

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

**NEXSTAR BROADCASTING GROUP, INC.  
d/b/a WIVB-TV**

**and**

**Case 03-CA-210156**

**NATIONAL ASSOCIATION OF BROADCAST  
EMPLOYEES AND TECHNICIANS -  
COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO**

**GENERAL COUNSEL'S OPPOSITION TO MOTION  
FOR SUMMARY JUDGEMENT**

The General Counsel of the National Labor Relations Board (Board), by the undersigned Counsel, hereby opposes Respondent's Motion for Summary Judgment as there are disputed issues of fact and, accordingly, Respondent is not entitled to judgment as a matter of law. On the contrary, Respondent's Motion demonstrates that there are genuine issues of fact in dispute warranting a hearing before an administrative law judge.

The Region issued a Complaint and Notice of Hearing on June 22, 2018, setting the above-captioned matter for hearing on October 9, 2018.<sup>1</sup> Respondent filed an Answer on July 1, 2018. Respondent filed the instant Motion for Summary Judgment, a Brief in Support, and a supporting Affidavit on September 6, 2018.

**I. Facts**

Respondent, a Buffalo-area CBS-affiliate television station, and the Union have a collective-bargaining agreement with effective dates of March 27, 013 – March 26, 2017. This

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<sup>1</sup> The Region will seek to amend Respondent's name to Nexstar Broadcasting, Inc. d/b/a WIVB-TV at the hearing. Administrative Law Judge David Goldman reissued a Notice to Show Cause on September 14, 2018 as to why Respondent's Answer to the Complaint should not be stricken as a sham based on Respondent's denials premised on its name.

agreement was negotiated with LIN Television, which owned the television station at the time. Media General acquired the station from LIN Television in 2015 and assumed the contract. On January 27, 2017, Media General merged with Nexstar Broadcasting (Respondent), which assumed control of the station. Respondent recognized the Union and assumed the contract.

In February 2017, the parties began negotiations for a successor collective-bargaining agreement.<sup>2</sup> After the parties met on February 2, 23, and 24; March 28, 29, and 30; July 21; and August 14 and 15; and October 2 and 3, Respondent paid the members of the bargaining unit on the Union's bargaining committee for the time they spent at negotiations.

The Union asserts that historically employees on the Union's bargaining committee were paid by their employer for hours spent negotiating a contract. They were paid for the shift they were spending at the bargaining table. The union bargaining committee employees reported on their time sheet that they had worked an eight-hour day, regardless of whether they spent six, eight, or ten hours at the bargaining table, and were paid for eight hours by their employer.

At the July 21 bargaining session, (as opposed to the May date referenced by Respondent) the Union had a sidebar discussion with Respondent's Regional Vice President Theresa Underwood during which Underwood stated that she had learned that Respondent had been paying the bargaining committee members for the hours they were at the bargaining table. Underwood told the Union that the contract did not require Respondent to pay bargaining committee members and that it was not going to pay them from that point forward. The Union indicated that it would check with the committee members.

After the bargaining session ended that day, the Union, contrary to Respondent's assertions, informed Respondent the Union viewed the issue as an established past practice

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<sup>2</sup> All dates are 2017 unless stated otherwise.

regarding a mandatory subject of bargaining and that the Union expected Respondent to continue paying employees on the bargaining committee until the parties negotiated a different arrangement. Respondent expressed its disagreement.

On September 14, Respondent sent the Union an itemized invoice for all of the wages it had paid to union bargaining committee members as of that date. The bill for the three bargaining committee members for the bargaining sessions at issue totaled \$8,744.67.<sup>3</sup>

The Union responded by letter dated October 3, stating that the parties had a longstanding practice in which the Union is not required to pay for the lost salary or replacement cost for the Union's bargaining committee and that any change to this practice is subject to collective bargaining and cannot be unilaterally changed without proper negotiations. The Union further stated that it would not reimburse Respondent for these costs until the parties reached a successor agreement that provided for a different payment structure.

The Respondent ultimately paid the bargaining committee members for the time they spent bargaining through the subsequent October 2 and 3 bargaining sessions. Then, by letter dated November 3, Respondent advised the Union that it should instruct its bargaining committee members not to submit future time cards recording any time spent at bargaining sessions. Respondent clarified with the Union by email that same date that the Employer would no longer be paying employees to be at the bargaining table.

## **II. Respondent's Motion should be denied**

### **A. Summary judgment standard**

“It is a settled principle that for summary judgment to be appropriate the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to

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<sup>3</sup> The bill included eight hours per employee per bargaining session at each employee's rate of pay, plus the associated Respondent 401K contributions.

judgment as a matter of law.” *Security Walls, LLC*, 361 NLRB 348, 348 (2014) (quoting *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985)). Section 102.24(b) of the Board’s Rules and

Regulations provides that, with regard to motions for summary judgment:

Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party’s pleadings, opposition and/or response indicate on their face that a genuine issue may exist.<sup>4</sup>

In considering a motion for summary judgment, the pleadings and evidence must be viewed in the light most favorable to the nonmoving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001); *Petrochem Insulation, Inc.*, 330 NLRB 47, 50 fn. 20 (1999), *enfd.* 240 F.3d 26 (D.C. Cir. 2001). See also *KIRO, Inc.*, 311 NLRB 745, 746 (1993) (“Nor do we believe that it was incumbent on the General Counsel, during the motion stage of the proceeding, to set forth the precise facts on which he relies”); *Postal Service*, 311 NLRB 254, 254 fn. 3 (1993) (“The Board’s Rules do not provide for prehearing discovery, and, accordingly, it is not the Board’s usual procedure to require more than allegations of legally significant factual issues to warrant a hearing in an unfair labor practice matter”).

#### **B. Disputed issues of material fact render summary judgment inappropriate**

The Complaint alleges that “Since about November 3, 2017, Respondent unilaterally ceased its past practice of paying employees on the Union’s bargaining committee for work time spent in collective bargaining negotiations with Respondent,” and did so without prior notice to the Union and without affording the Union an opportunity to bargain over the change or its

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<sup>4</sup> The Board has sometimes analyzed summary judgment motions with specific reference to Rule 56(c) of the Federal Rules of Civil Procedure. See, e.g., *Stephens College*, 260 NLRB 1049, 1050 (1982); *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1330-31 (1979). However, Rule 56 can only provide limited guidance because the Board’s procedure does not provide for pre-trial discovery devices such as interrogatories or requests for admission.

effects. The Complaint, Respondent's Answer, and Respondent's Motion illustrate that the existence of such an established past practice is the heart of the matter, and is a material fact that is in dispute. Consequently, summary judgment is not appropriate.

It is well settled that an employer may not unilaterally change a mandatory term or condition of employment and that to do so violates Section 8(a)(5) of the Act.<sup>5</sup> *NLRB v. Katz*, 369 U.S. 736 (1962). An exception to this principle is if the union has waived its statutory right to bargain, but any such waiver must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Waiver of bargaining rights can occur (a) by express provision in the collective-bargaining agreement, (b) by the conduct of the parties, including past practices, bargaining history, and action or inaction, or (c) by a combination of the two. *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992) (citing *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)).

### **1. The "contract coverage" doctrine is not Board law**

As just noted, it is well established that the Board evaluates waiver of bargaining rights under the "clear and unmistakable waiver" standard. Respondent first urges the Board to apply a different analysis, the "contract coverage" doctrine followed by the First, Seventh, and D.C. Circuit Courts of Appeals. But the Board has declined the suggestion to adopt this doctrine and adheres instead to the "clear and unmistakable waiver" standard, the standard which has been approved by the U.S. Supreme Court. *Provena St. Joseph Medical Center*, 350 NLRB 808

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<sup>5</sup> The Board has consistently held that pay for employees who are serving on the union's bargaining committee is a mandatory subject of bargaining. *Axelson, Inc.*, 234 NLRB 414 (1978), *enfd.* 599 F.2d 91(5th Cir. 1991); *Arizona Portland Cement Co.*, 302 NLRB 36 (1991); *Richmond Times Dispatch*, 346 NLRB 74 (2005), *enfd.* 225 Fed Appx. 144 (4th Cir. 2007), *cert. denied* 552 U.S. 990 (2007).

(2007); *Metropolitan Edison Co. v. NLRB*, supra. Hence, Respondent’s suggested alternate analysis should be rejected.

**2. Respondent’s “clear and unmistakable waiver” argument fails to show that no genuine issues of material fact exist**

Respondent’s Motion next argues the Union clearly and unmistakably waived its right to bargain over Respondent’s past practice of paying employees for work time spent in collective bargaining negotiations by virtue of the language of the parties’ 2013-2017 collective-bargaining agreement; Respondent does not base its argument on such matters as the parties’ past practice or bargaining history. In particular, Respondent argues that the contract provisions regarding leaves of absence for union business (Articles 13.0 and 13.1)<sup>6</sup>, its “zipper clause” (Article 14.0)<sup>7</sup>, and

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13. LEAVE OF ABSENCE - UNION AND OTHER

13.0 The Company will endeavor to arrange leave for Union activity upon written request to not more than one (1) Employee at any time for specific periods, up to, but not exceeding, one (1) year in duration. The Company will consider a request for extended Union leave of absence beyond the first year not to exceed one (1) year and the Company will grant such leave of absence if the request is reasonable in the Company’s opinion.

13.0(a) In the event that up to two (2) NABET Employees make a written request for leave for Union business, and it is necessary for them to be replaced, the Union will, upon request from the Company, provide a qualified replacement. In the event such replacement must be paid overtime, the Union will reimburse the Company for any premium costs paid to such replacement; provided, however, any such leave for Union business may not exceed two (2) weeks at any one time.

13.1 It is agreed that upon the return to employment of a regular Employee from the Union or other leave of one year or less, he shall be given his former position and the Company may release the substitute Employee from employment without penalty. The Employee with the least seniority in the seniority group involved shall at all times be the substitute.

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14. PREVIOUS AGREEMENTS

14.0 It is mutually agreed between the parties that this Agreement, together with updated side-letters and agreement attached hereto,

management rights clause (Article 22.0)<sup>8</sup> collectively establish the Union has clearly and unmistakably waived any right to bargain over paying employees for work time spent in collective bargaining negotiations. See Respondent's Brief in Support of Motion at 20.

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supersedes all previous Agreements, either oral or written covering Employees employed under the terms hereof, and constitutes the entire Agreement between the parties.

Side-Letters attached are:

1. Outside Work
2. Colden Transmitter
3. Loss of License
4. Short Term Disability Policy
5. WNLO Work
6. ParkerVision/Hubbing
7. Hidden Cameras
8. Equipment

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22. MANAGEMENT RIGHTS

22.0 The Union recognizes that the Employer has an obligation to fulfill its responsibilities as a broadcasting licensee under the terms of its grant from the FCC.

22.0(a) Except as expressly abridged by any provision of this Agreement the Company reserves and retains exclusively all of its normal and inherent rights and authority with respect to the management of the business, whether exercised or not, including, but not limited to the right (a) to hire, assign, transfer, promote, demote, schedule, layoff, recall, discipline and discharge its Employees and direct them in their work; (b) to make, enforce and amend from time-to-time reasonable rules and regulations uniformly applied concerning the conduct and responsibilities of Employees, some of which have been set forth in the Employee's Handbook, subject to approval by the Union which will not be unreasonably withheld; (c) to determine and schedule work and programming, acquisition, installation, operation, maintenance, alteration, retirement and removal of equipment and facilities; and (d) to ownership and control of all Company equipment, supplies and property, including the product of any work performed during the course of Employees carrying out job duties as set forth in this Agreement.

This argument is without merit. The contract provision governing leaves of absence for union business is simply not sufficiently specific to show such a clear and unmistakable waiver of the right to bargain over the issue of paying employees for work time spent in collective bargaining negotiations with Respondent. The contract, rather, is silent on the matter. Further, generally worded management rights clauses and zipper clauses are not to be construed as waivers of statutory bargaining rights. *Ohio Power Co.*, 317 NLRB 135, 136 (1995); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). In particular, a zipper clause must meet the standard of any other form of alleged waiver, that is, the waiver must be clear and unmistakable. *Angelus Block Co., Inc.*, 250 NLRB 868, 877 (1980) “Even where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the [u]nion consciously yielded or clearly and unmistakably waived its interest in the matter.” *Id.*

The zipper clause and management rights clause presented here do not contain specific language which would suggest that the Union waived its right, clearly and unmistakably, to bargain over the issue of payment to employees for work time spent in collective bargaining negotiations with Respondent. Notably, the zipper clause says nothing of the contract’s effect on past practices. And the management rights clause contains no language that speaks to the matter of the past practice at issue.

The Board cases cited by Respondent in support of its claim of “clear and unmistakable waiver” do not support its position. In *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board found that the employer did not violate the Act with respect to the newly implemented disciplinary policy on attendance and tardiness. *Id.* at 815. The Board found that several provisions of the management rights clause, taken together, explicitly authorized the

employer's unilateral action. *Id.* Specifically, the clause provided that the employer had the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." *Id.* The Board found that, by agreeing to that combination of provisions, the union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements. *Id.*

In contrast to *Provena*, where the language of the management rights clause mapped neatly onto the employer's unilateral change, here the management rights clause, or any other contract language, in no way provides for Respondent's ability to act unilaterally to change an established past practice of paying employees for work time spent in collective bargaining negotiations with Respondent.<sup>9</sup>

It is also noted that analysis of "clear and unmistakable waiver" frequently involves a factual inquiry into the conduct of the parties, i.e., past practices and bargaining history. Although Respondent avoids these subjects in its argument for the Union's waiver of its bargaining rights, to the extent that the parties' conduct are relevant, a hearing would be required to resolve those issues of material fact, which Respondent obviously disputes.

In sum, Respondent's argument based on "clear and unmistakable waiver" fails to show that there are no genuine issues of material fact at issue and that Respondent is entitled to judgment as a matter of law. Thus, summary judgment is not appropriate.

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<sup>9</sup> The two other cases cited by Respondent on this point are entirely inapt. In *Mission Foods*, 350 NLRB 336 (2007), the Board found numerous violations of Section 8(a)(5) and (contrary to Respondent's characterization) dismissed none. *Quebecor World Mt. Morris II*, 353 NLRB 1 (2008), is a decision issued at a time when the Board lacked a quorum, and hence is not valid precedent. See *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

**3. Respondent's argument regarding "consistency" with the collective-bargaining agreement fails to show that no genuine issue of material fact exists**

Respondent next argues that it is entitled to summary judgment because its unilateral change to its past practice of paying employees for time spent in collective bargaining negotiations is "entirely consistent" with the parties' collective-bargaining agreement. This is a novel theory that is in fact a variation of Respondent's argument that it is entitled to summary judgment because the Union clearly and unmistakably waived its right to bargain on the issue. Respondent cites only two cases in support of this argument, and examination of those cases cited show that they do not support Respondent's Motion.

First, in *Corpus Christi Medical Center*, 362 NLRB No. 94 (2015), the Administrative Law Judge, affirmed by the Board, applied a "clear and unmistakable waiver" analysis to find that the union had waived its right to bargain over the employer's change in extended leave policy. There, the collective-bargaining agreement specifically allowed the employer to make changes to this policy provided it met certain detailed conditions. *Id.*, slip op. at 5-6. The ALJ found, after extensive factual inquiry, that the employer had met those conditions, and therefore concluded that, by agreeing to the relevant, detailed contract provision, the union had clearly and unmistakably waived its right to bargain over the change. *Id.* at 6-7.

Thus, the facts presented in *Corpus Christi* are vastly different than those presented here. There, the contract contemplated the very change that the employer enacted provided it met conditions which were also clearly spelled out in the agreement. Here, as described above, the contract is silent on the matter of paying employees for work time spent in collective bargaining negotiations, let alone laying out how Respondent could change its past practice in that regard.

The second case cited by Respondent, *American Electric Power*, 362 NLRB No. 92 (2015), is entirely inapt. There the Board applied a "sound arguable basis" analysis to the

question of whether the employer violated the Act by eliminating retiree medical benefits for certain employees. *Id.*, slip op. at 1. The Board specifically distinguished the “sound arguable basis” standard, which applies in cases involving the alleged midterm modification of a collective-bargaining agreement, from the “clear and unmistakable waiver” standard that applies to all other unilateral changes. *Id.* Respondent’s unilateral change here was to an established past practice, not to the collective-bargaining agreement, so *American Electric Power* has no application.

In sum, Respondent’s argument that its unilateral change to its past practice is lawful because it is “entirely consistent” with the collective-bargaining agreement fails to show that no genuine issue of material fact exists and that Respondent is entitled to judgment as a matter of law. Therefore, summary judgment is not appropriate.

**4. Respondent’s argument based on “continuation of the status quo” demonstrates that genuine issues of material facts exist**

Respondent finally argues that it is entitled to summary judgment because its conduct at issue merely presents a “continuation of the status quo.” This is a peculiar argument, and one that actually demonstrates that disputed issues of fact exist.

First it is noted that Respondent here, and throughout its Motion and supporting brief, mischaracterizes the Complaint allegations, and hence the basic factual dispute. As noted, the Complaint alleges that “Respondent unilaterally ceased its past practice of paying employees on the Union’s bargaining committee for work time spent in collective bargaining negotiations with Respondent.” Respondent, by contrast, repeatedly speaks in terms of “a *proposal* seeking reimbursement for pay provided to union officials for collective bargaining in 2017 [emphasis added].” The Complaint alleges an actual ceasing of a past practice, not a proposal to do so.

In this section of its argument, Respondent further distorts the nature of the dispute, claiming that the relevant “status quo” is the parties’ “discussions and exchange of correspondence regarding bargaining arrangements, including pay for union committee members.” Respondent also “presume[s],” without evidence, that “similar discussions took place leading up to the 2010 and 2013 negotiations which resulted in the two previous collective bargaining agreements.” Consequently, Respondent claims, such discussions “represented no departure at all from past practice as to how these arrangements were made,” and that its “proposal” was “a mere continuation of the status quo.” See Respondent’s Brief in Support of Motion at 25.

Again, the Complaint alleges Respondent unilaterally changed its past practice of paying employees for work time spent in collective bargaining negotiations, not its practice of engaging in “discussions” regarding such payments. In any event, however, Respondent’s invocation of its conduct in the 2017 negotiations, and its predecessors’ conduct in past negotiations and what it “presumes” those negotiations included, makes abundantly clear that factual issues underlie this argument. Hence, this argument does not support Respondent’s entitlement to summary judgment – just the opposite. It shows that factual matters are presently unresolved and a hearing is required to evaluate Respondent’s denial of an established past practice it unilaterally changed, as alleged in the Complaint.

### **III. This matter should not be deferred to arbitration**

Respondent’s final argument is that, should its Motion be rejected, this matter should be deferred to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Because Respondent’s unilaterally changed past practice has here created a breakdown in contract negotiations, which has affected the employees’ statutory right to freely select their bargaining

agent, this dispute is not well suited for resolution by arbitration. Therefore, Respondent's argument for deferral should be rejected.

The Board finds deferral to arbitration appropriate when the following conditions are met: (i) the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; (ii) there is no claim of animosity to employees' exercise of Section 7 rights; (iii) the parties' agreement provides for arbitration in a broad range of disputes; (iv) the parties' arbitration clause clearly encompasses the dispute at issue; (v) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and (vi) the dispute is well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984); *Collyer*, 192 NLRB at 842.

The relevant facts presented here are as follows. Respondent is a successor that took over operation of the facility shortly before negotiations began for an agreement to succeed the 2013-2017 collective-bargaining agreement, which agreement expired in February 2017 but the parties have agreed to extend. In 2017, the parties met several times to negotiate a successor agreement. After Respondent's announcement on November 4, 2017 that it was ceasing the practice of paying employees for work time spent in collective bargaining negotiations with Respondent (begun under Respondent's predecessors and continued by Respondent), the Union requested that the next previously scheduled bargaining session be moved to the employees' non-work hours. The parties agreed to meet from 5:00 to 7:00 p.m. on November 28, 2017, and they subsequently met on December 6, 2017 from 5:00 to 7:00 p.m. The parties have not been able to agree on any additional meeting times and have not met again. The Union has requested that additional bargaining sessions take place exclusively on non-work time during the evening or on weekends. Respondent has rejected, without explanation, the Union's request for all the

meetings to take place during off-hours and instead has proposed alternating, “one on, one off” sessions, where one meeting would take place during non-work hours and the next during working hours. The Union has rejected this offer and is opposed to bargaining during working hours if the three employee committee members are not paid for that time in accordance with the past practice.

The Board’s pre-arbitral deferral policy is centered on the principle that encouraging parties to agree on a method of dispute resolution and holding them to that agreement is an integral component of encouraging collective bargaining. See *United Technologies*, 268 NLRB at 559. At the same time, the Board’s deferral policy is one of discretion and “is merely the prudent exercise of restraint, a postponement of the use of the Board’s processes to give the parties’ own dispute resolution machinery a chance to succeed.” *Id.* at 560.

Essential to the Board’s policy favoring deferral is that the parties have a functioning bargaining relationship devoid of conduct that indicates disregard for their contractual responsibilities. The Board, therefore, will refuse to defer charges alleging violations of the Act that involve a complete breakdown in the collective-bargaining process. See, e.g., *AMF, Inc.- Union Machinery Division*, 219 NLRB 903, 912 (1975). In such situations, or where there is evidence of one party repudiating the bargaining process, rejecting bargaining principles, or other indicators that the bargaining relationship has collapsed, it would not effectuate the policies of the Act to defer to a dispute resolution process that will fail to provide an effective solution. See e.g., *United Technologies*, 268 NLRB at 560 (the Board will not defer where there is a “rejection of the principles of collective bargaining”); *Collyer*, 192 NLRB at 845 (Member Brown, concurring) (deferral inappropriate where there is a “repudiation of the collective bargaining process”).

In keeping with these principles, the Board has not *Collyer* deferred cases involving midstream unilateral changes to negotiated ground rules, including unilateral cessation of pay to employees for work time spent in collective bargaining negotiations, because such conduct not only violates Section 8(a)(5), but also severely disrupts the mechanics of the parties' bargaining relationship. See *AMF*, 219 NLRB at 912; *Proctor & Gamble Mfg. Co.*, 248 NLRB 953, 973, 975 (1980), *enforced in relevant part*, 658 F.2d 968 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982). See also *Western Block Co.*, 229 NLRB 482, 483-84 (1977) (holding employer's conduct to constitute a "rejection of the principles of collective bargaining" where it unilaterally began charging the union for the work time that unit employees spent on union business, and then deducted those amounts from the dues it was obligated to remit to the union under the parties' contract; deferral was not an issue in the case).

For example, in *AMF, Inc.-Union Machinery Division*, the employer unilaterally withdrew from bargaining after the local union sought to include about ten outside negotiators from the AFL-CIO on its bargaining committee. *AMF*, 219 NLRB at 903. The employer cancelled negotiations, refused to meet, cut employee hours until the union agreed to negotiate without the outside negotiators, and tried to bypass the union and deal directly with employees. *Id.* at 909. The employer's defense was that the case should have been deferred to arbitration, claiming the expired collective-bargaining agreement prohibited the union from having more than five members on the bargaining team. *Id.* at 910 (although it had expired, the parties agreed to extend their contract on a day-to-day basis until a successor contract was negotiated). The Board upheld the ALJ's refusal to defer. While acknowledging that the employer raised a cognizable contract interpretation issue, the ALJ held that deferral was inappropriate because the issue presented by the complaint related to "a complete breakdown in contract renewal

negotiations, rather than a routine contract violation” and involved “a statutory dispute – right of a union to select its own bargaining agents – that goes to the heart of the Act’s purposes and policies.” *Id.* at 912. As a result, the ALJ concluded that the Board was obligated to use “its own special competence in dealing with unfair labor practice issues emerging from a serious disruption to the negotiating process” and apply statutory remedies to “facilitate a resumption of negotiations and provide a means to preclude a tense situation from being aggravated by further unfair labor practices.” *Id.* Because the unfair labor practice claim was intertwined with the collapse of the bargaining relationship, Board action was necessary to reestablish the parties’ bargaining relationship, rather than merely resolve a dispute over an employment term. *Id.*

In *Proctor & Gamble Mfg. Co.*, the Board similarly concluded that pre-arbitral deferral was inappropriate where the employer’s unlawful conduct, including unilaterally ceasing paying employees for lost work time spent in collective bargaining negotiations, caused the parties’ bargaining process to effectively break down. 248 NLRB at 953. The employer operated four plants that each had an independent, in-house union that bargained with the employer individually. The unions wanted to establish a multi-plant unit and decided to initiate that process by placing a member from each of the other three unions on the in-house bargaining team for each of the other plants during upcoming contract renewal negotiations, while making clear they were not bargaining on a multi-plant basis. *Id.* at 957. After the unions announced their intention, the employer unilaterally altered what had been long-established bargaining rules, including no longer paying employee bargaining committee members for work time spent in negotiations, refusing to hold negotiations outside of normal working hours, barring “outsider” employee-negotiators from entering other facilities for negotiations, moving sessions off-site, and, at some of the plants, refusing to provide employees union and/or vacation leave to prevent

them from traveling to other plants for collective bargaining. *Id.* at 956, 966. While the employer continued negotiating with the individual unions at some of the plants, the employer refused to meet with any bargaining team that had an “outsider” member on it, which effectively halted negotiations with a full bargaining committee of the unions’ choosing. *Id.* at 966. The unions alleged that the employer was violating Section 8(a)(3) and (5) and putting up unlawful roadblocks to interfere with their right to choose their bargaining representatives. *Id.* at 955. The employer asserted that some of the charges, specifically those regarding the unilateral cessation of employee pay for work time spent in negotiations and denial of requested union and vacation leave to attend negotiations, should have been subject to pre-arbitral deferral. The Board affirmed the ALJ’s finding that deferral was inappropriate. *Id.* at 953, n.2. The ALJ noted that the basic issue in the case was whether the employer was engaged in a calculated effort to unlawfully interfere with the union’s fundamental statutory right to choose its bargaining representatives. *Id.* at 969. Even though the issue of employee pay for time spent in negotiations and leave issues involved past practice and were arguably contractual, they were part and parcel of the allegedly unlawful conduct. Deferral would only have served to “fragmentize the issues” by severing deferrable issues from the overarching statutory question, which would not effectuate the policies of the Act. *Id.* Further, because the employer’s conduct was designed to be an impediment to good-faith bargaining, the ALJ and Board additionally determined that deferral of the issues of pay for time spent in negotiations and leave was inappropriate because of the adverse effect on the bargaining process that resulted from breaching the ground rules for bargaining midstream. *Id.* at 973.

Applying this precedent, deferral is inappropriate here because several *Collyer* factors are not met and Respondent’s conduct has severely disrupted the mechanics of collective bargaining.

*AMF* demonstrates that deferring to contractual dispute resolution machinery does not effectuate policies of the Act – including fostering collective bargaining – when the alleged violation undermines the parties’ bargaining process. The parties have not met since December 2017 and have been unable to reach agreement on the fundamental issue of how to resume negotiations. The impetus for this breakdown was Respondent’s abrupt unilateral change to paying employees for work time spent in negotiations. The Union then made a reasonable offer to meet outside of working hours, which would prevent employees from having to exhaust their leave or forego wages to participate. While Respondent has ostensibly indicated its willingness to compromise by agreeing to meet during non-work hours – provided the next meeting is during work hours – in reality it has offered the Union and the unit employees a Hobson’s Choice that will impair its employees’ right to select their bargaining representatives, since the chosen representatives may be unwilling to serve at great personal cost. See *AMF*, 219 NLRB at 912; *NLRB v. General Electric Co.*, 412 F.2d 512, 517 (2d Cir. 1969) (“This right of employees and the corresponding right of employers . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme. In general, either side can choose as it sees fit and neither can control the other’s selection. . . .”). Respondent has not offered any reason for why the Union’s offer to meet solely during non-work time was not a workable solution, particularly in light of its past practice of paying employees for work time spent in collective bargaining. As a result, Respondent’s alleged violation here is very similar to those in *AMF* and *Proctor & Gamble*, because the underlying issue has an effect on the unit employees’ statutory right to freely select their bargaining representatives, which is a matter best left for Board action.

Furthermore, several of the other *Collyer* criteria for when pre-arbitral deferral is appropriate are not satisfied here. First, the parties do not have a long and productive bargaining

relationship, but rather a new relationship that has collapsed following Respondent's unexpected unilateral change to the bargaining rules in the middle of negotiations. Second, Respondent's actions demonstrated animosity to its employees' exercise of protected statutory rights. Specifically, Respondent punished employees who volunteered to serve as bargaining committee members by abruptly changing the longstanding, and Respondent-adopted, policy of paying employees for work time spent in collective bargaining and adopting the position that continued exercise of Section 7 rights would result in loss of wages. See *Proctor & Gamble*, 248 NLRB at 975. See also *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (antiunion animus established based on circumstantial evidence such as unilaterally implemented policy that violated Section 8(a)(5)); *NLRB v. General Electric Co.*, 418 F.2d 736, 757 (2d Cir. 1969) ("Given the effects of take-it-or-leave-it proposals on the [u]nion . . . the Board could appropriately infer the presence of anti-[u]nion animus. . . ."), *cert. denied*, 397 U.S. 965 (1970). And Respondent seeks to continue punishing the employees by insisting, without any explanation for its position, that some negotiation sessions must occur during their work day. An arbitration award would not address the deleterious effect of Respondent's conduct on the unit employees' Section 7 rights.

In sum, Respondent's argument that this matter should be deferred to arbitration under *Collyer* should be rejected.

**WHEREFORE**, for the reasons stated herein, the General Counsel respectfully requests that the Board deny Respondent's Motion for Summary Judgment in its entirety.

**DATED** at Buffalo, New York this 14th day of September, 2018.

Respectfully submitted,

    /s/ Eric D. Duryea    

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