

**United States of America**  
**Before the National Labor Relations Board**  
**Region Five**

In The Matter of:

District Hospital Partners L.P. D/B/A  
The George Washington University  
Hospital,  
A Limited Partnership, and UHS of D.C.,  
Inc., General Partner

Cases 5-CA-216482  
5-CA-230128  
5-CA-238809

and

1199 SEIU, United Healthcare  
Workers East, MD/DC Region  
A/W Service Employees  
International Union

**CHARGING PARTY'S POST-HEARING BRIEF**

On June 25, 2019, The National Labor Relations Board (“NLRB”) Region 5, issued a Second Amended Consolidated Complaint in the matter of cases 5-CA-216482, 5-CA-230128 and 5-CA-238809. In that complaint, NLRB Region 5 alleged that, during the period from about November 21, 2016 to October 26, 2018, District Hospital Partners, L.P. D/B/A The George Washington University Hospital, a Limited Partnership, and UTTS of D.C., Inc. (“Respondent”) bargained with no intention of reaching agreement by;

- (1) simultaneously maintaining and adhering to bargaining proposals that provide the Unit with fewer rights than afforded to them without a collective-bargaining agreement, such as a restrictive grievance-arbitration procedure that does not include binding arbitration, a no-strike provision, and an expansive management's right clause;
- (2) 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;
- (3) simultaneously maintaining and adhering to a bargaining proposal that deletes a longstanding union security clause provision; and
- (4) simultaneously maintaining and adhering to wage proposals that give Respondent unfettered discretion.

And, The Board alleged that, by this and other conduct, Respondent failed and refused to bargain in good faith with 1199 SEIU, United Healthcare Workers East, MD/DC Region A/W Service Employees International Union ("Charging Party"), the exclusive collective bargaining representative of its bargaining unit employees.

NLRB Region 5 further alleged that, on or about October 26, 2018, Respondent withdrew its recognition of the Charging Party as the exclusive collective-bargaining representative of its bargaining unit employees.

NLRB Region 5 further alleged that, on or about November 1, 2018, Respondent: (a) unilaterally implemented changes to wage rates, compensation structure and transit benefits, each of which are both terms and conditions of bargaining unit employment and mandatory subjects of collective bargaining; and (b) told bargaining with unit employees that they did not receive benefits because of the Charging Party.

Finally, NLRB Region 5 alleged that, on or about June 6 and 7, 2019, Respondent coercively interrogated employees about matters that are the subject of unfair labor practice proceedings.

Charging Party offers the following in support of these allegations:

## **I. STATEMENT OF FACT**

Prior to October 26, 2018, Respondent had long recognized and bargained with the Charging Party, the representative of certain bargaining unit employees. These bargaining unit employees all worked in Respondent's Dietary and Housekeeping departments. Id.

On December 19, 2016 the collective bargaining agreement between the Respondent and the Charging Party, which had been in effect for the prior four years, was due to expire. In late November of 2016, The Respondent and the Charging Party began to meet concerning a new collective bargaining agreement.

### **a. Management Rights**

On December 7, 2016, Respondent presented the Charging Party with a proposal entitled "Rights and Duties of Managers, Supervisors, and Licensed Staff." The proposal listed twenty-six "rights and duties," including the following:

- a. direct and schedule the working force;
- b. plan, direct and control operations;
- c. hire, promote, demote, transfer, lay-off and recall employees to work;
- d. establish, reorganize, combine or discontinue the conduct of its business or operations temporarily or permanently, in whole or in part;
- e. introduce a change in the method or methods of operation which may produce a change in job duties, a reduction in workforce, or a reduction of work hours in any department;
- f. restructure jobs or work flow processes or methods and to establish and/or discontinue any department or method of maintenance or service:
- g. introduce new or improved methods, equipment and facilities;
- h. establish, add to, reduce, combine or discontinue job classifications;
- i. assign, transfer and/or reassign, temporarily or permanently, job duties and tasks regardless of employee job classifications, or department as necessary to meet patient care needs, including those required to provide patient-centered care;
- j. determine the number of employees, as well as the existence, number and type of positions to be filled by employees, and to determine the use of part-time per diem, agency and temporary employees;
- k. use individuals not employed by the Hospital in any aspect of the Hospital's operations for training and/or education purposes, or in emergency situations:

- l. determine the extent to which bargaining unit work will be performed at the facility and the extent to which it may be performed through the use of contractors or subcontractors;
- m. allow supervisory employees to perform bargaining unit work;
- n. establish work schedules and determine what work and duties are to be performed:
- o. supervise employees and their work. Including the right to decide the number of employees that may be assigned to any shift or job, or the equipment to be employed in the performance of such work.
- p. determine the quality, quantity and pace of work and tasks to be performed;
- q. establish and determine employees' competency and qualifications;
- r. determine acceptable standards of performance based on productivity, efficiency, and quality and require that such standards be met;
- s. establish, change and enforce all work rules, regulations, policies and practices for the purpose of maintaining order, safety and efficient and effective operations, and to require that such rules be complied with by employees:
- t. reprimand, suspend, discharge or otherwise discipline employees for cause;
- u. determine whether and when there is a job vacancy;
- v. determine the qualifications for a position and to take steps to determine if any individual is capable of meeting those qualifications:
- w. select and change benefit plan carriers, insurers, administrators, fiduciaries, and/or trustees:

- x. ensure the security of its facility and property, including without limitation, the rights of inspection and search:
- y. make and change Employer Hospital rules, regulations, policies and practices not inconsistent with the terms of this Agreement; and
- z. change, alter, or modify any policy, practice or decision with respect to any of the rights reserved, retained or enumerated above, or with respect to any other rights reserved to the Hospital and otherwise – generally to manage the facilities of the Hospital so as to attain and maintain full operating efficiency

#### General Counsel Exhibit 2

On December 7, 2016, The Charging Party questioned whether the language of the management rights clause in the expiring collective bargaining agreement “had proven to be an obstacle to the Hospital in accomplishing its end [sic].” Resp. Exhibit 3, B0054. Tr.at p.35 (“ . . . management rights provision in the contract for decades, that there had never arisen any disputes between management and the Union with respect to the interpretation of that managements rights clause, its extent.”) The Respondent’s spokesperson, Steven Bernstein, replied that he could not “speak to that” Resp. Exhibit 3, B0054

On February 1, 2017, the Charging Party gave a counter to the Respondent’s proposal of December 7, 2016. Resp. Exhibit 2, B3761. The Charging Party tentatively agreed to the proposal’s preamble, save for mention of “the right to subcontract services or products.” The Charging Party agreed to lettered “rights” a. through d.; f. through h.; j. and k.; n. through r.; u and v.; and y. and z., to the extent that it was merely repetitive of y [Resp. Exhibit 3, B00130].

The Charging Party did not agree that Respondent had the “right” to allow supervisors to perform bargaining unit work. The Charging Party did not agree that the Respondent had the “right” to “establish change and enforce all work, regulations, policies and practices for the purpose of maintaining order, safety and efficient and effective operations. . .” The Charging Party did not agree that the respondent had the “right” to change methods of operation that “may produce a change in job duties, a reduction in workforce, or a reduction in work hours in any department.” The Charging Party did not agree that respondent had the “right” to assign or transfer “job duties and tasks regardless of employee job classifications, seniority. . .” The Charging Party did not agree that Respondent had the “right” to “determine the extent to which bargaining unit work will be performed at the facility and the extent to which it may be performed through the use of contractors and subcontractors.” The Charging Party did not agree that the Respondent had the “right” to discipline and discharge employees without “cause.” The Charging Party did not agree that Respondent had the “right” to “select and change benefit plan carriers, insurers, administrators. . .” The Charging Party did not agree that Respondent had the “right” to inspect and search bargaining unit members “without“ limitation.

And, the Charging Party asserted that language had to be included, requiring that the exercise of any management rights and duties had “to be reasonable.” Id.

On March 28, 2017, the Respondent replied to the Charging Party’s counter of February 1, 2017. General Counsel Exhibit 9. Although Respondent acknowledged that the Charging Party had made “substantial movement” (Tr.at.p.577), Respondent’s reply to the Charging Party’s counter included only: (a) a correction of a typographical error, and (b) its agreement “to receive from the Union constructive suggestions, which the Hospital shall consider with sole discretion.”

With respect to the lettered “rights and duties,” the Respondent offered no changes in the positions it had advanced on December 7, 2016.

Neither the Respondent nor the Charging Party again even suggested any modification of their respective positions concerning management’s “rights and duties” until September 5, 2018. On September 5, 2018, the Charging Party presented a proposal entitled “Management Rights.” General Counsel’s Exhibit 25. As the Charging Party’s spokesperson explained to the Respondent:

Dozens and Dozens of healthcare institutions in New York City  
Had agreed with 1199 SEIU to this provision. We’re trying to show that all of the  
great hospitals, healthcare institutions in this city had lived and lived comfortably  
for years

Under this sort of provision And we were hoping that that would move management. Tr.at p. 107; Tr.at p. 141 (“... employers had agreed to this language and used it for many, many years. . . I feel like it made sense to keep the ball rolling. . .”; Tr. at 578 (“... This was the Union’s attempt to move the process forward”).

b. Dispute Resolution Procedure

On March 29, 2017, the Respondent presented at the bargaining table its proposal with respect to dispute resolution. The Respondent proposed to replace Article 8 of the expired collective bargaining agreement, which had provided arbitration as the means of resolving unresolved grievances. In its stead, the Respondent proposed “Grievance and Mediation.” General Counsel Exhibit II.

The Respondent’s proposal defined a grievance “as a filed dispute over the interpretation or application of the terms of [the collective bargaining agreement].” It provided that the “sole and exclusive method” for the settlement of unresolved grievances was to be mediation that

“shall be non-binding upon either party. Id. The Respondent’s “Grievance placed a limit on an employees right to pursue a claim in court” for breach of collective bargaining agreement provisions. As proposed, employees could not “sue in court for breach of any provision not subject to mediation.” Id.

On September 5, 2018, the Charging Party presented a counter to the Respondent’s proposal of March 29, 2017. General Counsel Exhibit 23. When it presented the counter, the Charging Party’s spokesperson explained that it provided for “an expedited and low cost arbitration procedure” with limits on “potential back pay,” which the Charging Party hoped would “encourage [the Respondent] to reconsider your position on arbitration. . .” Resp. Exhibit 3, B0374.

c. No- Strike Clause

On March 29, 2017, the Respondent presented, along with its counter on management rights, and its “Grievance and Mediation” proposal, a proposed “No strikes or lockouts” proposal. General Counsel’s Exhibit 12. The Respondent proposed to prohibit “strikes, picketing (informational or otherwise), slow-downs, sit-ins, sick outs, boycotts, work stoppages” or “any other action which shall interrupt or interfere with. . .the normal or orderly operation of the Hospital. . .” Id. The Respondent made it clear that these prohibitions were to apply to “strikes over alleged violations of this Agreement, and strikes in protest of alleged violations of local, state or federal law.” Id. Additionally, “any statutory right under the National Labor Relations Act that an employee may otherwise have to engage in the activities prohibited by this article are specifically waived by the Union.” Id. And, any disciplinary action taken by the Respondent against employees alleged to have disregarded these prohibitions “shall be final and binding upon the Union and the employee(s). . .” Id.

On May 16, 2017, the Charging Party advised counsel for the Respondent that the National Labor Relations Board had already ruled that a combination of “a broad no strike clause, management [rights] proposals and no binding labor arbitration” constituted evidence of surface bargaining violative of Section 8 (a) 5 of the Act. Resp. Exhibit 3, B022, Tr. at p. 616 (“ . . I do remember you conveying that point.”)

On March 12, 2018, the Charging Party filed with the Board charges against the Respondent. General Counsel Exhibit 1-A. In these charges, Charging Party alleged that the Respondent had violated 8(a)(1) and (5) of the Act by maintaining as bargaining positions “an expansive management rights clause,” a “no strike provision” and a proposal to eliminate arbitration as a dispute resolution mechanism. Id. Investigation of these allegations was assigned to a Board agent by the name of Bisi Dean.

On June 7, 2018, Steven Bernstein, the Respondent’s counsel, sent an email to the Union. Resp. Exhibit 1, B3655. In that email, Mr. Bernstein advised the Charging Party that the Respondent was withdrawing its “no-strike proposal.” Id. On the same day, Mr. Bernstein sent to Ms. Dean a copy of his email to the Charging Party “for your investigation file.” Id. Tr. at p. 564 (“I thought it was important to Ms. Dean to know that because we’d not yet tendered a position statement, but I was certainly aware that a ULP charge was pending, containing allegations consisting, in part of the no-strike clause at issue.”)

### c. Union Security

On March 20, 2017, the same day that if presented its counter on management rights, its “Grievance and Mediation “proposal and its proposed “No Strikes or Lockouts,” the Respondent also proposed to delete Article 2 of the expired collective bargaining agreement “IN ITS

ENTIRETY.” General Counsel Exhibit 10. Section 2 of Article 2 of the expired agreement entitled “Union Security,” provided as follows:

The Employer agrees that as a condition of continued employment, all employees who are presently members of the Union shall maintain said membership, and all employees who are not presently members of the Union and all new employees shall become members on the first day of the first full calendar month which follows completion of sixty (60) days of employment, or the thirtieth day following the effective date of this Agreement, whichever is later.

General Counsel’s Exhibit 30.

At negotiations on April 5, 2017, the Respondent’s representatives attempted to justify its position in this regard. The Respondent acknowledged that while it had agreed to similar union security provisions to Article 2 of the expired agreement (Resp. Exhibit 3, B0182), it now had “philosophical” objections to “compelling employees to pay anything as condition of employment.” Id.

On September 5, 2018, the Charging Party presented a counter on “Union Security.” General Counsel Exhibit 24. In pertinent part, the Charging Party’s proposal would have restored the provisions of Article 2 of the expired agreement.

d. Wages

On May 2, 2018, the Respondent offered its proposal with respect to pay. General Counsel Exhibit 18. As originally presented, the proposal called for two “individual merit based increases.” The first was to be effective in August 2019, a year and three months in the future. The second, in August 2020.

The Respondent advised the Charging Party that the range of the merit increases were not negotiable. Resp. Exh-3, B0307. (“Q: Are you going to negotiate what those ranges are each

year?); A; [by Ms. Schmid]: “No, the ranges are set for the hospital as a whole, it will be the same range for non-union employees and applied exactly the same way. . . .”)

Placement on the range of merit increases was to be based on annual performance evaluations. The Charging Party would not be permitted to challenge any employee’s performance evaluation, unless the performance evaluation resulted in the employee’s discharge. Resp. Exh. 3, B0310. (Q: “So the annual review that’s going to affect your wage is not going to be grievable?”.) A. [by Ms. Schmid]: “Correct.”)

The second component of the Respondent’s proposal on pay was what the Respondent referred to as a “market-based adjustment.” Tr. at p.61. The Respondent advised the Charging Party that the range of these adjustments had been derived from some sort of market survey. When the Charging Party asked for the survey,” we were told that there was no survey; the market based adjustments would be based upon some anecdotal evidence that the Employer had as to what the market was or was not paying.”Id.

Later that same day, the Respondent offered a second pay proposal virtually indistinguishable from its first, to which it attached an Appendix B. General Counsel Exhibit 19. This appendix set forth an hourly rate range for each of the active bargaining unit job titles, i.e., the range of rates that the Respondent proposed to pay an employee, based on “the number of years of credited experience the employee has for that job classification.” Id.

The Respondent announced that: “It’s management’s discretion to place [employees] by years of experience.” Resp. Exhibit 3, B0317. And, when asked where the Respondent planned on placing current employees within the ranges delineated in Appendix B, the Respondent replied: “To respond to that, we know that’s going to take a process we have not undertaken.” Id.

e. Discipline

On January 17, 2017, the Respondent presented a proposal concerning matters of discipline. General Counsel Exhibit 4. The proposal called for the institution of a four-step sequence of progressive discipline: documented verbal warning, written warning, final written warning and termination. Id. And, it provided that “[d]ocumented written and final written warnings may only be grieved; terminations are subject to the full grievance and arbitration procedure.” Id. When he submitted the proposal, the Respondent’s spokesperson explained, “we think arbitration is for end process not along the way.” Resp. Exhibit 3, B0107. When asked whether disciplinary measures other than terminations ever could be arbitrated, he replied, “They are grievable, not to arbitrate unless result in termination.” Id.; Tr. at p. 596; Tr. at p. 608.

On January 31, 2017, the Charging Party presented a counterproposal on “Discipline.” General Counsel Exhibit 6. The counterproposal specified that both final written and terminations “are subject to the full grievance and arbitration procedure.” Id.

On January 31, 2017, the Respondent countered the Charging Party’s counterproposal on “Discipline.” General Counsel Exhibit 7. When it presented this counter, the Respondent’s spokesperson took pains to point out that, insofar as the arbitrability of steps in the progressive disciplinary sequence were concerned, “Our language retains same language we initially proposed.” Resp. Exhibit 3, B0121.

On May 16, 2017, the Charging Party pointed out to the Respondent that, while its “Grievance and Mediation” proposal stated that mediation “shall be the sole and exclusive method for the settlement of disputes under this Agreement” (General Counsel Exhibit II), its

“counter on “Discipline” still provided that terminations were subject to “the full grievance and arbitration procedure.” General Counsel Exhibit 6; Tr. at p.610.

On May 25, 2017 the Respondent’s counsel sent an email message to counsel for the Charging Party. Resp. Exhibit I, B3627. He advised counsel for the Charging Party that:

. . . per our discussion at the bargaining table the past week, I’ve gone ahead and attached proposals pertaining to both Discipline and Grievance and Mediation, which have been revised in an effort to reconcile some of the discrepancies that you had pointed out in prior sessions.

Resp. Exhibit 1, B3627.

In pertinent part, the attached proposal on “Discipline” read: “Documented verbal, written and final written warnings may only be grieved; terminations are subject to the full grievance and mediation procedure.” Resp. Exhibit I, B3630. In pertinent part, the attached proposal on “Grievance and Mediation” read: “Documented verbal, written and final written warnings are grievable but not subject to mediation.” Resp. Exhibit I, B3632.

#### f. Withdrawal of Recognition

On October 26, 2018, counsel to the Respondent sent an email message to the Charging Party’s Yahnae Barner. The email message stated as follows:

The Hospital has received objective evidence which clearly and unequivocally indicates that the Union has lost the support of a majority of bargaining unit employees. Specifically, we have verified that over 50% of current bargaining unit employees have signed a petition indicating that they do not want to be represented by the Union.

Therefore, the Hospital is withdrawing recognition of the Union effective immediately. Please consider all future bargaining sessions cancelled. Also, all access rights to the Hospital that may otherwise have been available under the expired collective bargaining agreement are hereby terminated.

General Counsel Exhibit 28.

g. Post- Withdrawal Unilateral Charges

It is undisputed that, on or about November 1, 2018, the Respondent implemented changes to the wages and benefits of employees whose exclusive representative for purposes of collective bargaining prior to October 26, 2018, the Respondent had acknowledged the Charging Party to be. It is undisputed that the Respondent made these changes to wages and other terms and conditions of employment, statutorily mandated subjects for collective bargaining, without ever affording the Charging Party any opportunity to bargain with respect thereto.

**II. ANALYSIS**

In Reichhold Chemicals, 288 NLRB69 (1988), The National Labor Relations Board described the circumstances in which it would examine the substance of a party's bargaining proposals, in order to determine whether there had been bad faith bargaining. In this regard, the Board stated as follows:

That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals.

Each party to collective bargaining "has an enforceable right to good faith bargaining on the part of the other."<sup>6</sup> Enforcement of that right is one of the Board's most important responsibilities. Indeed, the fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative. The Board will not have fulfilled its obligation to look at the whole picture of a party's conduct in negotiations if we

have ignored what is often the central aspect of bargaining, i.e., the proposals advanced by the parties.

Id. (Emphasis added.)

As the United States Supreme Court stated in American National Insurance, 343 U.S. 395, 404 (1952): enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences. Indeed, . . . if the Board is not to be blinded by empty talk and mere surface motions collective bargaining, it must take some cognizance of the positions taken by the employer in the course of bargaining negotiations.

NLRB v. F. Straus & Son, Inc., 536 F. 2d 60, 64 (5<sup>th</sup> Cir. 1976)(quoting NLRB v. Reed and Prince Mfg. Co., 205 F. 2d 131, 134 (1<sup>st</sup> Cir. 1953), cert. denied 346 U.S. 887 (1953). And, “sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered.”Wright Motors, Inc., 603 F. 2<sup>nd</sup> 604, 609 (7<sup>th</sup> Cir. 1978).

There is in the record herein ample evidence that the Respondent did, in fact, “make a mockery of the of the duty to bargain by adhering to proposals which clearly demonstrate an intent not to reach agreement with the employees’ selected collective-bargaining representative. “As an initial matter, we would note in this regard that the Respondent proposed, at the very outset of negotiations, an inordinately expansive management rights provision. As proposed, this management rights provision granted the Respondent unfettered discretion in the creation of workplace rules and regulations, in decisions to discipline and discharge employees, to assign their work to supervisors, and to subcontract that work as the Respondent would. Indeed, as proposed, the provision actually arrogated to the Respondent unfettered discretion “to determine

the extent to which bargaining unit work will be performed at the facility.” General Counsel Exhibit 2.

And, nothing the Charging Party did at the bargaining table could persuade the Respondent to alter its position in this regard. Thus, on February 1, 2017, the Charging Party presented the Respondent with a counterproposal on management rights. In that counterproposal, the Charging Party tentatively agreed to twenty-two out of the twenty-six provisions on management rights that the Respondent had proposed.

The Respondent’s reply, as its counsel admitted at hearing, “was not significant.” Tr. at p. 614. It included but a corrected “typo” and agreement by the Respondent “to receive from the Union constructive suggestions, which the Employer shall consider in its sole discretion.” The Charging Party’s proposed inclusion of a provision requiring the Respondent to exercise its rights in a reasonable manner was rejected out of hand. General Counsel Exhibit 9.

On March 28, 2017, during the very same two-day bargaining session in which the Respondent rebuffed the Charging Party’s effort to moderate the Respondent’s stand on management rights, the Respondent proposed to replace Article 18 of the parties’ expired agreement, which provided for the arbitration of unresolved grievances. General Counsel Exhibit II. In its place, the Respondent proposed non-binding mediation. That is, the Respondent proposed to exclude from any binding dispute resolution any grievance questioning the Respondent’s exercise of rights retained in its management rights clause. Indeed, it even proposed to limit the right of bargaining unit employees to pursue a claim in court for certain collective bargaining agreement breaches.

And again during that same two-day bargaining session, the Respondent presented its “No strikes or Lockouts” proposal. General Counsel Exhibit 12. This proposal would have broadly prevented the Charging Party and the bargaining unit employees from engaging in any “picketing, slow-downs, sit-ins, sick-outs, boycotts, work stoppages. . . concerted failure or refusal to work, or any other action which shall interrupt or interfere with. . . the normal or orderly operation of the Hospital.” Id. And, the Respondent made it clear that these prohibitions applied to “strikes over alleged violations of this Agreement, strikes over issues excluded from grievance and arbitration [sic] procedures, and strikes in protest of alleged violations of local, state and/ or federal law.” Id.

Thus, under the Respondent’s proposals, bargaining unit employees and the Charging Party that represented them would be left with no avenue to challenge the Respondent’s decision making with regard to discharges, subcontracting, work rules, regulations and policies, benefit plans, or decisions concerning any of the other terms and conditions of employment as to which the Respondent demanded unfettered discretion. That is, these three proposals, taken as a whole, would leave the Charging Party and the bargaining unit employees it represented with substantially fewer rights and less protection than provided by law without a contract. See, A-1 King Size Sandwiches, Inc., 265 NCRB 850, 859-861 (1982), ent’d 732 F.2d 872, 877 (11<sup>th</sup> Cir. 1984). And, as the Board noted in Public Service Company of Oklahoma (PSO), 334 NCRB 487 (2001),

An inference of bad-faith bargaining is appropriate when the employer’s proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily

entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith. See A-1 King Size Sandwiches, *supra*, 265 NLRB at 859 fn. 4; Id. At 488.

In short, these three proposals, taken as a whole, required the Charging Party to surrender almost all of its functions as the bargaining unit's representative, and in response thereto the Respondent "could not seriously have expected meaningful collective bargaining." Id. at 489.

It is certainly true that the Respondent's counsel did withdraw its "No Strike or Lockouts" proposal on June 7, 2018. But, it is absurd even to suggest that withdrawal of the proposal somehow manifested an intent, on the part of the Respondent, to abandon its efforts to frustrate even the possibility of arriving at an agreement.

For, by June 7, 2018, Respondent's counsel was well aware of the fact that the Charging Party had charged the Respondents with surface bargaining. The Respondent's counsel was just as well aware that "a ULP charge was pending, containing allegations consisting, in part, of the no-strike clause at issue." Tr. at p. 564. And of course it was for this very reason that the Respondent's counsel made certain that its withdrawal of the "no strike or lockout" was made known to the Board agent who was investigating the "ULP charge."

In short, it is evident that the Respondent withdrew this proposal- the only proposal that the Respondent ever did withdraw- solely in order to evade the issuance of a Board complaint. And, the Respondent's suggestion at hearing that the proposal was withdrawn "because we wanted to see some movement and dispute resolution" is revealed to be disingenuous.

And, it is to be noted that Respondent's intent to frustrate the possibility of arriving at any agreement was manifest not only in its proposals on management rights, grievance and

mediation and no-strikes or lockouts. The Respondent's intent to require the Charging Party to surrender functions as the bargaining unit's representative was manifest, as well, in other proposals advanced by to the Respondent at the bargaining table.

In this connection, we would point out that the Respondent's wage proposal completely excluded the Charging Party from participation in pay decisions. Thus, the range of the merit increases proposed by the Respondent was not negotiable. Resp. Exh. 3, B0307. Placement within the range of the proposed merit increases was to be based on employee performance evaluations. But, employee performance evaluations were not grievable. Resp. Exh. 3, B0310.

The second element of the Respondent's wage proposed was a so-called "market-based adjustment," i.e., placement of employees within a range of hourly rates that the Respondent proposed to pay based on "the number of years of credited experience the employee has" in a particular job classification. General Counsel's Exhibit 19.

But, the Respondent would not or could not make the Charging Party privy to just how the Respondent derived the range of hourly rates for each classification. Tr. at p. 61. And, the Respondent made it plain that placement of employees within the range of hourly rates for their classifications was a matter for "management's discretion." Resp. Exh.3, B0317.

The simple fact is that the Respondent refused to negotiate with the Charging Party over any of the elements of its wage proposal that were informed by a measure of discretion. See, NLRB v. Katz, 369 U.S. 736, 746-747 (1962). In effect, its proposal on wages actually amounted to a proposal requiring the Charging Party to waive its statutory right to bargain over the subject of wages. Colorado- Ute Electric Ass'n., 295 NLRB No. 67 (1989). And of course, the Respondent's "Grievance and Arbitration" and "No Strike or Lockout" provisions would have

left the Charging Party with no avenue to challenge any decisions that the Respondent might make with respect to the matter of employee pay. See, e.g. Regency Service Crts, Inc. 345 NLRB 67(2005).

The Respondent's cavalier attitude toward its bargaining obligation was also patent in its position on union security. Thus, it is to be noted that in support of its proposal to delete Article 2 of the parties' expired agreement, the Respondent offered no significant business justification at all. Even though it acknowledged that it had agreed to union security provisions no different than Article 2 in other collectively bargained agreements, the Respondent asserted that it lately had developed "philosophical" objections to agreeing to union security in these negotiations. As the Board pointed out in Universal Fuel, Inc., 358 NLRB No. 150 (2012), however, in the absence of "legitimate business reasons," it will view opposition to union security for purely philosophical reasons as evidence of bargaining in good faith."

And then, there is the matter of the Respondent's inclusion of provision for arbitration of terminations in its proposals on "Discipline" of January 17, 2017 and January 31, 2017. At hearing, Respondents counsel suggested that the inclusion of this provision was but a "scrivener's error." But of course, the Respondent may not have it so.

To begin with, we would point out that, on January 7, 2017 the Respondent explained to the Charging Party the reasons why the provision was included in the first place. And, the Respondent adhered to that explanation when questioned that day by representatives of the Charging Party.

Furthermore, on July 31, 2017, the Respondent submitted a counterproposal to the Charging Party's counter to the Respondent's initial proposal on "Discipline." That

counterproposal included the very same provision for arbitration of terminations as had the Respondent's initial proposal on "Discipline." And, Respondent's spokesperson made sure that the Charging Party understood that provision for arbitration of terminations had not changed.

At the end of March 2017, however, the Respondent made its decision to introduce what one court called the "paradigm management functions clause 'evading' the employer's collective bargaining duty"[.] in which the collective bargaining agreement that it proposed would really have "just three clauses: (1) union recognition, (2) the employer's discretion over all terms, and (3) a no-strike clause." McLatchy Newspapers, Inc-NLRB. 131 F. 3d 1026, 1034 (D.C. Cir. 1997) cert denied 524 U.S. 937 (1998).

In fact, by March 28, 2017, the Respondent had become so disdainful of its duty to bargain with the Charging Party in good faith that it continued to refer in its proposals to arbitration; and simply forgot that its proposals on "Discipline" actually continued to provide for arbitration. The Respondent's counsel decided regressively to delete provision for arbitration from its "Discipline" proposal in May of 2017, not for any reasons of policy, but simply because the provision had become a source of personal embarrassment.

Finally, it is necessary to respond to the Respondent's contention that it was free lawfully to withdraw recognition from the charging party, on the basis of the petition that it received on October 26, 2018. The contention is wholly without merit.

In Lee Lumber Building Material Corp., 322 NLRB 175 (1996), the Board restated its position that an employer may not lawfully withdraw recognition from a union based on a showing of employee disaffection for a union, where it has committed unfair labor practices that are likely to have affected the union's status, caused employee disaffection, or improperly

affected the bargaining relationship itself. And, the Board held that where an employer has engaged in a general refusal to bargain with an incumbent union, connection to the union's alleged loss of majority support is to be presumed. Lee Lumber, supra, at p.178.

In the instant case, the Respondent has engaged in a general refusal to bargain. The Respondent certainly has pretended an interest in reaching a collective bargaining agreement with the Charging Party. But, the pretense was all too apparent. And at the end of the day, sham bargaining is no more than a general refusal to bargain in disguise. Radisson Plaza Minneapolis, 307 NLRB 94 (1992), enf'd.987 F.2d 1376(8<sup>th</sup> Cir.1993).

To be sure, the Respondent has argued that Lee Lumber is inapposite, because in Lee Lumber the Board stated that it was in cases of a "general refusal to recognize and bargain" that the causal relationship between the unfair labor practice and the subsequent loss of majority support was to be presumed. And, the Respondent has argued that in the instant case there was not a refusal to recognize at the same time that the Respondent refused to bargain.

The Respondent's argument must be rejected, however. To begin with, we would point out that, in Lee Lumber, the Board found that the petition upon which the respondent had relied was "tainted by the Respondent's initial refusal to bargain". Id. at 176. That is, the Board found that petition to have been tainted by a general refusal to bargain, which as the record herein indicates, preceded the Respondent's withdrawal of recognition.

Moreover, the Board in Lee Lumber could not have made its real concern any more plain. In this connection, the Board quoted at length from its decision in Karp Metal Products, 51 NLRB 621, 624 (1943) to this effect:

. . . [employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by its employees is normally

decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with the union., standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether. . .

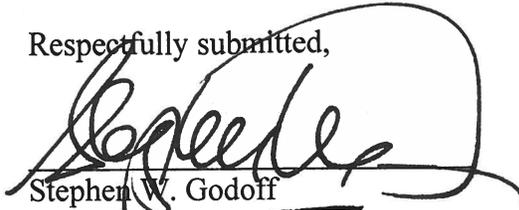
Or, as the Board itself stated, if a union is deprived, as a result of an employer's unlawful refusal to bargain, "of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them." Id.

That is precisely what occurred in the instant case. In this case, then, a causal relationship between the Respondent's unlawful acts and the Charging Party's subsequent loss of majority support must be presumed; and the Respondents withdraw of recognition on the basis of a tainted petition deemed violative of Section 8 (a)(5) of the Act.

#### IV. CONCLUSION

The General Counsel has proved the allegations contained in the Complaint. Appropriate relief should therefore be Ordered.

Respectfully submitted,



Stephen W. Godoff  
Abato, Rubenstein and Abato, P.A.  
809 Gleneagles Court, Suite 320  
Baltimore, Maryland 21286  
(410) 321-0990

Counsel to 1199 SEIU, United Healthcare  
Workers East,  
MD/DC Division

Date: August 16, 2019

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of August, 2019, I caused to be served, by first class mail, postage prepaid, a copy of the Charging Party's Post-Hearing Brief on Case Number 5-CA-216482; 5-CA-230128; and 5-CA-238809 to:

Barbara Duvall, Esq.  
Drew Andela, Esq.  
National Labor Relations Board  
100 South Charles Street  
Suite 600  
Baltimore, 21201

Tammie Rattray, Esq.  
Ford Harrison, LLP  
101 East Kennedy Blvd  
Suite 900  
Tampa, FL 33602

Paul Deshears, Esq.  
Ford Harrison, LLP  
271 17<sup>th</sup> Street, NW  
Suite 1900  
Atlanta, GA 30363

Steven Bernstein, Esq.  
Fisher & Phillips, LLP  
101 East Kennedy Blvd  
Suite 2350  
Tampa, FL 33602

  
\_\_\_\_\_  
Stephen Geroff