

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

PRIMEFLIGHT AVIATION SERVICES, INC.,
Respondent,

and

**Case Nos. 29-CA-191801
29-CA-196327**

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ,**
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS
CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE¹

On January 9, 2018, Administrative Law Judge Kenneth Chu issued a decision (“ALJD”), in which he found that PrimeFlight Aviation Services, Inc. (“Respondent”) committed numerous violations of the Act as alleged by the General Counsel. Judge Chu found that Respondent is an employer within the meaning of the Act, is required as a *Burns* successor to recognize and bargain in good faith with Service Employees International Union Local 32BJ (“Union”), violated Section 8(a)(1) by threatening employees with more strict enforcement of a work rule because of their activities in support of the Union, and violated Sections 8(a)(1) and (5) by making unlawful unilateral changes to terms and conditions of employment without providing to the Union notice and an opportunity to bargain.

Despite finding in favor of the General Counsel on all these allegations, Judge Chu erred by dismissing the allegation that, beginning on January 25, 2017, until April 4, 2017, Respondent refused to meet and bargain with the Union’s bargaining team, unless the Union removed non-bargaining unit employees, in violation of Sections 8(a)(1) and (5) of the Act.

¹ On January 25, 2017 Service Employees International Union Local 32BJ (“Union”) filed an unfair labor practice charge against PrimeFlight Aviation Services, Inc. (“Respondent”) in Case No. 29-CA-191801. G.C. Ex. 1(A). On April 5, 2017, the Union filed a second charge against Respondent in Case No. 29-CA-196327. G.C. Ex. 1(E). On April 6, 2017, the Union filed an amended unfair labor practice charge against Respondent in Case No. 29-CA-191801. G.C. Ex. 1(I). On April 20, 2017, the Regional Director issued a Complaint and Notice of Hearing in Case No. 29-CA-191801. G.C. Ex. 1(M). On June 9, 2017, the Regional Director issued an Order Consolidating Cases and Amendment to Complaint in Case Nos. 29-CA-191801 and 29-CA-196327. G.C. Ex. 1(P). On June 27, 2017, the case was litigated before Administrative Law Judge Kenneth Chu.

An exhaustive history of Respondent’s recent and related unfair labor practices is provided in Counsel for the General Counsel’s Answer to Respondent’s Exceptions to the Administrative Law Judge’s Decision. For economy’s sake, Counsel for the General Counsel presents here only those facts that are necessary to evaluate the question at issue.

II. QUESTION INVOLVED

Did Judge Chu err in concluding that Respondent did not violate Sections 8(a)(1) and (5) of the Act beginning on January 25, 2017, until April 4, 2017, by refusing to meet and bargain with the Union's bargaining team, unless the Union removed non-bargaining unit employees?

III. FACTUAL OVERVIEW²

As background, Respondent and the Union have been parties to a collective bargaining relationship since May 23, 2016. Jt. Ex. 2, Landow ALJD at 19 ("since May 23, 2016, and at all times material thereafter the Union has been, and is now, the exclusive collective bargaining [representative] of Respondent's employees in the above-described unit, within the meaning of Section 9(b) of the Act").³ Although the Act's bargaining obligation attached on May 23, 2016, as a result of Respondent's unlawful refusal to recognize the Union, the parties did not commence bargaining until after Judge Brian Cogan of the Eastern District of New York issued a Preliminary Injunction requiring Respondent to recognize and bargain in good faith with the Union on October 24, 2016, and a clarifying Memorandum on December 13, 2016. R. Ex. 2, 4.

(A) **On December 13, 2016, The Parties Met For Their First Bargaining Session.**

During the first week of November 2016, Respondent and the Union corresponded by e-mail in order to schedule their first bargaining session. R. Ex. 6. The parties agreed to meet at the

² An overview of all facts pertaining to the ALJD is provided in Counsel for the General Counsel's Answer to Respondent's Exceptions to the Administrative Law Judge's Decision. For economy's sake, Counsel for the General Counsel presents here only those facts that are necessary to evaluate the question at issue.

³ In a joint stipulation between Counsel for the General Counsel, Respondent, and the Union, all parties agreed that Judge Chu properly relied on the prior record evidence and Judge Landow's findings with regard to this issue, as well as Respondent's status as an employer within the meaning of the Act. Jt. Ex. 1.

Union's office in New York City on December 13, 2016. R. Ex. 6. The Union, by Deputy General Counsel Brent Garren, informed Respondent that no employee committee would attend the first bargaining session. R. Ex. 6.

The parties' first bargaining session took place as planned at the Union's office on December 13, 2016. Tr. 26. Present on behalf of the Union were Brent Garren (Union Deputy General Counsel), Olivia Singer (Union Law Fellow), Michael Cassaday (Union Organizer), and Rob Hill (Union Vice President). Tr. 26. Present on behalf of Respondent were William Stejskal (Senior Vice President of Human Resources for Respondent's parent company, SMS Holdings Corp.), and Matt Barry (Respondent Northeast Mid-Atlantic Division Vice President). Tr. 26. Other than Stejskal and Barry, no employee of Respondent attended the December 13, 2016 meeting. Tr. 26. On behalf of the Union, Garren proposed an outline of a collective bargaining agreement. Tr. 150-51.

(B) Following the December 13, 2016 Bargaining Session, The Parties Corresponeded by E-mail in Order to Schedule The Second Bargaining Session, and to Arrange for Bargaining Unit Employees to be Released From Work.

Following the December 13, 2016 bargaining session, by e-mails dated December 22, 2016 and December 27, 2016, Stejskal and Garren agreed that the parties would meet for the second bargaining session on January 25, 2017. R. Ex. 7. In addition, Garren wrote, "I will let you know about who will be on our committee and when we need release time after the newyear." R. Ex. 7.

On January 17, 2017, as promised, Garren e-mailed Stejskal the list of employees who would be participating in bargaining and need to be released from work for that purpose. R. Ex.

8. Garren wrote, “please release these employees from work for next Monday, January 23 afternoon and again for the bargaining on the morning of January 25,” and listed the names of eight bargaining unit employees⁴, employed by Respondent at JFK Airport. R. Ex. 8. Then, on January 20, 2017, Garren e-mailed Stejskal again with the names of two bargaining unit employees⁵ who “would like to be released from work for their Tuesday night shift” because they would normally work until the early morning on Wednesday, the day of the bargaining session. R. Ex. 9. As is customary among unions during organizing campaigns, Garren did not reveal the identities of any unrepresented employees from outside the existing bargaining unit who would be attending the bargaining session in support of the Union. *Id.* Stejskal confirmed by e-mail to Garren that he would forward Garren’s request to Respondent’s management at JFK Airport, and did so. R. Ex. 9.

(C) **Respondent Admits That On January 25, 2017, Respondent Walked Out Of the Parties’ Second Bargaining Session Because the Union’s Bargaining Team Included Non-Bargaining Unit Employees of Respondent.**

The record evidence conclusively establishes – and Respondent’s key witness William Stejskal admits – that Respondent walked out of the January 25, 2017 bargaining session and refused to bargain with the Union because Respondent objected to the Union’s chosen bargaining representatives, which included non-bargaining unit employees employed by Respondent at LaGuardia and Newark Airports. In his testimony, Stejskal admitted that he said,

⁴ Prakash Roopnarine, Yolie Jean Benoit, Hemchand Harnarine, Denzyl Prince, Donna Baskerville, Allison Halley, Tessa Lopez Francis, and Joe Nuñez.

⁵ Yolie Jean Benoit, Hemchand Harnarine.

in reference to the non-unit employees, “either they leave or I leave,” and admitted, “otherwise I wasn’t going to bargain.” Tr. 152.

On January 25, 2017, Respondent and the Union met at the Union’s office for their second bargaining session. Tr. 28. Union Law Fellow Singer arrived in the meeting room approximately ten minutes before 9:00 AM, along with Union Deputy General Counsel Brent Garren, Union Organizer Michael Cassaday, Union Organizer Cathy De La Aguilera, and a group of Respondent’s employees. Tr. 28. The group of employees who were designated by the Union to participate in negotiations consisted of the eight bargaining unit employees employed by Respondent at JFK Airport, who had been granted release time, as well as non-bargaining unit employees employed by Respondent at LaGuardia and Newark Airports, who were attending the bargaining on their own non-work time. Tr. 28. The Union’s sign-in sheet establishes that sixteen employees attended in total, including eight bargaining unit employees from JFK Airport and eight non-bargaining unit employees from the other two area airports. R. Ex. 10.

Singer testified that at approximately 9:00 AM, Respondent representatives Stejskal and Heady arrived. Tr. 28. The meeting began with introductions. Tr. 29. First, Respondent’s representatives introduced themselves. Tr. 29. Then, proceeding in the order in which they sat, the employees introduced themselves by stating their name, job title, and the airport at which they work. Tr. 29. The first group of employees to introduce themselves consisted entirely of bargaining unit employees who worked at JFK Airport. Tr. 29. Next, Union representatives Garren and Singer introduced themselves. Tr. 29. After Singer introduced herself, the employee next to her introduced himself. Tr. 29. That employee was a non-bargaining unit employee employed at Newark Airport. Tr. 29. It is undisputed that at the time that the Newark employee

introduced himself, no other employee had stated that he or she worked at an airport other than JFK Airport. Tr. 29.

Singer testified that when the first non-bargaining unit employee introduced himself, Stejskal appeared upset and said that “they needed to speak to us outside the room immediately.” Tr. 30. Garren replied, “this moment?” Tr. 30. Stejskal said, “yes, immediately.” Tr. 30. Stejskal admits that, when the first non-unit employee introduced himself, Stejskal said that he needed to speak with Garren privately “right now.” Tr. 134. At that time, Singer, Garren, and Stejskal stepped outside the meeting room. Tr. 30.

Singer testified that outside the meeting room, Stejskal asked if there were workers present who were not from JFK. Tr. 30. Garren said that, yes, they were there to observe. Tr. 30. Stejskal replied “that he would not continue the session if the workers from the other two airports were present.” Tr. 30. Garren objected, stating that the Act gives the Union the right to designate its bargaining representatives. Tr. 31. Stejskal repeated that Respondent “would not continue the session unless the workers from LaGuardia and Newark left immediately.” Tr. 31.

Stejskal’s version of the events is largely consistent: when the group stepped into the hallway, Stejskal “made clear that [he] didn’t come to bargain over LaGuardia and Newark.” Tr. 135. According to Stejskal, Garren made clear that the Act gives the Union the right to choose its bargaining representatives, but assured Stejskal that, contrary to attempting to force bargaining over LaGuardia and Newark airports, the non-unit employees were merely present “to watch what’s going on.” Tr. 135-36. Despite receiving this assurance from Garren, Stejskal issued an ultimatum: “either they leave or I leave.” Tr. 138.

After the discussion outside the meeting room, the group re-entered the room. Tr. 31. Upon re-entering the meeting room, Stejskal and Heady gathered their belongings. Tr. 31.

Garren said, “is it your position that you will not bargain with workers from LaGuardia and Newark present?” Tr. 31. Stejskal said, “yes.” Tr. 31. Although Stejskal quibbled with the exact wording of what was said when the group reentered the meeting room, Stejskal admitted in his testimony that he said, in reference to the non-bargaining unit employees, “either they leave or I leave.” Tr. 152. Stejskal also admitted, “otherwise I wasn’t going to bargain.” Tr. 152. Stejskal further admits that he did not ask any employee if he or she was missing work that day, did not ask any Union representative if any employee was missing work that day, and did not ask the Union to deliver any proposals that it had prepared. Tr. 151. When the non-unit employees did not leave, Respondent representatives Stejskal and Heady did – terminating the bargaining meeting. Tr. 138.

(D) By E-mail Correspondence Between January 25, 2017 and April 4, 2017, Respondent Continued to Refuse to Meet With the Union’s Designated Bargaining Committee, Unless the Union Removed Non-Bargaining Unit Employees.

The record evidence establishes that Respondent continued to refuse to meet and bargain with the Union over the following months. During the period from the January 25, 2017 bargaining session until April 4, 2017, the Union repeatedly asked Respondent to resume bargaining with the Union’s designated bargaining committee, including non-bargaining unit employees. Respondent repeatedly refused. While Respondent eventually agreed to resume bargaining on April 4, 2017, the parties did not actually resume bargaining until April 25, 2017, three months after Respondent’s walk out.

Following Respondent’s January 25, 2017 walking out of and terminating the bargaining session, despite having heard no offer from Respondent to resume bargaining in the presence of

non-unit members of the Union's bargaining team, Garren reached out to Stejskal by e-mail dated February 22, 2017. G.C. Ex. 2. In that email, Garren asked Stejskal for a second time if Respondent was willing to bargain with the Union's designated bargaining committee, including non-bargaining unit employees. Garren wrote, "please let me know if you have changed your position and are willing to bargain with us when PrimeFlight employees from LGA and/or EWR, on their own time, attend the session as observers on the Union's bargaining team." G.C. Ex. 2 at 5. Stejskal did not immediately reply. When Stejskal did reply, he steadfastly refused to answer Garren's straightforward question.

Over a week later, by e-mail dated March 1, 2017, Stejskal replied to Garren's email. Stejskal wrote, "PrimeFlight has reasons for not being keen on employees from our union-free Newark Liberty and LaGuardia airport operations participating as observers." G.C. Ex. 2 at 4. Instead of simply answering Garren's question in a straightforward manner, Stejskal offered a laundry list of reasons why Respondent did not want to bargain in the presence of non-unit employees and, ultimately, did not confirm that Respondent would do so. *Id.*

Given Stejskal's flat refusal to bargain and the NLRB's investigation of the Union's unfair labor practice charge, the Union did not immediately respond to Stejskal's March 1, 2017 email. On March 24, 2017, Stejskal asked Garren for his availability to resume bargaining, and Garren responded within a few days. G.C. Ex. 2 at 3.

By e-mail dated March 27, 2017, Garren wrote to Stejskal, and asked for a third time if Respondent was willing to bargain with the Union's designated bargaining committee, including non-bargaining unit employees. Garren wrote, "please confirm that you are offering to bargain with the Union's bargaining team, which is likely to include PrimeFlight employees from outside the bargaining unit (on their own time, of course). Thank you." G.C. Ex. 2 at 2.

Later that day, Stejskal replied by e-mail, but persisted in refusing to confirm that Respondent would bargain with the Union's entire bargaining team. Instead of simply agreeing to meet with the Union's chosen bargaining team, Stejskal wrote, "we would surely consider doing so, just curious how we (you included) would know that the observers are not scheduled to work at the time." G.C. Ex. 2 at 2.

By e-mail dated March 29, 2017, Garren replied to Stejskal, and asked for a fourth time if Respondent was willing to bargain with the Union's designated bargaining committee, including non-bargaining unit employees. Consistent with all of his prior correspondence, Garren wrote, "we are not asking for release time for any PrimeFlight employee who is not in the bargaining unit. We understand that your usual attendance policies would apply to anyone who is not released to attend the bargaining. Please confirm that your intention is to bargain even if PrimeFlight employees from Newark and/or LaGuardia are present, and I will provide some dates on which we are available." G.C. Ex. 2 at 1. Stejskal did not respond until six days later.

(E) **On April 4, 2017, Respondent Finally Acquiesced to Meet With the Union's Designated Bargaining Committee, and Simultaneously Threatened Employees With More Strict Enforcement of A Work Rule Because of Their Activities in Support of the Union.**

Six days later, by e-mail dated April 4, 2017, over two months after Respondent walked out of the January 25, 2017 bargaining session, Stejskal finally agreed that Respondent would be willing to meet with the Union's designated bargaining committee, including non-bargaining unit employees. However, the undisputed record evidence establishes that in the very same e-mail, Stejskal also informed the Union that Respondent threatened to punish any non-bargaining unit

employees by treating their resulting absences more harshly than an ordinary attendance infraction. Stejskal wrote:

We merely sought your ideas on how to allow your Observers to be present without having any unexpected absences in the workplace. Our idea is to check the work schedules of your proposed Observers in advance. You are not agreeable to this. Your idea is to shrug off any unexcused absence of an Observer as an ordinary attendance infraction. We are not agreeable to this because it could do more to encourage unexpected absences than prevent them. *Any PrimeFlight employee who considers skipping work without management permission to attend bargaining as your Observer needs to understand that such unexcused absence may not be treated as an ordinary attendance infraction.*

G.C. Ex. 2 at 1 (emphasis added). Stejskal's written statement, that Respondent would retaliate against employees by treating their absences for the purpose of attending bargaining more harshly than an "ordinary attendance infraction," was a clear rejection of Garren's earlier written statement that "we [the Union] understand that your usual attendance policies would apply to anyone who is not released to attend the bargaining." G.C. Ex. 2 at 1.

(I) **On April 25, 2017, Three Months After Respondent Walked Out of A Bargaining Session, the Parties Finally Resumed Bargaining, and Stejskal Followed Through On His Plan to More Strictly Enforce a Work Rule Because of Employees' Activities in Support of the Union.**

Three months after Respondent walked out of the January 25, 2017 bargaining session, the parties resumed bargaining on April 25, 2018 in the presence of "quite a few" non-unit employees of Respondent employed at Newark and LaGuardia airports. Tr. 144-46. At the beginning of the bargaining session, Stejskal followed up on his earlier written threat to bootstrap employees' unexcused absences into insubordination by directing employees to report to work. In accordance with the threat that he made by email on April 4, 2017, Stejskal admits that he told the employees "that if they were, in fact, skipping work to be in attendance that day,

at that session in April, that they needed to get back to work and I was directing them to go back to work.” Tr. 148. As Stejskal testified, his direct order was the precursor to treating employees’ run-of-the-mill unexcused absences as a more serious case of insubordination. Tr. 143-44. Judge Chu correctly found that Stejskal’s statement constitutes an unlawful threat in violation of Section 8(a)(1). ALJD at 20-21.

IV. ARGUMENT

(A) **The Judge Erred by Implicitly Finding that Respondent’s Refusal to Meet and Bargain With the Union’s Bargaining Team On January 25, 2017, Was Justified By a “Clear and Present Danger” to the Collective Bargaining Process.**

The Board has held:

It is well settled that each party in the collective-bargaining process may choose its own representative in formal labor negotiations and that the other party has a correlative duty to negotiate. The extremely rare exceptions to this rule have involved situations infected with such extreme ill will as to preclude good-faith bargaining. In those rare instances when a bona fide doubt of the right of a designated appointee to sit in negotiations exists, the burden is on the party objecting to establish that his or her presence will subvert the collective-bargaining process.

Stevens Ford, 272 NLRB 907, 911 (1984). With regard to the burden on the objecting party to establish that a person’s presence will subvert the collective-bargaining process, the Board has explained further:

The statutory policy favoring the free choice of bargaining representatives is an important one, and a “considerable burden,” therefore, rests on a party who would justify a refusal to bargain because of the presence of undesired persons on the other party’s bargaining committee to establish that the participation of such persons in the negotiations would create a “clear and present danger to the collective-bargaining process.”

Harley Davidson Motor Co., 214 NLRB 433, 437 (1974) (quoting *General Electric Company v. N.L.R.B.*, 412 F.2d 512, 517 (2d Cir. 1969)). Circumstances that meet the clear and present danger standard “have been rare and confined to situations so infected with ill will, usually

personal, or conflict of interest, as to make good faith bargaining impractical.” *Id*; see *Caribe Staple Co.*, 313 NLRB 877, 889-90 (1994) (employer violated 8(a)(5) when it refused to bargain with union’s bargaining representative who had recently been discharged for assaulting a supervisor); *Int’l Bhd. of Elec. Workers, Local Union No. 46*, 302 NLRB 271, 283 (1991) (“clear and present danger” standard also applies to union refusing to bargain with employer on the basis of bargaining team composition).

One situation that has been explicitly held to fall short of the clear and present danger standard is where – like here – a union’s bargaining committee includes non-bargaining unit employees who are not represented by the union and who work for the employer at a non-union facility. *Stevens Ford*, 272 NLRB at 911 (employer violated Section 8(a)(5) by refusing, over a period of two months, to bargain with Union except in the absence of non-bargaining unit employees). Here, the facts are precisely the same as in *Stevens Ford*. As in *Stevens Ford*, Respondent unlawfully refused to bargain with the Union’s designated bargaining representatives because they included employees of Respondent who are not represented by the Union and who work for Respondent at non-Union facilities (i.e. LaGuardia and Newark Airports).

As a matter of law, Judge Chu erred in implicitly finding that Respondent satisfied its burden of proving that the presence of non-unit employees posed a clear and present danger to the collective bargaining process. ALJD at 18, lines 13-16. In support of this finding, Judge Chu relied solely on Stejskal’s subjective belief “that their presence would be disruptive to the bargaining session” because “it was the Union’s attempt at a ‘dog and pony’ show to impress the nonunit employees that the Union would purportedly achieve the same representation for them in Newark and LaGuardia.” ALJD at 16. However, “an employer is not lawfully entitled to refuse

to deal with [a mixed unit/non-unit] committee so long as the committee seeks to bargain solely on behalf of the bargaining unit for which the union is the representative.” *Harley Davidson Motor Co.*, 214 NLRB at 437. The record establishes that Respondent knew that the Union did not seek to expand bargaining beyond the scope of the bargaining unit, and Judge Chu cites no evidence to the contrary. In fact, Stejskal’s own testimony is that when he “made clear that [he] didn’t come to bargain over LaGuardia and Newark,” Garren assured him that this was not the case by stating, “they’re merely observers here to watch what’s going on.” Tr. 135-36. Despite this assurance from Garren, Stejskal issued an ultimatum: “either they leave or I leave.” Tr. 138. Under clear and controlling Board law, Respondent was not entitled to use the non-unit employees’ presence as an excuse to refuse to bargain.

For all the above reasons, the Judge’s implicit finding that Respondent’s refusal to meet and bargain with the Union’s bargaining team on January 25, 2017, was justified by a “clear and present danger” to the collective bargaining process is wrong as a matter of law, and must be reversed.

(B) The Judge Erred By Relying on *BHC Northwest Psychiatric Hospital*, 365 NLRB No. 79 (May 15, 2017), In Determining that Respondent Did Not Unlawfully Refuse to Bargain With Non-Unit Employee “Observers” From January 25, 2017 to April 4, 2017.

In his decision, Judge Chu relied on *BHC Northwest Psychiatric Hospital*, 365 NLRB No. 79, for the proposition that the rights of non-unit employees in attendance at a bargaining session turn on whether they are referred to as members of the bargaining team or “observers.” ALJD at 18. This is a clear error of law that must be reversed.

In *BHC Northwest Psychiatric Hospital*, a union brought non-unit employees, who were represented by a rival union, to a bargaining session with an employer. 365 NLRB No. 79. When the employer objected to the presence of the non-unit employees, the union replied that the non-unit employees were “here as witnesses to what’s happening at the table with us.” *Id.* The union proposed removing the non-unit employees on the condition that the employer agreed to cease mandatory anti-union meetings. *Id.* The employer rejected the proposal and left the meeting. *Id.* The following day, the parties resumed bargaining in the presence of the non-unit employees without incident. *Id.*

Based on these facts, Judge Giannasi concluded that the employer did not violate Section 8(a)(5) by refusing to bargain in the presence of non-unit employees. Specifically, Judge Giannasi held that while “parties are generally permitted to select their own bargaining team, that does not necessarily include the selection of ‘observers’ who are not members of the bargaining team and have nothing to add to the bargaining.” *Id.* Upon the consideration of exceptions, however, the Board specifically repudiated Judge Giannasi’s reasoning. The Board wrote:

In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain in the presence of mental health technicians at the November 10, 2015 bargaining session, we rely solely on the fact that the Respondent bargained in the presence of the mental health technicians the very next day. We also observe that there is no evidence that this incident negatively affected subsequent bargaining between the parties.

Id. at *1 n.1 (emphasis added). Essentially, the Board agreed with Judge Giannasi’s result – that the employer in that case did not violate the Act by refusing to bargain with that union’s chosen representatives for about 24 hours – but stripped away all of Judge Giannasi’s reasoning that members of a bargaining team have no right to attend bargaining if they are referred to as “observers.” This is for good reason; as Judge Giannasi’s improvisational opinion demonstrates,

there is absolutely no support in Board law for distinguishing “observers” from other members of a bargaining team.

Judge Chu blatantly ignored the Board’s clear direction to disregard the “observer” distinction when he explicitly stated that he found the facts here to be similar to *BHC Northwest Psychiatric Hospital*, and proceeded to rely on Judge Giannasi’s reasoning. ALJD at 18.⁶ Despite Judge Chu’s repeated references to “observers,” the only holding from *BHC Northwest Psychiatric Hospital* that can be relied upon is that an employer will not run afoul of Section 8(a)(5) by refusing to bargain with a union’s bargaining team, so long as the employer resumes bargaining with the fully constituted team the very next day. *See id.*

Here, Respondent refused to bargain with the Union’s bargaining team on January 25, 2017, and did not agree to resume bargaining until April 4, 2017, ten weeks later. During this ten week period, the Union repeatedly asked, by e-mails dated February 22, March 27, and March 29, 2017, if Respondent was willing to resume bargaining in the presence of the non-unit employees, and Respondent repeatedly failed and refused to agree until finally acquiescing by e-mail dated April 4, 2017. Bargaining did not actually resume until April 25, fully three months after Respondent’s unlawful refusal to bargain.

Furthermore, Judge Chu’s statement, that “a review of that string of emails shows that Stejskal never refused to bargain in the presence of the observers,” ALJD at 19, completely ignores Respondent’s crystal clear refusal to bargain in the presence of non-unit employees on

⁶ Even assuming, *arguendo*, that Judge Chu is correct in holding that the Act affords non-unit bargaining representatives lesser rights simply because they are termed “observers,” Respondent could not have lawfully insisted on bargaining over the Union’s selected representatives. *Southwestern Portland Cement Co.*, 289 NLRB 1264, 1264 (1988) (Chairman Stephens concurring) (“the identity of a party’s representative is a permissive subject in which the other party may not interfere unless ‘the presence of the chosen representative would make good-faith bargaining virtually impossible’”). Here, of course, Respondent did not engage in any bargaining over the identity of the Union’s selected representatives, much less bargain to impasse. Instead, Stejskal simply issued an ultimatum (“either they leave or I leave”), left the bargaining session when his demand was unsatisfied, and refused to resume bargaining with the Union’s selected representatives until ten weeks later.

January 25, 2017, when Stejskal flatly stated, “either they leave or I leave,” Tr. 138 – after which Respondents’ representatives walked out of the bargaining session – and Stejskal’s repeated refusals to simply agree to the Union’s lawful request. Contrary to the facts in *BHC Northwest Psychiatric Hospital*, where the employer’s refusal to bargain lasted a mere 24 hours and did not “negatively affect[] subsequent bargaining between the parties,” here Respondent’s refusal to bargain stalled the bargaining process for months.

For these reasons, *BHC Northwest Psychiatric Hospital* is inapposite. Judge Chu’s dismissal of the 8(a)(5) allegation in reliance on misinterpreted case law must be reversed.

(C) **The Judge Erred By Finding that Respondent’s Refusal to Bargain Had No Negative Impact, Especially In Light Of Clear Facts Showing that Respondent’s Refusal to Bargain Is Part and Parcel of an Extended Campaign of Unfair Labor Practices Now Nearly Two Years Old.**

Respondent’s history of repeatedly and unlawfully escaping its obligations under the Act amplifies the ten week delay caused by Respondent’s refusal to bargain in January 2017. At that point in time, Respondent’s campaign of unfair labor practices had already achieved its goal of ignoring its employees’ Section 7 rights for over 18 months, stretching back to Respondent’s unlawful refusal to recognize the Union in May 2016. Since Respondent’s original unlawful refusal to recognize the Union, Respondent has engaged in the following unlawful conduct to frustrate its employees’ rights under the Act:

- In May 2016, Respondent failed to provide the Union with information that is necessary for and relevant to the Union’s performance of its duties as the exclusive collective bargaining representative of the bargaining unit (Jt. Ex. 2.);
- In June 2016, Respondent threatened employees with discharge because they engaged in activities in support of the Union (Jt. Ex. 2.);

- In August 2016, Respondent unilaterally implemented changes to pay deductions pertaining to paid break time without providing to the Union prior notice and an opportunity to bargain (Jt. Ex. 2.);
- In September 2016, Respondent unilaterally implemented changes to employee work schedules and hours without providing to the Union prior notice and an opportunity to bargain (Jt. Ex. 2.); and
- In January 2017, Respondent again unilaterally implemented changes to employee work schedules and hours without providing to the Union prior notice and an opportunity to bargain (ALJD at 16).

At that point, after 18 months of repeated unlawful conduct, Respondent threw another roadblock in the collective bargaining process by refusing to bargain in the presence of non-unit employees. Respondent only agreed to resume bargaining, as the Act requires, in the same April 4, 2017 email in which it tied its agreement to resume bargaining to its unlawful threat to more strictly enforce attendance rules in retaliation for employees' Union activities. This well established pattern of unfair labor practices shows just how far afield Judge Chu strayed in his reliance on *BHC Northwest Psychiatric Hospital*. 365 NLRB No. 79 (dismissing refusal to bargain allegation where no other unfair labor practice committed). The Board should not countenance Respondent's unlawful scheme to evade the Act's strictures, and should instead reverse Judge Chu's dismissal of the instant 8(a)(5) allegation.

V. CONCLUSION

Beginning on January 25, 2017, until April 4, 2017, Respondent refused to meet and bargain with the Union's bargaining team, unless the Union removed non-bargaining unit employees, in violation of Sections 8(a)(1) and (5) of the Act. Judge Chu's dismissal of this allegation is based on a readily apparent misreading of Board law, because as a matter of law, the presence of non-unit employees does not constitute a clear and present danger to the bargaining

process, no matter what word is used to describe them. Furthermore, Judge Chu's finding permits Respondent to trample its employees' Section 7 rights, as evidenced by the severe impact that Respondent's refusal to bargain has had on the bargaining process. Especially in light of Respondent's extended and unlawful campaign to escape its obligations under the Act, the Board must find that Respondent's admitted refusal to bargain violated the Act.

Dated at Brooklyn, New York, March 27, 2018.

/s/ Brady Francisco-FitzMaurice _____

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