



**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	1
I. The ALJ Erred By Failing to Find That Respondent Engaged in an Unlawful Pattern of Bad Faith Bargaining That Warranted An Award of Bargaining Expenses. ....	1
1. The ALJ Erred by Failing to Consider the Totality of Respondent’s Conduct by Respondent’s Repeated Delay and Refusal to Meet for Negotiations, Failure to Produce Information, and Failure to Bargain Over Economic Terms. ....	3
2. The ALJ Erred by Failing To Hold That Respondent’s Bargaining Proposals Constitute Further Evidence of Overall Bad Faith Bargaining. ....	8
II. The ALJ Erred by Failing to Award Bargaining Expenses To Remedy Respondent’s Overall Bad Faith Bargaining. ....	13
CONCLUSION.....	15

**TABLE OF AUTHORITIES**

	<u>Page</u>
<u>Cases:</u>	
<i>A-1 King Size Sandwiches, Inc.</i> 265 NLRB 850 (1982) .....	8
<i>Altorfer Machinery Co.</i> , 332 NLRB 130 (2000).....	3
<i>Atlas Metal Parts Co.</i> , 252 NLRB 205 (1980) .....	8
<i>Bryant &amp; Stratton Business Institute</i> , 321 NLRB 1007 (1996) .....	2, 4, 8, 11
<i>Caterpillar Inc.</i> , 355 NLRB 521 (2010) .....	4
<i>Eastern Maine Med. Ctr.</i> , 253 NLRB 224 (1980) .....	5
<i>Erie Brush &amp; Manufacturing Corp.</i> , 357 NLRB 363 (2011) .....	5
<i>Federal Mogul Corp.</i> , 212 NLRB 950 (1974).....	5
<i>First Student Inc.</i> , 359 NLRB 208 (2012) .....	5
<i>Frontier Hotel &amp; Casino</i> , 318 NLRB 857 (1995) .....	13
<i>Logemann Brothers Co.</i> , 298 NLRB 1018 (1990).....	8, 13
<i>Lower Bucks Cooling &amp; Heating</i> , 316 NLRB 16 (1995).....	2, 7
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	4
<i>Northwest Graphics, Inc.</i> , 342 NLRB 1288 (2004).....	5
<i>Regency Service Carts, Inc.</i> 345 NLRB 671 (2005).....	<i>passim</i>
<i>Teamsters Local Union No. 122</i> , 334 NLRB 1190 (2001).....	13

## PRELIMINARY STATEMENT

Charging Party, 1199 SEIU United Healthcare Workers East (“the Union”), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this brief in support of its cross-exceptions to the Decision and Order of Administrative Law Judge Benjamin W. Green (“ALJ”), dated December 12, 2018, in the above-captioned cases.

While ALJ Green correctly found that Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home (“Putnam Ridge” or “Respondent”) committed numerous unfair labor practices, including failing to bargain, implementing unilateral changes, failing to produce information, prohibiting employees from conducting union business on Respondent’s property, terminating an employee because of her support for the Union, and reducing employees’ wages because of their participation in protected activities, the ALJ erred by failing to find that Respondent also engaged in overall bad faith bargaining in order to frustrate the bargaining process.

In support of its cross-exceptions, the Union relies on the statement of facts and arguments set forth in the brief for the Counsel for the General Counsel, except as supplemented herein. For all of the following reasons, and those set forth in the brief for the Counsel for the General Counsel, the Board should find that Respondent engaged in an unlawful pattern of bad faith bargaining that warrants an award of bargaining expenses.

## ARGUMENT

### **I. The ALJ Erred By Failing to Find That Respondent Engaged in an Unlawful Pattern of Bad Faith Bargaining That Warranted An Award of Bargaining Expenses.**

The overwhelming, and largely undisputed, record evidence reveals systematic efforts by Putnam Ridge to unlawfully strip employees of their statutory rights, punish employees for their

support for the Union, and frustrate the collective bargaining process.<sup>1</sup> Taken as a whole, the record amply demonstrates that Respondent engaged in an unlawful pattern of bad faith bargaining designed to prevent employees from securing a collective bargaining agreement.

When analyzing whether a party has violated its statutory duty to bargain in good faith, “the Board examines the totality of the party’s conduct, both at and away from the bargaining table.” *Regency Service Carts, Inc.* 345 NLRB 671, 671 (2005). Based on the party’s overall conduct, the Board determines whether the 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.” *Id.*, citing *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001) *enfd.* 318 F.3d 1173 (10th Cir. 2003).

The factors considered by the Board when evaluating a claim of surface bargaining include delay tactics, nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, and arbitrary scheduling of meetings. *Regency Service Carts*, 345 NLRB at 672. The refusal to provide, and/or delay in providing, information relevant to the Union’s efforts at negotiations is also evidence of surface bargaining. *Regency Service Carts*, 345 NLRB at 675; *Bryant & Stratton Business Institute*, 321 NLRB at 1044. Cancelling bargaining sessions, limiting the duration of meetings, and delaying the scheduling of meetings are also indicative of bad-faith bargaining. *See e.g., Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995). As explained by the Board:

It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of

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<sup>1</sup> Herein, citations to the transcript are cited as “Tr.”; citations to the General Counsel’s exhibits are cited as “GC Ex. X”; citations to the Respondent’s exhibits are cited as “R Ex. X”; and citations to the Charging Party’s exhibits are cited as “CP Ex. X.”

these areas: rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.

*Regency Service Carts*, 345 NLRB at 672 (internal citations omitted); *see also Altorfer Machinery Co.*, 332 NLRB 130, 130 n.1 (2000) (Board's analysis in such cases is intended to evaluate whether party's conduct, in its entirety, "reflects an intention on its part to avoid reaching an agreement.").

Here, the record establishes that for years after employees voted to unionize, Respondent engaged in unlawful surface bargaining to frustrate the bargaining process and prevent the parties from reaching agreement, as demonstrated by its refusal to provide information, persistent delay in scheduling negotiations, and predictably unacceptable bargaining demands, all while simultaneously engaging in additional unlawful conduct found by the ALJ.

1. *The ALJ Erred by Failing to Consider the Totality of Respondent's Conduct by Respondent's Repeated Delay and Refusal to Meet for Negotiations, Failure to Produce Information, and Failure to Bargain Over Economic Terms.*

The undisputed record evidence reveals a consistent and repetitive pattern of delay by Respondent that was clearly designed to prevent the parties from reaching an agreement. The ALJ erroneously disregarded this evidence in evaluating the totality of the circumstances as to whether Respondent engaged in overall bad faith bargaining. *See* ALJD, at 32-35.

Respondent's delay tactics began after the parties' very first bargaining session in March of 2016. At the close of that session, the Union offered Respondent dates for two subsequent sessions in March and in May. GC Ex. 6. Putnam Ridge did not respond to these dates at that session or for weeks thereafter. This, despite the fact that the Union sent follow up letters on March 14, 2016 and April 6, 2016, reiterating the dates that the Union offered and requesting a response. Jt. Ex. 17; GC Ex. 6. Still, Respondent failed to respond. Jt. Ex. 19. The Union wrote Respondent again on April 19, 2016, and offered four more dates for bargaining: May 4,

11, 18, and June 1. The parties finally met for bargaining on June 1, 2016, almost *three months* after the first bargaining session, despite the Union's repeated efforts to meet sooner and more frequently.

The parties then met approximately once per month from June through November of 2016. However, during this entire time, Respondent was failing and refusing to produce information requested by the Union *in January of 2016*. Much of the information Respondent withheld concerned matters of substantial importance to the Union's bargaining activities, including: basic wage data, health insurance information, work schedules, and information related to unit employees' existing retirement benefits.<sup>2</sup> Respondent's unjustified and unexplained failure to produce such information is indicia of bad faith. *See e.g., Regency* 345 NLRB at 675; *Bryant & Stratton Business Institute*, 321 NLRB at 1044.

In 2016, as determined by the ALJ, Respondent then unlawfully: implemented unilateral changes to mandatory subjects of bargaining, reduced employees' wages because they voted to unionize, prevented employees from conducting union business on Putnam Ridge property, and committed other unfair labor practices. *See ALJD*, at 35-36. Unilateral actions by an employer that modify employees' conditions of employment permit an inference of subjective bad faith. *NLRB v. Katz*, 369 U.S. 736 (1962); *Caterpillar Inc.*, 355 NLRB 521 (2010).

From June to November of 2016, Respondent also failed and refused to bargain over economics. By way of illustration, it is undisputed that Respondent only made its first economic proposal on November 28, 2016, seven bargaining sessions and eight months into the bargaining

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<sup>2</sup> For example, by the November 2016 session, *ten months* after the Union requested this information, Respondent had still not provided information on wage data, hours worked, information on health insurance costs, information on retirement benefits or information on agency usage. *See e.g.* Jt. Exs. 14, 25, 27; GC Exs. 7, 28-30; Tr. 147-157.

process. GC Ex. 26; Tr. 474-475, 661. This was so despite the fact that the Union had, for many months, repeatedly asked the Respondent to bargain over economics, Tr. 254-255, 679, and had presented its own comprehensive proposal that covered *both* economic and noneconomic terms and conditions at the parties' first bargaining session in March of 2016. Tr. 678, 680-681; GC Ex. 22.<sup>3</sup>

The Board has repeatedly held that an employer may not refuse to bargain, or delay bargaining, over economics until progress is made on noneconomics. *See e.g., First Student Inc.*, 359 NLRB 208 (2012); *Northwest Graphics, Inc.*, 342 NLRB 1288, n. 24 (2004). This is true even where parties initially agree to bargain over noneconomics first. *Erie Brush & Manufacturing Corp.*, 357 NLRB 363 (2011). In fact, the Board considers the failure to bargain over economics to be evidence of overall bad faith bargaining. *Eastern Maine Med. Ctr.*, 253 NLRB 224, 244-47 (1980); *Federal Mogul Corp.*, 212 NLRB 950, 950-51, 964-65 (1974). The reasons for this are clear. Refusing to bargain over economics "obstruct[s] the process of meaningful contract discussion and exhibit[s] on [the employer's] side a cast of mind against reaching agreement," because a party's economic offer can help determine where parties may be willing to move on other items. *Federal Mogul Corp.*, 212 NLRB at 964.

While the Union did initially agree, in March 2016, to start bargaining by discussing noneconomic terms, the parties did so during the first three bargaining sessions. Respondent cannot justify its repeated refusal to bargain over economics thereafter on grounds that the

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<sup>3</sup> Respondent's sole witness did not dispute that the Union made comprehensive economic and noneconomic proposal at the March 10, 2016 bargaining session. *See* Tr. 656. Mr. China also testified that the Union presented GC Ex. 22 at the March 10, 2016 session and explained the basis for this proposal to the Respondent. Tr. 678, 680-681. The ALJ improperly disregarded this evidence and thereby erroneously concluded that the Union did not make an economic proposal until September 12, 2016. *See* ALJD at 35 (footnote 29). This is factually incorrect. The Union made a *modified* economic proposal on September 12, 2016, *see* GC Ex. 24, but it is undisputed that the Union's initial economic proposals were first made on March 10, 2016. For this reason, the ALJ's conclusion that Respondent did not fail to bargain over economic terms during this period of time is erroneous and contributes to his erroneous conclusion that Respondent did not engage in overall bad faith bargaining.

parties agreed to *start* negotiations by discussing noneconomic terms. Tr. 679. It is undisputed that at the June 30, 2016 session, the Union told Respondent that it was time to get to economics. Tr. 679. At each session thereafter, the Union repeated its demand that Respondent bargain over economics. Tr. 254-255, 679. Respondent refused to do so for four more sessions. This, despite the fact that the Union repeatedly told Respondent that bargaining over economics was necessary to make overall progress in negotiations. Tr. 183-184.

Respondent's bargaining delay tactics became even more severe in 2017. At the first bargaining session of the year, on January 10, 2017, Respondent refused to bargain altogether. Tr. 480-481, 661-662. Two sessions later, on April 4, 2017, Respondent ended bargaining prematurely based on concocted claims by Respondent's counsel that he was disrespected by a member of the Union's bargaining committee. (Three witnesses, including two employee witnesses, testified in a manner contrary to Respondent's account of what occurred at that session. Tr. 40-41, 68, 80-82, 162.) Regardless, because Respondent had previously stated that it would not bargain without the owner (Mr. Greenberger) present, no further bargaining would have occurred that evening because Greenberger had left the negotiations. Tr. 40, 42, 68. Thus, four months into 2017, there had been far more delay than actual bargaining.

Then, after the April 4, 2017 session, Respondent simply stopped responding to the Union's requests to bargain. This despite the Union's repeated requests. First, the Union offered the dates of May 22 and 23 to continue negotiations, and Respondent failed to respond. GC Ex. 29. Next, the Union offered bargaining dates of June 2 and 8. Respondent failed to respond until after those dates had passed. While the parties ultimately scheduled bargaining for June 20, 2017, Respondent cancelled this session the week before. GC Ex. 32-33. Cancelling bargaining sessions, limiting the duration of meetings, and delaying the scheduling of meetings are all

indicative of bad-faith bargaining. *See e.g., Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995).

The parties finally met in July and again in August of 2017 but then Respondent again disappeared from view. On August 11, 2017, four days after the last bargaining session, the Union offered bargaining dates in September and asked Respondent to propose alternative dates if the offered dates were not available. Jt. Ex. 32. Respondent failed to respond. Jt. Ex. 33. On August 17, 2017, the Union again wrote to Respondent asking for confirmation of the dates. *Id.* Again, Respondent did not respond. On October 9, 2017, the Union proposed three additional dates and again asked Respondent to propose alternative dates if necessary. Jt. Ex. 34. On October 27, 2017, the Union wrote again and proposed two additional dates and, again, asked Respondent to accept the dates or propose alternative dates. Jt. Ex. 35. Again, Respondent failed to respond. The parties did not meet again until December 21, 2017 – more than four months after the last bargaining session.<sup>4</sup>

As a result of Respondent's failure and refusal to meet, the parties met for bargaining only six times in 2017, including the January session where Respondent refused to bargain at all. This, despite the Union's consistent and diligent attempt to meet much more frequently. Throughout 2017, Respondent also continued to delay and/or refuse to provide relevant information, including information of substantial importance to the Union, such as health insurance information, retirement benefit information, and agency employee usage. To date, Respondent has failed to provide much of the information sought by the Union *in 2016*. *See e.g.,*

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<sup>4</sup> While Mr. Jasinski was involved in an unfortunate car accident in early November of 2017, Respondent cannot credibly claim this was the reason for their failure to bargain in the second half of 2017. First, the Union had requested bargaining and offered numerous dates for *months* prior to the accident and had received no response. Second, at the time of Mr. Jasinski's accident, no bargaining session was scheduled. Any claim that the parties would have met in November or earlier in December but for Mr. Jasinski's accident is speculative and highly unlikely given Respondent's previous conduct.

Jt. Exs. 14, 25, 27, GC Exs. 7, 28, 29, 30, Tr. 147-157. Here, “the totality of the employer’s conduct,” which delayed and frustrated the bargaining process, demonstrates overall bad faith bargaining. *See Logemann Brothers Co.*, 298 NLRB 1018, 1020 (1990); cases cited *supra* at pp. 2-3.<sup>5</sup>

2. *The ALJ Erred by Failing To Hold That Respondent’s Bargaining Proposals Constitute Further Evidence of Overall Bad Faith Bargaining.*

In addition to its numerous delay tactics, Respondent’s bargaining proposals provide additional and compelling evidence that Respondent engaged in bad faith bargaining to prevent the parties from reaching agreement. As the Board has long held, “the advancement of predictably unacceptable proposals and the failure to provide a reasonable justification for proposals which are questioned, are indicia of bad-faith bargaining.” *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996); *see also Atlas Metal Parts Co.*, 252 NLRB 205, 219 (1980); *A-1 King Size Sandwiches, Inc.* 265 NLRB 850, 858 (1982) (unusually harsh and unreasonable proposals may support a finding of bad faith bargaining).

By the time of the hearing in this matter, more than two years into bargaining, Respondent’s economic proposals, if accepted, would have left bargaining unit employees substantially worse off than they would have been without a collective bargaining agreement. Specifically, Respondent’s proposals would have resulted in lower annual wage increases, loss of shift differential, loss of sick time, loss of holiday pay, loss of tuition reimbursement, loss of

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<sup>5</sup> That the Union has continued to bargain, despite the prejudice caused by Respondent’s misconduct, is hardly evidence that *Respondent* is bargaining in good faith. Moreover, the Union has repeatedly explained that the lack of information has hampered progress in negotiations and prevented the Union from bargaining effectively. *See e.g.*, Tr. 256-257.

dental benefits, loss of 401(k), loss of bereavement leave, loss of camp scholarships, and other significant losses. *Compare* GC Ex. 27 and GC Ex. 26.<sup>6</sup>

With respect to wages, Respondent initially proposed the following increases across a five-year agreement: 1% increase upon ratification on employees' anniversary date, 1% 18 months later, 1% 30 months later, and 1% 48 months later, or a *total* of 4% over a five-year period. GC Ex. 26. This represents a substantial reduction to the increases that Respondent paid employees before the Union's certification, when employees received *annual* increases of between 2%- 2.5%, or 10%-12.5% over five years. In fact, Respondent's initial bargaining proposal was even less than employees receive under Respondent's own unilaterally-implemented policy. Since the Union election, employees have received annual merit increases of between 1.25% - 1.75%, or 6.25% - 8.75% over five years, far more than the 4% proposed by the Respondent in negotiations with the Union.

Contrary to the record evidence, the ALJ erroneously concluded that Respondent would likely continue its annual merit increases after the parties settled on a first contract. *See* ALJD at 33, fn.27. This is factually inaccurate, *see* Tr. 475-478, and contradicted by the facts recited in the Decision. *See* ALJD at 14 (Respondent's attorney "clarified that any current wages and benefits not specifically covered by the Respondent's proposals would be eliminated"); ALJD at

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<sup>6</sup> In bargaining, Respondent explained that any current benefit not included in their proposal would be eliminated. Tr. 475-478. Most revealing is that many of the benefits Respondent proposed eliminating are the very ones Respondent implemented after taking over the facility and the very same benefits it highlighted when campaigning against the Union prior to the election. Specifically, the November 23, 2015 letter from Respondent to unit employees regarding the upcoming Union election stated the following: "Take a look at what management has done since it took over this operation:

- Yearly increases for every employee;
- Paid tuition for employees;
- Paid health benefits;
- Numerous accommodations to help any employee with family issues;
- Paid camp scholarship for employees' children"

*See* CP Ex. 3, pg. 4.

13 (the Employer “reserved the right” to provide a merit increase “to an eligible employee” but did not agree to do so on an annual basis, or agree to preserve the practice of doing so for *all* bargaining unit employees). The ALJ’s erroneous assumption as to Respondent’s continuation of the merit increases thereby led the ALJ to conclude, incorrectly, that Respondent’s wage proposal was not a wholesale reduction. *See* ALJD, at 33 (“a combination of the Respondent’s contractual wage adjustments and its modified practice of granting merit increases (0%-1.75%) would not constitute a wage reduction”).

While Respondent modified its wage proposal in the seventeen months since it was made, it was still far worse than what employees received prior to the Union’s certification and even worse than what employees received since Respondent’s (unilateral) change to the merit increase percentage amounts. Respondent’s wage proposal, as of two years into bargaining, was: 1.25% increase effective upon ratification on employees’ anniversary date, 1% 18 months later, 1.25% 30 months later, 1.5% 48 months later, and 1% 54 months later. In total, the increases would have amounted to 6% *over five years*. Tr. 666. Under this proposal, *every single bargaining unit employee would have earned less each year* than they would without a collective bargaining agreement.

Moreover, Respondent’s proposed minimum rate for CNAs would provide *no economic benefit* for existing employees. The proposed minimum rates were for new hires only, not incumbents. Tr. 533, 539. For this reason, the ALJ erred by concluding that the proposed minimum rates would result in wage increases for a number of bargaining unit employees. ALJD at 33. For all of the forgoing reasons, the ALJ erred by failing to conclude that Respondent’s substantially worse wage proposal was a “predictably unacceptable proposal” without a

“reasonable justification; and, therefore, an indication of bad-faith bargaining. *Bryant & Stratton Business Institute*, 321 NLRB at 1044.

Respondent’s retrograde wage proposal was not the only “predictably unacceptable” proposal. With respect to holidays, employees currently receive seven paid holidays and employees who work on one of those holidays receive double time pay. GC Ex. 27. Under Respondent’s initial proposal, employees would no longer receive *any* premium pay for working on a holiday and would receive another day off instead. GC Ex. 26. Respondent also proposed to slash double-time qualifying holidays from seven to only three. Tr. 483. Respondent proposed further takeaways to sick days and proposed eliminating employees’ ability to “buy back” (or cash out) up to forty hours of unused accrued time, a substantial economic benefit for low wage workers. *Compare* GC Ex. 26 and GC Ex. 27.

To make matters even worse, Respondent also proposed eliminating shift differentials, which would leave many employees making less for *each hour of work*. Tr. 496; GC Ex. 26. But Respondent did not stop there. Respondent also proposed eliminating: bereavement leave (currently three paid days off in the event of the death of an immediate family member); tuition reimbursement (which reimbursed employees up to 100% for job related courses); dental insurance; life insurance; the 401(k) plan; camp and college scholarship programs; the perfect attendance bonus; and numerous other benefits of substantial importance to employees. Tr. 477-478, 496; *also compare* GC Ex. 27 and GC Ex. 26.

Throughout bargaining, the Union repeatedly asked Respondent to explain its justification for proposing such extreme and sweeping takebacks. Tr. 324, 474-475, 606-607. Respondent’s consistent response was simply: “these are negotiations” and “there was no guarantee.” Tr. 324, 606. Respondent’s failure to provide any reasonable justification for such

extreme economic takeaways is further indication of bad faith bargaining. *Bryant & Stratton Bus Inst.* 321 NLRB at 1044. Respondent has never claimed, nor could it, that its economic proposals are based on market forces, Respondent's economic circumstances, or any other legitimate business concern. As Respondent admitted at the hearing, before the Union election Respondent was considering improvements to employees' pay *and* benefits due to market forces. Tr. 674-675. There can be no doubt that Respondent needed to offer improved pay and benefits to recruit and retain employees. *See e.g.*, Jt. Ex. 39 and CP Exs. 4 and 5. Yet Respondent provided no explanation for why, once employees unionized, Respondent proposed making employees' pay and benefits worse.

Indeed, although the ALJ credited the Respondent's justification for "start[ing] low in its proposal because the Union started so high in its demands," *see* ALJD at 34, this conclusion was flawed from the outset. By the time Respondent finally advanced an economic proposal, eight months of bargaining had elapsed; thus, this was hardly a "starting point" of negotiations. As of the date of the hearing, close to *two years* into bargaining, Respondent's economic proposals were still such that all bargaining unit employees would be worse off under Respondent's proposals than they would be without a collective bargaining agreement. This is compelling evidence that Respondent was making proposals that were intended to prevent the parties from reaching agreement. This is particularly true given Respondent's failure to provide any reasonable explanation for making such predictably unacceptable positions in bargaining.

Despite this evidence, the ALJ was not convinced that "Respondent's proposal, if accepted as a package, would leave employees worse off than they were before unionizing." ALJD, at 33 (the General Counsel and the Union failed to establish, through costing, that Respondent's economic proposal would "result in a net economic loss with the information that

was available to them[.]”). But, as the ALJ acknowledged, Respondent withheld critical wage and benefit information requested by the Union that was necessary for such costing. Regardless, such costing was unnecessary. Steep reductions to nearly every pre-existing economic benefit enjoyed by employees, coupled with slashes to their wage increases, is *prima facie* evidence of net economic loss.

Finally, the mere fact that Respondent proposed some noneconomic terms that would benefit bargaining unit members does not insulate Respondent from an overall finding of bad faith. The totality of Respondent’s conduct – not only at the bargaining table and by its persistent delay away from negotiations, but also by its pervasive unlawful conduct in other respects as determined by the ALJ – amply supports a finding that Respondent engaged in overall bad faith and surface bargaining. *Logemann Brothers Co.*, 298 NLRB at 1020.

## **II. The ALJ Erred by Failing to Award Bargaining Expenses To Remedy Respondent’s Bad Faith Bargaining.**

The Board has repeatedly held that an order requiring a respondent to reimburse the charging party negotiation expenses is warranted when “it may fairly be said that a respondent’s substantial unfair labor practices have infected the core of a bargaining process to such an extent that their ‘effects cannot be eliminated by the application of traditional remedies...’” *Regency Services Carts, Inc.*, 345 NLRB at 676, *citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), *citing NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967); *see also Teamsters Local Union No. 122*, 334 NLRB 1190, 1994 (2001) (bargaining order alone does not make charging party whole for financial losses it incurred when respondent was engaged in surface bargaining); *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995).

Such a remedy is necessary to “make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to

ensure a return to the status quo ante at the bargaining table.... [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses." *Regency Services Carts, Inc.*, 345 NLRB at 676.

Here, such a remedy is warranted and necessary. From the very beginning of the bargaining process, over three years ago, Respondent has engaged in a calculated effort to delay bargaining, frustrate the bargaining process, and prevent the parties from reaching agreement. Years into bargaining, the parties are miles apart. The Union still does not have much of the information it requested, the information that has been provided was done in such a delayed and intermittent fashion that its value is substantially diminished, and Respondent continues to demonstrate, through the totality of its course of conduct, that it seeks to prevent the parties from reaching agreement.

In the over three years since the Union's certification, the Union has wasted substantial time and resources in efforts to continue bargaining despite Respondent's unlawful conduct that has infected every stage of the bargaining process. Simply requiring Respondent to bargain will not restore the status quo ante or restore the economic losses the Union has suffered during the years Respondent has been engaged in unlawful surface bargaining.

For all of these reasons, an award of bargaining expenses is appropriate and should be awarded.

**CONCLUSION**

For the forgoing reasons, and those set forth in Counsel for the General Counsel's brief, the ALJ erred by failing to find that Respondent engaged in unlawful surface bargaining and by failing to recommend an order awarding bargaining expenses.

Dated: New York, New York  
March 29, 2019

Respectfully submitted,

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