

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

UNIVERSAL HEALTH SERVICES, INC. AND
GEORGE WASHINGTON UNIVERSITY D/B/A THE
GEORGE WASHINGTON UNIVERSITY HOSPITAL

and

Cases 5-CA-216482

5-CA-230128

1199 SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS EAST,
MD/DC REGION A/W SERVICE EMPLOYEES
INTERNATIONAL UNION

5-CA-238809

**COUNSEL FOR THE GENERAL COUNSEL'S MOTION *IN LIMINE*, AND BRIEF IN
SUPPORT, TO EXCLUDE RESPONDENT'S PRESENTATION OF EMPLOYEES'
SUBJECTIVE REASONS FOR SUPPORTING OR OPPOSING THE UNION**

Counsel for the General Counsel files this Motion *in Limine* seeking to preclude Respondent from eliciting and presenting certain evidence in this matter.

A. Factual Background

As will be presented at the hearing of this matter, the underlying dispute began when Respondent and the Charging Party engaged in bargaining for a successor collective-bargaining agreement, during the period of November 21, 2016 through about October 12, 2018. The General Counsel alleges that, during this period, Respondent engaged in surface bargaining with the Charging Party by:

- Simultaneously maintaining and adhering to bargaining proposals that provided unit employees with fewer rights than afforded to them without a collective bargaining agreement, such as a restrictive grievance procedure that does not include binding arbitration, a no-strike provision, and an expansive management's right clause;

- Engaging in regressive bargaining by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing that the grievance procedure culminates in non-binding mediation;
- Maintaining and adhering to a proposal to delete the union security clause of the collective-bargaining agreement; and
- Maintaining and adhering to wage proposals that give Respondent unfettered discretion.

At no time has Respondent made any effort to remedy the above unfair labor practices. It is undisputed that on October 26, 2018, Respondent withdrew recognition from the Charging Party, and at all times since has refused to bargain with the Charging Party. The General Counsel alleges that Respondent further violated Section 8(a)(5) of the Act by withdrawing recognition when it had not remedied prior unfair labor practices. The remaining allegations in the First Amended Consolidated Complaint allege that, after withdrawing recognition, Respondent continued to violate the Act by unilaterally changing bargaining unit employees' terms and conditions of employment. Counsel for the General Counsel anticipates that Respondent intends to offer evidence regarding individual employees' subjective reasons for supporting or opposing the Charging Party to justify its withdrawal of recognition. As explained below, such testimony is irrelevant to determining whether Respondent's unremedied unfair labor practices caused supposed loss of majority support for the Charging Party. Accordingly, Respondent should be precluded from attempting to offer any such evidence into the record.

B. Analysis

An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee

disaffection, or improperly affect the bargaining relationship itself. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber*). If the Board can establish a causal relationship between an employer's unfair labor practices and a union's loss of majority support, any evidence on which the employer claims to have based a subsequent withdrawal of recognition is tainted by the employer's conduct, and the withdrawal is unlawful. Where an employer has engaged in a general refusal to bargain with an incumbent union, as alleged by the General Counsel in this matter, a causal connection to the union's loss of majority support is presumed. *Lee Lumber at 178*. The General Counsel intends to prove a general refusal to bargain by Respondent in this matter; under *Lee Lumber*, the withdrawal of recognition and subsequent unilateral change in terms and conditions of employment by Respondent are unlawful.

In withdrawal-of-recognition cases involving employer conduct other than a general refusal to bargain, the General Counsel bears the burden of proving a causal connection. *Master Slack*, 271 NLRB 78, 84 (1984). In the event this case is analyzed under *Master Slack*, Respondent still should not be permitted to present subjective witnesses. According to the test set forth in *Master Slack*, the Board considers: 1) the length of time between the unfair labor practices and the withdrawal of recognition; 2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; 3) the tendency of the violation to cause employee disaffection; and 4) the effect of the unlawful conduct on employees' morale. *Id.* The Board has consistently held that the *Master Slack* test is an objective test that assesses only the likelihood that causation exists. *See, e.g., SFO Good-Nite Inn*, 357 NLRB 79, 82–83 and fn. 26 (2011) (“To the extent that an employer seeks to elicit employee testimony about their reasons for signing documents supporting or rejecting a union, the Board and the courts have

long recognized the inherent unreliability of such testimony. . . . [W]e are unwilling to subject petition signers to *ex post facto* examination about their reasons for supporting decertification.”). *See also Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) (“The *Master Slack* test is an objective one and the matters set forth above can be objectively ascertained. The relevant inquiry at the hearing does not ask employees *why* they chose to reject the Union.” (emphasis in original)). Accordingly, “it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the Union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard.” *AT Systems West, Inc.*, 341 NLRB 57, 60–61 (2004) (citations omitted).

There is simply no issue under the *Master Slack* test toward which employees’ subjective testimony would be relevant. In *Wire Products Mfg. Corp.*, 326 NLRB 625 (1998), the Board explained that, because the causal connection test is objective, “actual knowledge by the employees of the unfair labor practices need not be shown.” *Id.* at 630 (and cases cited therein). In *Denton County Electric Coop, Inc.*, 366 NLRB No. 103 (2018), the Board held that employees’ testimony on the decertification petition “is irrelevant under the objective *Master Slack* analysis.” *Id.* at fn. 10; *see also Saint Gobain Abrasives*, 342 NLRB 434, 434 fn. 2 (2000) (“The *Master Slack* test is an objective one,” and thus “the relevant inquiry at the hearing does not ask employees *why* they chose to reject the Union” (*emphasis in original*)).

C. Conclusion

Counsel for the General Counsel respectfully asks that its Motion *in Limine* be granted, precluding Respondent from introducing as relevant evidence any documents or testimony concerning employees’ subjective reasons for supporting or opposing the Union.

Dated at Baltimore, Maryland this 6th day of June 2019.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 6th day of June 2019, a copy of Counsel for the General Counsel's Motion *In Limine* and Brief, was served electronically on all parties:

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