, the Employer’s bargaining representative just reiterated that the “Phase 3” plan only applied to the Employer’s non-union stores, that the Employer would not apply the plan to any of the Union stores, and that the Employer would not discuss the “Phase 3” plan with the Union.²¹

Finally, any doubt as to the Employer’s discriminatory intent was made clear when, soon after it withdrew recognition from the Union in the Manhattan store, the Employer implemented its “Phase 3” plan there as well. Nothing else had changed about the store or its employees, other than the Employer’s withdrawal of recognition. The message sent by the Employer’s action could not have been more clear -- employees would receive lower wages and benefits if they continued to be represented by the Union, and could only get the wages and benefits given to other employees by foregoing collective bargaining. Therefore, we conclude that the Employer violated Section 8(a)(3) and (5) of the Act by discriminatorily denying its represented employees the wage increases and elimination of the “fade” system it gave unrepresented employees in the “Phase 3” plan, while failing or refusing to offer such wage provisions in negotiations.²²

²¹ See, e.g., *South Shore Hospital*, 245 NLRB at 861, in which the administrative law judge, affirmed by the Board, emphasized that the employer offered no legitimate justification for denying retroactive wage increases, noting that the employer’s bargaining representative “made clear to the union representative that the [employer] was not claiming any ‘financial inability to grant retroactivity’; the [employer] had budgeted such increases months earlier for both [u]nion and nonunion employees.”

²² The Region should therefore solicit new charge amendments alleging that the Employer also violated Section 8(a)(3) of the Act by its discriminatory denial to represented employees of the “Phase 3” plan wage increases and elimination of the “fade” system granted to unrepresented employees. Such amendments are timely, notwithstanding the limitations period set forth in Section 10(b) of the Act, as the same facts and legal theories provide the basis for both the Section 8(a)(5) and 8(a)(3) allegations. See, e.g., *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1019 (1996) (otherwise untimely Section 8(a)(3) allegations were permissibly added to timely Section 8(a)(5) charges because the Section 8(a)(3) allegations were closely related to the Section 8(a)(5) allegations, although the Board ultimately found it unnecessary to pass on the added 8(a)(3) allegations); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 n.5 (1989) (in determining whether essentially similar legal theories

Moreover, we agree with the Region that the Employer violated Section 8(a)(5) of the Act by generally bargaining in bad faith, without a serious intent to reach agreement. As set forth above, the Employer's unlawful motive in bargaining is clear, and the totality of the circumstances, particularly including the Employer's initial refusal to discuss economic issues, its repeated failure to make proposals and counter-proposals, and its other dilatory tactics, demonstrates that the Employer acted with the intended aim to frustrate the bargaining process and "run out the clock" until it would be able to withdraw recognition from the Union, as it did as soon as the certification years expired in Manhattan and Las Vegas.

We would not, however, specifically allege as separate violations any of the allegations of regressive bargaining proffered by the Union. A party's withdrawal of a tentatively agreed-to contract proposal without good cause is evidence of a lack of good-faith bargaining.²³ In addition, the withdrawal of prior proposals and their substitution with less advantageous proposals, i.e., "regressive" proposals, is itself unlawful if it is intended to frustrate the possibility of agreement.²⁴ Although a party's reasons for its regressive actions need not be totally persuasive, they must not indicate a lack of good faith or be "so illogical" as to warrant the conclusion that the party intended to frustrate negotiations.²⁵ Where a party provides no explanation for its actions, the Board will find that the party was motivated by bad faith.²⁶ Where a

underlie different allegations in order to add otherwise-untimely closely-related allegations, "it is not necessary that the same sections of the Act be invoked").

²³ *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007); *Suffield Academy*, 336 NLRB 659, 659 (2001), *enforced* 322 F.3d 196 (2d Cir. 2003).

²⁴ *Telescope Casual Furniture, Inc.*, 326 NLRB 588, 589 (1998).

²⁵ *Oklahoma Fixture Co.*, 331 NLRB 1116, 1118 (2000) (quoting *Barry-Wehmiller Co.*, 271 NLRB 471, 473 (1984)), *enforced* 332 F.3d 1284 (10th Cir. 2003) (*en banc*); *Merrell M. Williams*, 279 NLRB 82, 83 (1986) (no violation where employer's reason for withdrawing from tentative agreements on cost-of-living increases and meal credits was legitimate and did not indicate a lack of good faith); *Homestead Nursing Center*, 310 NLRB 678, 678 (1993) (violation found where employer's reasons for withdrawing from tentative agreement on wage increases were not only unsubstantiated, but also manifested a failure to bargain in good faith).

²⁶ *See, e.g., Driftwood Convalescent Hospital*, 312 NLRB 247, 252-53 (1993) (employer violated Section 8(a)(5) by renegeing on tentative agreements, and simultaneously making regressive changes to prior proposals, without explanation), *overruled in part on other grounds, TNT Skypak, Inc.*, 328 NLRB 468 (1999), *enforced mem. sub nom.*

party does assert a reason for withdrawing from a tentative agreement or offering regressive proposals, the Board scrutinizes the validity of that justification to determine if the party was in fact acting in good faith.²⁷

In the instant cases, we conclude that none of the Employer's specific proposals themselves should be separately alleged as unlawful regressive bargaining, although they properly should be considered as part of the Employer's unlawful course of bad-faith bargaining. Thus, the Employer's May 2014 verbal wage reduction proposal, and its September 2014 announcement about contest ineligibility were apparently made by mistake; both were quickly corrected, one of them before the Union even raised the issue. The Employer's July 2014 "performance management" system proposal that would have affected the tentatively agreed discharge and grievance/arbitration provisions arguably was based on different considerations than the earlier tentative agreements and may appropriately have been considered along with the parties' economic proposals. In any case, the parties ultimately resolved the issue consistent with the earlier tentative agreements. Finally, the reason offered by Employer for its reluctance to accept the Union's medical plan, i.e., that it preferred to only have one medical plan for all employees, is not illogical or so frivolous as to establish a separate regressive bargaining violation. We note however, that the above Employer conduct, particularly the dilatory bargaining and unilateral changes related to the medical plan, and the Employer bargaining representative's admitted inability even to remember the terms of its last offer on wages in May 2014, nonetheless provides further support for the conclusion that the Employer was bargaining in bad faith overall, without any intent to reach agreement with the Union.

NLRB v. Valley West Health Care, Inc., 67 F.3d 307 (9th Cir. 1995); *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 2, 29-30, 33-34, 36-37 (Sept. 30, 2011) (unlawful regressive proposals on seniority, no-strike/no-lockout, drug testing, and safety committee where employer offered no credible explanation as to each).

²⁷ See, e.g., *Suffield Academy*, 336 NLRB at 669-70 (bad-faith withdrawal from tentative agreement to participate in union health plan where no explanation given at the time and facts did not support employer's post hoc reasons); *U.S. Ecology Corp.*, 331 NLRB 223, 225-26 (2000) (employer engaged in bad-faith bargaining where its ordinarily legitimate explanation for regressive proposals was undercut by other evidence), *enforced mem.*, 26 F. App'x 435 (6th Cir. 2001); *Homestead Nursing Center*, 310 NLRB at 678 (no good cause for employer's withdrawal from tentative wage agreement based on unsubstantiated claim that substitute proposal was more generous).

The Employer violated Section 8(a)(5) of the Act by withdrawing recognition from the Union after its ongoing and unremedied unfair labor practices.

Finally, we agree with the Region that the Employer violated Section 8(a)(5) of the Act by withdrawing recognition from the Union after committing the above ongoing and unremedied unfair labor practices. It is well settled that an employer may not lawfully withdraw recognition from a union based on employee expressions of disaffection where the employer's own unfair labor practices caused or meaningfully contributed to that disaffection.²⁸ In *Master Slack*, the Board considered the following factors in determining whether there was a causal relationship between an employer's unfair labor practices and a subsequent petition for decertification: (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.²⁹

Applying these factors here, we agree with the Region that there is clearly a causal relationship between the Employer's unfair labor practices and the employees' disaffection from the Union. In addition to the clear effects of the Employer's unlawful discriminatory denial to the represented employees of the "Phase 3" plan wage increases and elimination of the "fade" system, close in time to the evidence of employee disaffection, we note that the Board has long recognized that bad-faith bargaining and dilatory bargaining tactics themselves may have a tendency to invite and prolong employee unrest and disaffection from a union.³⁰ In sum, the Employer's discriminatory and unlawful bargaining conduct had its intended effect, and resulted

²⁸ See *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

²⁹ *Id.*

³⁰ See, e.g., *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001) (dilatory tactics "reasonably convey the message that union activity is futile, and would clearly tend to undermine the employees' confidence in the effectiveness of their selected collective-bargaining representative"); *The Westgate Corp.*, 196 NLRB 306, 313 (1972) (when an employer delays bargaining, "unrest and suspicion are generated, the conclusion of an agreement is delayed, and the status of the bargaining representative is disparaged"); *Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1305 (1964), enforced 341 F.2d 1020 (8th Cir. 1965) (delayed bargaining may invite or prolong employee discontent); "*M*" *System, Inc.*, 129 NLRB 527, 548-49 (1960) (dilatory bargaining tactics cause employee frustration at their bargaining representative's failure to report progress).

in the represented Manhattan and Las Vegas employees becoming disaffected from the Union.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) and (5) of the Act by its discriminatorily-motivated bad-faith bargaining, and violated Section 8(a)(5) of the Act by withdrawing recognition from the Union after committing these unfair labor practices.³¹

/s/
B.J.K.

cc: Injunction Litigation Branch

ADV.13-CA-130446.Response.Guitar Center (b)(6), (b)(7)(C)

³¹ As noted above, the Region should solicit new charge amendments alleging that the Employer also violated Section 8(a)(3) of the Act by its discriminatory denial to represented employees of the “Phase 3” plan wage increases and elimination of the “fade” system granted to unrepresented employees.