UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A THE GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER

and

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

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

BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Michael Rosas, Administrative Law Judge.

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I. INTRODUCTION

In November 2016, the parties in this case began negotiations for a successor to the most recent of a decades-long series of collective-bargaining agreements. For almost two full years thereafter, George Washington University Hospital ("Respondent") engaged in an egregious pattern of bad-faith bargaining, with no intent to actually reach a new agreement with 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region ("the Union"). Respondent's motive was perhaps manifested most clearly in the language of the proposals it tendered to the Union. Even though the existing contractual language had generated minimal dispute, Respondent insisted on sweeping revisions that would strip from the Union virtually all of its representational function.

Among Respondent's earliest proposals was a zipper clause intended to eliminate any reliance on the parties' past practices. Following suit, the bulk of Respondent's other proposals intended to eliminate any reliance on the parties' previous contracts. Where the Union had long been able to advance disciplinary grievances to arbitration, Respondent insisted on new language in which arbitration would be replaced by non-binding mediation, and only for cases involving discharge; no impartial mechanism of any kind would be available for other discipline. Where the parties had managed to partner peacefully for years under the same management rights provision, Respondent refused to budge on a proposal that would reserve to itself unlimited discretion in such matters as: investigative searches of employees; defining, assigning, and subcontracting bargaining unit work; and discipline. Where even the threat of labor strife had long been non-existent, Respondent dug its heels in for over a year on a no-strike provision containing broad waivers of employees' statutory rights. Then, about ten months after the Union had proposed an across-the-board wage increase, Respondent countered with a wage scheme that

upended seniority and permitted Respondent to exercise unfettered discretion in determining unit employees' wages.

As for its insistence on rewriting fundamental provisions in their entirety, the best justifications Respondent could offer the Union involved vague concerns about the need to "modernize" the language by making it more "clear." And, despite any employee efforts over the years to remove or replace the Union, Respondent insisted that the new contract reflect its newfound philosophy regarding employee choice by deleting the parties' longstanding union-security clause. Throughout the twenty-three months during which the parties were at the table, Respondent steadfastly refused to provide any information that might have helped the Union understand why it should consider accepting proposals that on their faces would have gutted whatever employee protections might remain in the rest of the contract.

Meanwhile, Respondent was engaged in an orchestrated effort to mislead and confuse unit employees about the parties' bargaining process. At pre-shift meetings following nearly every bargaining session, Respondent would read and distribute to unit employees, documents called "bargaining briefs," which purported to be updates on the status of negotiations. These bargaining briefs were, in fact, riddled with mischaracterizations and misrepresentations that served to denigrate and undermine the Union, which for its part continued in its efforts to negotiate a new contract. About three weeks after the parties had started negotiations, Respondent circulated the second bargaining brief to the unit's supervisors. At this early stage, Respondent was already reminding the unit's supervisors about some previous directive not to "review, discuss or sign any petition, or anything that looks like a petition with anyone," since "doing so will disrupt the integrity of the process." Indeed, by the time Respondent had managed to drag negotiations all the way through March 2018, some unit employees had signed

a petition indicating that they no longer wished to be represented by the Union. Even with the help of Respondent's ongoing campaign of disinformation, this disaffection effort remained well short of obtaining the necessary support after seven months. Then, on October 12, 2018, Respondent issued a bargaining brief in which it effectively told the unit that, not only was their Union still to blame for the protracted negotiations, it was now also firmly standing in the way of immediate pay raises for all. Over the next twelve days, twenty-seven signatures were added to the fifty-four that had been gathered since March.

The "process" Respondent had warned supervisors not to publicly disrupt came to an end on the afternoon of October 25, 2018, when an employee presented Respondent with the petition, which by then had finally been signed by barely more than half of the individuals who Respondent considered unit employees. A few hours later, Respondent decided it had what it needed to finally bring the curtain down on its long-running performance at the bargaining table. Before noon the next day, Respondent terminated the parties' longtime collective-bargaining relationship, by e-mail. Over the days that followed, Respondent set about doing what it had intended to do all along: implementing changes to bring the unit employees' working conditions in line with those of Respondent's non-union workforce. Not content to simply move forward, Respondent seized upon one more opportunity to insult the Union, by telling employees that they had not previously been eligible for their new transit subsidy because the Union had failed to negotiate it.

The General Counsel respectfully urges that the Administrative Law Judge find that Respondent violated its statutory bargaining duty as alleged in the Complaint, and that Respondent withdrew recognition while those continuing unfair labor practices remained unremedied. The General Counsel further urges that the Administrative Law Judge find that

Respondent proceeded to further violate the Act by unilaterally changing the unit employees' working conditions, and by denigrating the Union in the process.

II. ISSUES PRESENTED

A. At various times between November 2016 and October 2018, Respondent made and adhered to the following bargaining proposals: a restrictive grievance-arbitration procedure that does not provide for binding arbitration; a no-strike provision that would waive employees' statutory rights; an expansive management rights clause giving Respondent sweeping discretion over working conditions; deletion of the parties' longstanding union security clause; and proposals that would give Respondent unfettered discretion to determine bargaining unit wages. During the same period, Respondent engaged in regressive bargaining by proposing that employee discharges would be subject to a grievance-arbitration procedure, then later proposing that the grievance procedure for discharges would culminate in non-binding mediation. ***Issue No. 1:*** Whether Respondent violated Sections 8(a)(1) and (5) of the Act by making any one or any combination of the bargaining proposals referenced herein, and/or by engaging in regressive bargaining.

B. On October 26, 2018, Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the Unit and since that date, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. ***Issue No. 2:*** Whether Respondent has violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition and/or by thereafter refusing to bargain with the Union.

C. About November 1, 2018, Respondent unilaterally implemented changes to unit employees' wage rates, compensation structure, and transit benefits, all of which are mandatory

subjects of bargaining, without affording the Union an opportunity to bargain with respect to these changes. ***Issue No. 3:*** Whether Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally changing unit employees' terms and conditions of employment.

D. On or about November 1, 2018, Respondent issued a memo to unit employees, telling them that they did not receive benefits because the Union had not negotiated them. ***Issue No. 4:*** Whether Respondent's memo denigrating the Union violated Section 8(a)(1) of the Act.

E. On or about June 6 and 7, 2019, Respondent failed to provide necessary assurances prior to questioning employees about matters that are the subject of unfair labor practice proceedings. ***Issue No. 5:*** Whether Respondent coercively interrogated employees in violation of Section 8(a)(1) of the Act.

III. FACTS

A. Respondent's operations

Respondent operates a short-term acute health care facility in Washington, D.C. Respondent is jointly owned by George Washington University and District Hospital Partners, L.P. District Hospital Partners, L.P. is a subsidiary of Universal Health Services, Inc. ("UHS"). At all material times, Jeanne Schmid has been Human Resources Vice President at UHS. Pursuant to a management contract between UHS and Respondent, Schmid manages all aspects of labor relations at George Washington University Hospital.

B. The parties' collective-bargaining relationship

The bargaining relationship between Respondent and the Union is more than two decades old. Tr. 29: 11–12. At all times throughout the course of that relationship, Respondent has been a health care institution providing patient care. Tr. 127: 14–128: 3. The Union represents a bargaining unit of about 150 regular full-time and regular part-time employees in the

Environmental Services ("EVS"), Linen Services, Ambulatory Care Center, and Food Services ("dietary") departments of George Washington University Hospital.[1] The parties' most recent collective-bargaining agreement ran from December 20, 2012 through December 19, 2016. GC Ex. 30. As they had with the contract prior to it, Respondent and the Union were able to negotiate that agreement within a week, and without the assistance of attorneys. In November 2016, the parties began negotiations for a successor agreement. When the parties first sat down at the table on November 21, 2016, only Respondent had brought legal counsel. The Union had left its counsel behind, believing this round of negotiations would likewise be reasonable and non-contentious, and not require the assistance of counsel. Tr. 31: 1–8. By the third session, however, the bargaining had become contentious and the Union realized the parties were not going to be able to reach a contract this time without the assistance of counsel. From that point on, attorney Stephen Godoff assumed the role of the Union's lead negotiator. Godoff has been counsel to the Union for about thirty-five years. Tr. 28:25–29:1.

In addition to Godoff, the Union's initial bargaining team typically included Antoinette Turner and Lisa Wallace. In January 2018, Yahnae Barner became part of the Union's committee. Godoff had to miss several meetings due to health issues; his colleague Brian Esders led the Union's committee at those sessions. Respondent's bargaining team included Jeanne Schmid and supervisors Rhonda Evans, Eric McGee, Makita Miller, and Robert Trump. A scribe typed verbatim notes at each session for Respondent. Outside counsel Steve Bernstein was Respondent's lead negotiator. He had not been involved in negotiating the parties' previous contract. Respondent first hired Bernstein in 2014, at a time when the hospital was still party to

[1] Schmid clarified at hearing that the ambulatory care department was subsumed into EVS years ago. Tr. 171: 6–17.

two collective-bargaining relationships: the one at issue here, and one involving a unit of security officers represented by a different union. At some point during its 2016–2018 negotiations with the Union, Respondent withdrew recognition of the security officers' union.

The parties met for approximately thirty bargaining sessions between November 2016 and October 2018. Within a day or so after almost each of these sessions, Respondent's bargaining team drafted and issued documents it called "bargaining briefs." The bargaining brief concept was the idea of Respondent's parent company UHS, and had never been utilized at the hospital prior to December 2016.[2] Each of these bargaining briefs purports to provide unit employees with an update on the parties' contract negotiations. Respondent directed its supervisors to read and post the briefs to unit employees at pre-shift meetings called "huddles." Along with at least some of the briefs, supervisors received a list of "talking points" that included items they were expected to go over with employees. GC Ex. 40. The talking points also contained internal instructions and guidance for the supervisors. For instance, the talking points accompanying the December 1, 2016 brief advised: "This is the first time GWUH is presenting a bargaining brief and we do not believe the union will be happy with us doing so. Therefore, please be vigilant as union presence may increase as soon as <u>today</u>." GC Ex. 36 (underlining in original). Schmid reviewed every bargaining brief prior to its issuance, even if Schmid had not attended the meeting that brief purported to describe.

[2] Although Schmid testified at the hearing that she did not know whether the hospital had ever utilized bargaining briefs, the internal memo to supervisors accompanying the brief distributed on December 1 states "this is the first time GWUH is presenting a bargaining brief." GC Ex. 40.

C. Substance of the parties' December 2016 to October 2018 contract negotiations

1. Respondent proposes to replace the longstanding management rights clause with expansive new language providing Respondent with unlimited discretion over unit employees' working conditions.

When bargaining began in November 2016, no dispute had ever arisen between the parties requiring interpretation of the management rights clause that had been in place for decades. Yet, on December 6, 2016, Respondent proposed a new, and fundamentally different, management rights provision that Godoff considered the most expansive he had ever seen. Tr. 33: 20–25. Included among the twenty-six subsections was language that would explicitly reserve Respondent's rights to: 1) assign any amount of bargaining unit work to supervisors; 2) use contractors and contract personnel to perform bargaining unit work; 3) engage in searches of unit employees without limit; 4) discipline employees without cause; 5) change employees' health insurance and other benefits at any time; 6) determine what positions are and are not part of the unit; 7) determine the existence of bargaining unit work; and 8) determine the extent to which bargaining unit work could be performed at all.

Concurrent with the above management rights proposal, Respondent proposed a zipper clause that included language eliminating the parties' right to refer to past practices. Respondent Ex. 1 at RESP 003541. In Respondent's view, this clause was linked to the proposal on management rights. Tr. 579: 2–20; 613: 24–614: 3. Indeed, the zipper clause stated that "Nothing contained in this Article shall be construed as impairing or limiting the Hospital's Management Rights [article] *including, without limitation, the Hospital's right to make, change, and enforce rules, regulations, and policies governing employment and conduct of employees on the job*." Respondent Ex. 1 at RESP 003541 (emphasis added). Although Respondent repeatedly conceded to the Union that the existing management rights provisions had not

generated dispute in the past, the only justifications Respondent provided for its insistence on such substantial changes were that the previous language was old or outdated and needed to be updated and modernized for the sake of clarity.

When the parties met on February 1, 2017, the Union tendered a counterproposal on management rights, indicating the Union's acceptance on twenty-two of Respondent's twenty-six enumerated subsections. The Union also agreed to Respondent's introductory language, with the exception of a portion permitting Respondent to subcontract services or products. At a bargaining session held on March 28, 2017, Respondent tendered what it called a counterproposal to the Union's February 1 offering on management rights. This proposal was substantially identical to Respondent's original December 6 proposal, save a minor modification in which Respondent agreed "to receive from the Union constructive suggestions, which the Hospital shall consider in its sole discretion." Nowhere had Respondent modified or limited any of the language describing management's rights, or incorporated any other language that the Union had proposed. In all substantive respects, both of Respondent's proposals were the same. Tr. 51: 1–2. As Schmid admitted during her hearing testimony, "We didn't change the position." Tr. 248: 18.

Following the parties' March 28–29 round of bargaining, Respondent prepared another bargaining brief for supervisors to present and post on March 30. Tr. 201: 6–8; GC Ex. 13. Respondent admits—both in its bargaining notes and through the testimony of its witnesses—that: 1) the Union had made substantial concessions in its February 1 management rights proposal; and 2) Respondent had not changed its position between December 6 and March 29. Nonetheless, the March 30 brief instead highlighted one of the four items that the Union did not accept: "the union continues to refuse to 'allow supervisory employees to perform bargaining

unit work.' We don't see how that helps staff members who would like to be able to rely on their directors' managers' and supervisors' help when facing a difficult task or call-outs[.]" GC Ex. 13 at p. 1. The brief also stated that the "union's negotiator was dismissive of the Hospital's March 28 proposal and told the Hospital they needed to 'Get the F*** Out!!' and that they would not be willing to consider further Hospital proposals on the subject." But a review of Respondent's bargaining notes shows that Godoff actually said: "Get the f***out of here. Put it in the bargaining notes keep going with your proposal."

On September 5, 2018, the Union tendered a new management rights counterproposal in an effort to break the stalemate on this issue and get Respondent to reconsider its previously unyielding position. Tr. 106: 7–13; 139: 22; 145: 18–19; 214: 24 to 215: 3; 577: 23 to 578: 1; GC Ex. 25. Since tendering its initial December 2016 proposal, Respondent had indicated no willingness to move; the Union had therefore determined that the parties would not be able to reach a contract as long as they continued to bargain off of that proposal. The Union's September 5 management rights proposal was lifted from a proposal that dozens of healthcare institutions in New York had accepted during contract negotiations with 1199 SEIU. The Union communicated its willingness to negotiate the proposal language. Tr. 142: 4–5.

2. Respondent proposes to replace longstanding discipline and grievance provisions with new language and a grievance process culminating in a non-binding mediation process restricted to employee discharges

During a January 17, 2017 bargaining session, Respondent tendered a proposal covering employee discipline. Tr. 39: 18–22; 186: 22 to 187: 14; 554: 3–14; GC Ex 4; Respondent Ex. 1 at RESP 003561–003563. Among the substantial departures from the longstanding language appearing in Article 22 of the previous contract were provisions: 1) deletion of "just cause"

language;[3] 2) excluding any discipline short of discharge from "the full grievance and arbitration procedure"; 3) placing limits on employees' right to union representation at investigatory interviews; 4) allowing Respondent to rely on final written warnings for four years; and 5) permitting Respondent to apply progressive discipline "where appropriate," and to skip steps for certain enumerated infractions, as well as "any other incident [or event] that the Hospital deems as a major [or egregious] infraction of employee conduct or work rules."

Then, on March 29, 2017, Respondent presented a grievance and mediation proposal that provided that any issue arising under the contract could at most be grieved to mediation that would not be final or binding. Tr. 51: 9–13; 201: 3–5; 568: 8–19; GC Ex. 11; Respondent Ex. 1 at RESP 003601–003603. This proposal made no specific reference to employee discharges, but substantially tracked the language of Respondent's January 17 discipline proposal, other than replacing "mediation" with "the full grievance and arbitration procedure" in setting the outer boundary of the proposed process.[4] See GC Exs. 4 and 11.

Respondent's proposal also drastically curtailed the Union's ability to file lawsuits alleging violations of the contract. Tr. 90: 6–11; 124: 2–3. Under Respondent's proposal, lawsuits were prohibited unless the alleged breach involved a provision subject to mediation. Tr. 123: 6–11. As described above, the discipline proposal, to which Respondent still adhered, provided that "documented verbal, written, and final written warnings are grievable but not subject to mediation." Tr. 123: 2–3. Taken together, these proposals meant that disputes related

[3] This was consistent with Respondent's proposed deletion of "for cause" from the management rights language regarding discipline.

[4] The no-strike provision that Respondent proposed the same day refers to "the grievance and arbitration procedure" in four places. GC Ex. 12.

to disciplinary actions short of discharge would not be subject to mediation or be litigable in court.[5]

At the hearing, Bernstein testified on direct examination that the Union never countered Respondent's dispute resolution proposal until September 5, 2018. Tr. 568: 20 to 569: 3. Other evidence in the record contradicts Bernstein's claim. For instance, Respondent's bargaining notes show that the Union orally countered the grievance and mediation proposal as early as the very next session on April 5, 2017. Respondent Ex. 3 at RESP 000181–000203.[6] Specifically, the Union challenged the idea of mediation instead of arbitration, and countered that the parties should maintain their longstanding grievance and arbitration procedure. Id. at 000184–000187. Respondent's bargaining notes also establish that Respondent considered this a counterproposal; Bernstein specifically identified it as the Union's position during a recitation of still-open terms at the beginning of the May 16, 2017 bargaining session. Id. at RESP 000220–000230.

As for why Respondent insisted on an upheaval of the parties' longstanding procedure, Bernstein offered only that it was in part because the Union had prevailed on a single arbitration, and because his client "prefers this approach."[7] R Ex. 3 at RESP 000185.

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[5] At the hearing, Respondent referenced Section 301 as an avenue to seek redress for contract violations .

[6] This was one of several times throughout the hearing where it was apparent that the Union witnesses' testimony about matters in dispute was more consistent with Respondent's bargaining notes than that of Respondent's own witnesses. And, unlike Respondent's witnesses, the Union witnesses were also internally consistent, giving the same answers on cross as they had on direct. Counsel for the General Counsel notes that the Board has held that evasiveness and inconsistency regarding crucial issues warrants adverse credibility resolutions. See *The Union*, 251 NLRB 1031, 1038 (1980); *Weather Tec Corp.*, 238 NLRB 1535, 1555 (1978).

[7] Prior to the negotiations at issue here, Godoff had never been involved with a contract in which Section 301 of the Act might be the sole recourse for a breach of its terms. Tr. 121: 10–16. As it turns out, even Section 301 would not be available to the Union in cases of discipline other than discharges. Tr. 122-23; GC Ex 17.

3. Respondent proposes deletion of the longstanding union security clause

At the same March 29, 2017 session, Respondent handed the Union a document identified on its face as a proposal based on the union-security clause contained in Article 2 of the previous contract; it called for deletion of the provision in its entirety.[8] Tr. 51: 13–15; 200: 25 to 201: 2; 602: 23 to 603: 4; GC Ex. 10. Respondent claims that it proposed to delete union security because the specter of dues deduction had been a "hindrance to recruiting [solid candidates]" for unit positions, and that unit employees had "expressed complaints and concerns about that obligation." Tr. 574: 21 to 575: 10.[9] At bargaining, Bernstein also explained that a third reason—which he described at the table as "philosophical"—involved Respondent's belief that it should not be "compelling employees to pay anything as condition of [employment] when it comes to rendering fees to a third party."[10] Respondent Ex. 3 at RESP 000181–000182.

At the April 6, 2017 bargaining session, the Union countered that it was rejecting the Respondent's proposals to delete union security and dues check-off. Respondent Ex. 2 at 003771. On April 6, 2017, Respondent issued another bargaining brief. Tr. 202: 15–24; GC Ex. 16. In this one, Respondent claimed its objection to a union security provision was based on Respondent's belief "that employees should have a choice as to whether or not to pay union dues, and should not be fired, as the union is insisting, if they choose not to pay dues." GC Ex. 16 at p. 2. In January 2018, Respondent went one step further and stopped dues deductions. Tr.

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[8] Respondent also proposed to delete the parties' longstanding dues remittance provision. Respondent Ex. 1 at 003598–003600.

[9] Respondent neither called any witnesses nor produced any documents in support of these proffered justifications.

[10] Bernstein appeared to allude to this "philosophical" justification during his hearing testimony: "and we did talk about the importance of choice, giving employees the opportunity to choose. . ." Tr. 575: 7–12.

130: 21 to 131: 8; 155: 8–12. Respondent's only explanation was that it felt it was within the law. Tr. 131: 12–15.

On September 5, 2018, the Union presented a counterproposal on union security. Tr. 83: 6–8; 145: 1–2; 214: 21–23; 575: 23–25; GC Ex. 24. The Union had pulled the language from a collective-bargaining agreement between the Union and a hospital in Boston also owned and managed by Respondent's parent company, UHS. Tr. 84: 3–11. In its September 7, 2018 bargaining brief, Respondent told the Unit that the Union was forcing the employees to pay dues for "slipshod" work. GC Ex. 26. The brief went on to state that the Union had "accus[ed] the Hospital of 'hating the union' when all the Hospital was doing was fighting for the freedom for employees to choose dues and choose membership." Id.

4. Respondent proposes a broad no-strike provision that would require the Union to waive employees' statutory rights

In addition to proposing the deletion of just-cause, arbitration, and union security from the contract, and tendering a management rights provision substantially identical to its initial proposal, Respondent also proposed sweeping revisions to the parties' no-strike provision at the May 29 session.[11] This proposal included language prohibiting, among other things: picketing; use of economic weapons in response to contract violations; or use of economic weapons in response to any violation of federal law, federal statutes, Board law, or unfair labor practices that Respondent may commit during the life of the contract. Tr. 51: 3–9; 200: 22–24; 560: 14 to 561: 20; GC Ex. 12; Respondent Ex. 1 at RESP 003610–003611.

[11] In Godoff's view, Respondent's March 29, 2017 proposals were "a clear announcement by management that they would never enter into an agreement with [the Union]." Tr. 126: 20–26.

The Union explained to Respondent on March 29 that a contract containing all of these terms would strip the Union's ability to secure or enforce employees' rights. Tr. 51: 16–25. The Union rejected outright and did not counter Respondent's no-strike proposal because the Union felt that any no-strike proposal, in conjunction with Respondent's grievance and mediation proposal, would deprive the Union of any weapons to contest unfair labor practices, federal law violations, and contract violations. Tr. 120: 3–10.

On June 7, 2018, Respondent withdrew its no-strike proposal. Tr. 71: 14–18; 564: 2–16; GC Ex. 21. Bernstein admitted at trial that, at the time Respondent withdrew its no-strike proposal, it was aware that the Union had filed an unfair labor practice charge alleging violations based on the combination of proposals Respondent had presented to the Union. Tr. 564: 12–16.

5. Respondent withdraws a proposal providing for binding arbitration and replaces it with a less favorable proposal limited to mediation.

Respondent's January 17, 2017 proposal on discipline, described above, had incorporated procedures for resolving disputes with respect to discipline. Tr. 82: 23–25. During discussion of these provisions at that January 17 session, Respondent took a position that arbitrations are only appropriate for terminations and that all other disciplines may be grieved, but not arbitrated.[12]

[12] Bernstein initially asserted on direct examination that the arbitration provision in Respondent's discipline proposal was a mistake or "error" and "inaccurate," but when pressed on cross-examination he admitted that it was in fact not a mistake and the parties actually discussed the arbitration provision when Respondent introduced the discipline proposal. *Compare* Tr. 554: 18 to 556: 18 *with* Tr. 597: 5 to 599: 6; 608: 24 to 609: 23; Respondent Ex. 3 at RESP 00107.

Specifically, Bernstein testified:

A. I remember discussing the notion of discipline, the various stages of discipline ending in termination, and I do think, and the minutes seem to suggest that, that there was discussion about whether arbitration should be available.
Q. For final warnings as well as termination?
A. Yes, yes.
Tr. 609: 12–17.

Tr. 42: 11 to 44: 4; 118: 22 to 119: 3; 188: 4–15; 189: 7–13; GC Ex. 46; Respondent Ex. 3 at RESP 000098–00112.

> STEVE BERNSTEIN: Yes in patient care areas then there's a catch all line filing paragraph starts Line 47. Whether attendance related or performance is proposal to combine. Put all in one category. Intent to propose language for discharge stage, our experience we think arbitration is for end process not along the way.
>
> ANTOINETTE TURNER: Anything other than termination
>
> STEVE BERNSTEIN: They are grievable, not to arbitrate unless result in termination. Line 81, 83 employee can submit written rebuttal. Grievance is preserved from timeliness.
>
> Respondent Ex. 3 at RESP 00107.

The Union objected at this bargaining session to Respondent's limitation of arbitrations to terminations, especially in light of Respondent's deletion of the for-cause language in the management rights proposal. Tr. 44: 1–16; 189: 23 to 190: 12.

On January 31, 2017, the Union presented a counterproposal to Respondent's article on discipline. Tr. 46: 6–7; GC Ex. 6; Respondent Ex. 2 at RESP 003746–003749. The Union proposed, among other things: (1) that employees be notified within a certain period of time of discipline; (2) that Respondent produce the work rules it references in its discipline proposal; and (3) for final written warnings to be arbitrable in addition to the discharges that Respondent had already proposed would be subject to arbitration. Tr. 46: 18–25; GC Ex. 6. On the same day, Respondent presented a counter in return. Tr. 45: 12–17; GC Ex. 7. The only concessions Respondent made to the Union's counter were to agree: to some notification to employees of the discipline; to a deadline by which discharged employees must be paid; that employees would not be disciplined in public; and to strike the catch-all provisions regarding conduct exempt from progressive discipline. Tr. 45: 12–17; GC Ex. 7. The parties again discussed arbitration with respect to discipline at this January 31, 2017 bargaining session. Tr. 118: 22 to 119: 3. On April

5, 2017, Respondent presented a revised discipline proposal. Tr. 54: 20–23; GC Ex. 14. This proposal still included language providing that discharges were subject to arbitration. Tr. 56: 8–10. The Union pointed out to Respondent this was inconsistent with the language in the March 29 dispute resolution proposal. Tr. 56: 4–10; 556: 6–18. Respondent did not resolve this discrepancy at the April 5 bargaining session. Tr. 56: 15–16. This discrepancy had not arisen until Respondent proposed mediation on March 29; up until that point, the parties had been discussing whether to expand the scope of the arbitration provision in Respondent's proposed discipline article. Tr. 118: 1–9.

On May 25, 2017, Bernstein e-mailed the Union a revised discipline proposal, along with its grievance and mediation proposal, proposing for the first time that discharges only be subject to non-binding mediation, not arbitration. Tr. 56: 18–24; 58: 13–25; 556: 16–18; 557: 2–20; GC Exs. 15 and 17. This backpedaling infuriated the Union; Godoff believed it further demonstrated Respondent's lack of intent to reach a new contract. Tr. 119: 13–16. Respondent's justification for its regressive bargaining is a nonsensical claim that, because the initial arbitration proposal was in a "disciplinary proposal" and not a "dispute resolution proposal," Respondent never intended the word arbitration to be construed as any sort of dispute resolution. Tr. 559: 4–9.

On September 5, 2018, the Union presented Respondent with a grievance and arbitration proposal that, like the other proposals they tendered that day, had been lifted from contracts between the Union and hospitals in New York. Tr. 139: 22–23; 144: 11–13; 214: 6–20; GC Ex. 23. Respondent would not agree to any portion of the Union's grievance and arbitration proposal. Tr. 143: 15–21.

6. Seventeen months into negotiations, Respondent tenders a wage proposal giving Respondent nearly unlimited discretion to determine wages for every bargaining unit employee

On April 6, 2017, the Union made an initial wage proposal. Tr. 111: 7–18; 579: 25 to 580: 18; Respondent Ex. 2 at RESP 003780–3782. Consistent with the wage provisions in the parties' previous contracts, the Union proposed an across-the-board five percent increase for all unit employees. Tr. 111: 20–25; 580: 1–5.

Toward the end of the parties' October 6, 2017 meeting, Bernstein asked if the Union had heard anything to that point that would alter its initial wage proposal in advance of Respondent's initial proposal. Respondent Ex. 3 at RESP 000273. Bernstein said, "I think your proposal is pretty straightforward just a straight bump, I just want to be sure you're not going to change it." Id. After Godoff stated the reasons behind the Union's wage proposal, Bernstein said "it shouldn't surprise anyone that we're going to propose a new str[u]cture." Godoff conceded that the previous wage scheme was problematic because of discrepancies among departments, to which Bernstein replied, "I think we all owe it to whomever comes after us to be clear and make it easier to figure out." Id.

Seven months later, and over a year after receiving the Union's wage proposal, Respondent countered with one unlike any the parties had ever exchanged. Tr. 60: 12–13; 203: 10–12; 581: 18–23; GC Ex. 18; Respondent Ex. 1 at RESP 003641–003643. Respondent's wage proposal provided for a new compensation structure that incorporated a "market-based adjustment" for each employee, and merit wage increases for employees Respondent deemed deserving. Respondent did not intend to implement the merit scheme until August 2019, even though the bargaining unit had already gone without wage increases for a lengthy period of time. Tr. 60: 15–21; 203: 20–21; 204: 9–17. When Godoff expressed concern "that these employees

haven't had a raise since January 2015," Bernstein replied, "Yes, it's an unfortunate side effect to bargaining." Respondent Ex. 3 at RESP 000306. Respondent made clear at bargaining that it would not permit the Union to have any input in determining the new wage scales. Tr. 68: 1–8; 134: 3–8. Bernstein and Schmid told the Union that this proposal was not negotiable. Tr. 124: 20–22; 605: 23 to 606: 1. When Godoff specifically asked whether Respondent was going to at least negotiate the ranges from year to year, Schmid said, "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, people are going to be rewarded based on their individual merit." Respondent Ex. 3 at RESP 000307. In fact, the proposal on its face provides that "[t]he evaluation process and merit increase awards for bargaining unit employees shall follow and be incorporated into the same general merit criteria and process used for all non-bargaining unit employees at the Hospital." GC Ex. 18, at p. 1.

Respondent told the Union at bargaining that the merit wage increases would be based on the employees' performance evaluations. Tr. 66: 23–24; 132: 14–18; 204: 20 to 205: 6. The bargaining unit employees had not received performance evaluations in years, and the Union was unable to get any information from Respondent about how unit employees had most recently been evaluated.[13] Tr. 66: 24–25; 133: 21–24. Under this proposal, Respondent would retain sole discretion for evaluating employees, and its decisions would not be grievable—except possibly in cases where a performance review served as a basis for discharging an employee.[14] Tr. 67:

[13] Respondent claimed that its performance evaluations had already been completed for 2018 at the time of this proposal, thereby preventing a 2018 merit increase for unit employees. This representation was inaccurate with respect to the bargaining unit employees, because they had not received a performance evaluation in 2018. Tr. 114: 9–15.

[14] As described above, even if such cases were grievable, the Union would not be able to move them to arbitration.

14–24; 205: 7–9. The Union tendered a counter on May 21, 2018. It contained a provision stating that, if an employee gets a performance evaluation of meets expectations or higher, he or she would be guaranteed a certain merit increase; Respondent rejected this proposal.[15] Tr. 69: 20–24; GC Ex. 19. Respondent also told the Union that if an employee had a final written warning in his/her file, that employee would not be eligible for a merit increase at all. Tr. 67: 4–7; 132: 18–19. As described above, Respondent insisted in other proposals that final written warnings: 1) remain in employees' files for at least two years; and 2) would be grievable, but not subject to arbitration or mediation.

Respondent's wage proposal also provided for market-wage adjustments to be implemented upon ratification of the contract. Tr. 61: 3–5; 205: 17–22; GC Ex. 18. When its proposal was first tendered, Respondent only provided the high and low ends for each range of the market-based wages, and did not provide any specificity for the Union or the bargaining unit to analyze this proposal.[16] Tr. 135: 16–24. Respondent proposed to base bargaining unit wage rates on employees' overall experience, not just on their time at George Washington University Hospital. Tr. 61: 22 to 62: 5; 136: 1–14; 604: 24 to 605: 9. Like merit pay, the concept of a market-wage adjustment was new to the parties' bargaining relationship. Tr. 62: 9–11.

Although Respondent had been in receipt of the Union's wage proposal for over a year, it was unable and/or unwilling in May 2018 to provide a complete proposal containing enough information for the Union to evaluate the terms. Despite referencing its proposal as far back as

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[15] Respondent's wage proposal also included shift differential changes, and lump sum bonuses for quality performance, high attendance, etc., that were agreeable to the Union. Tr. 112: 19–24.

[16] In August 2018, Respondent gave the Union a yearly break-down of the market-wage rate proposal. Tr. 138: 14–15.

October 2017, Respondent was not even able to provide the appendix to the proposal until the afternoon of May 21, 2018, three days after it tendered the proposed language. As the Union repeatedly pointed out at the table, the proposal itself was almost useless absent any specific numbers. For instance, when Bernstein suggested raises could be implemented soon if the Union agreed to the proposal, Godoff said "I have no idea what you are proposing, I have no idea what you are talking about when you say this and what the numbers are." Respondent Ex. 3 at RESP 000306. Then, when Respondent finally provided the appendix, it contained only ranges of pay, without reference to where any individual unit employee might fall.

The Union pointed out that Respondent's proposal lacked sufficient information for the Union or the unit to evaluate it. Nonetheless, Respondent adamantly refused the Union's repeated requests for additional documentation. Godoff told Bernstein and Schmid that "every employee is going to want to know where they are going to fit. . . if you don't tell us, this is not really a proposal." Respondent Ex. 3 at RESP 00322. Schmid responded, "We are making a proposal, and we will give you examples but not individual people." Id. When the Union requested something at least showing how Respondent intended to apply the scheme to hypothetical unit employees, Respondent said it would "make a grid." When Godoff pointed out that it would be a "simple enough task" to provide something showing what each classification would be paid based on years of experience, Schmid refused to commit to even that: "We're going to give you some examples, just not every single year."[17]

After a few minutes of spinning its wheels trying to get more information about what wages Respondent was proposing to pay, the Union raised questions about the "objective

[17] By the time the parties met to bargain on July 31, 2018, Respondent had modified its position: it was willing to provide its proposed wage rate for each unit employee, conditioned on the Union's execution of a non-disclosure agreement. Respondent Ex. 3 at RESP 000329.

criteria" on which Schmid claimed Respondent had based its numbers in the first place. Godoff said to Schmid, "Supposedly you are using some kind of a market criteria, we want to see what you are using to determine the market." Id. at RESP 000323. Schmid's response: "We are using our information and knowledge of the market." Despite again claiming Respondent was relying on "objective criteria," Schmid refused to provide any relevant information, and even went so far as to suggest none existed: "It is based off the market, we're not using a study. . . We're using our knowledge of the market."

Despite the Union's making clear that it could not accept Respondent's wage proposals without additional information or input, Respondent continued to adhere to its own position, without justification or explanation. When the parties met on July 31, 2018, Schmid told the Union's bargaining team that Respondent intended to apply a market wage to all new employees based on their previous experience, and to apply the merit scheme from then on. Schmid insisted that Respondent wanted to give higher wage increases to those employees who Respondent considers higher performers. Tr. 207: 4–16. The Union stated that a wage scheme based on merit was "not anything the union is looking to do." Respondent Ex. 3 at RESP 000331. Bernstein and Schmid argued that across-the-board wage rates prevented high-performing employees from being recognized. The Union made clear that it would never oppose Respondent going beyond the contract to compensate performance, but that it did not believe wage rates should be "based on something so subjective." In response, Schmid said, "Well, that's not the way it works." The Union reiterated its objection to tying wage rates to "something so easily abused as merit," and noted that Respondent's merit determinations would

not be grievable.[18] At the October 10, 2018 bargaining session, the parties again discussed Respondent's wage proposal; Respondent was unchanged in its wage position. Tr. 216: 11-13.

7. Through the end of the final bargaining session in October 2018, Respondent adhered to its original proposals on management rights, grievance, discipline, union security, and wages.

By the end of the parties' October 11 bargaining session, the parties had agreed on very little, and Respondent had refused to make any substantial changes to the initial proposals the Union had made clear it could not accept as written. Respondent had withdrawn its no-strike proposal, but had not indicated any willingness to move off of its initial positions on management rights, discipline, dispute resolution, union security, or wages.

8. On October 12, Respondent told unit employees that the Union is preventing employees from receiving raises.

In what would turn out to be its final bargaining brief, Respondent went so far as to: 1) blame the Union for the employees not receiving a wage raise; 2) announce that long overdue dietary backpay checks would be issued the following week; and 3) make the blatantly false claim that the Union had never asked for information about Respondent's wage proposal. GC Ex. 27. The brief also told employees that, under Respondent's proposal, everyone in the unit would receive a wage increase and many employees would receive significant increases up to 33%. Tr. 216: 14–23; GC Ex. 27. Among the other information conveyed in this brief was that Respondent intended to issue backpay checks on October 19 to compensate certain dietary

[18] During the same session, a member of the Union's bargaining team expressed frustration with the pace of these negotiations: "I really can't figure out why it's taking so long, maybe longer sessions, maybe more dates, but 15 months an inordinate amount of time as far as I'm concerned to come to an agreement." Schmid responded, "it hasn't been inordinate for us."

employees for the shortages the Union had pointed out more than a year earlier, and about which they had spent seemingly endless hours at the table discussing.

Finally, the brief also stated:

> After months of silence on the Hospital's wage proposal, the union finally asked for further information about it. The union could have had this information three months ago and they could have had a counter proposal ready to give to the Hospital. Instead, we have still not moved forward on wages because the union is just beginning to look at them.

GC Ex. 27. In conjunction with this baffling and demonstrably false claim, Respondent laid out what appeared to be a comparison between the parties' wage proposals. The brief explained that, under Respondent's proposal: 1) all employees would receive an immediate increase of at least 2% upon ratification of the contract; 2) many employees would receive "significant increases" up to 33%; 3) "the increases taken all together average approximately 9.7%"; and 4) more merit increases and lump sum bonuses would follow. As for the proposal the Union had tendered eighteen months earlier, the brief claimed that: 1) "the vast majority of employees would receive less than a one dollar raise;" and 2) it provided no personal performance rewards or bonuses. Nowhere in the brief did it state that Respondent had refused to consider higher across-the-board increases or that Respondent's proposal reserved to itself unfettered and non-grievable discretion to determine each unit employee's wage rate. As described in the following section, Respondent withdrew recognition two weeks later upon receipt of a disaffection petition.

D. Respondent Withdraws Recognition of the Union on October 26, 2018

1. Between March 11 and October 25, 2018, certain employees sign a petition indicating they no longer wish to be represented by the Union.

On or around March 11, 2018, a disaffection petition started circulating among the unit employees. EVS employees Eugene Smith and Hardie Cooper were at the forefront of this anti-

union campaign, though their testimony failed to establish the original source of the blank petition. Cooper credits Smith with starting the petition. Tr. 393: 7–8. Smith, however, insists he got it from a female employee who at the time worked in the kitchen. Tr. 400: 4–8. After she gave him "a copy that she had" of the unsigned petition, Smith approached other unit employees about signing it. Tr. 402: 10–12. According to Smith, "everybody wanted to sign it," including one employee who said she wanted to be the first to sign, and "grabbed it out of [Smith's] hand." Tr. 404: 3–6.[19]

Nonetheless, seven months into their efforts to obtain signatures from at least half of the unit employees, the petition had only been signed by about a third of the unit. See R Ex 7. But between October 12—when Respondent issued the bargaining brief blaming the Union for holding up raises—and October 25, more than two dozen more employees signed.[20] This burst of signatures followed the longest dry spell reflected on the petition, as no one appears to have signed it between September 11 and October 12. Believing he now had at least half of the employees he believed to comprise the unit, Smith presented the petition to Respondent's CEO Kim Russo. After Smith handed it to Russo, she shook his hand, thanked and congratulated him for what he did, and told him she knew it had not been easy to do. Tr. 423: 7–17.[21]

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[19] The record is unclear as to whether Smith had already made copies of the blank petition he received from the kitchen employee, or if, instead, he actually received dozens of blank copies in the first place.

[20] This dramatic increase in signatures also coincided with Respondent issuing backpay checks on or about October 19 to the dietary employees whose underpayment the Union had identified over a year earlier. Prior to October 20, three dietary employees had signed the petition; nine more signed it over the next five days. See Respondent Ex. 7.

[21] Although Smith was on the clock, he had received supervisory permission to take the petition to Russo's office, where he had to "wait a while" before meeting with her. Tr. 414: 1–8; 422: 21–25.

2. After unit employee Eugene Smith delivers the disaffection petition to CEO Kim Russo, Respondent evaluates the petition by verifying signatures of the signers Respondent considered part of the bargaining unit.

Schmid admitted that she learned of the disaffection petition from EVS assistant director Rhonda Evans, sometime around "July, August, September" of 2018 . Tr. 224: 3–14; 228: 3–11. While Schmid denied learning previously about the particular disaffection petition circulated by Eugene Smith, Respondent had been anticipating the possibility of such a petition since the first few weeks of negotiations. See GC Ex. 36.[22] In a December 11, 2016 e-mail to the unit employees' supervisors—and Respondent's counsel—human resources manager Alicia Brill wrote:

- There were two days of bargaining with the union last week
- This is a brief which shares what happened
- The brief was distributed to Dietary and EVS management on Friday, and management conducted huddles with respective staff to keep them informed.
- You need to stick to the brief if asked questions by your staff and refer any questions you receive to HR
- ***Remember – do not review, discuss or sign any petition, or anything that looks like a petition with anyone. Your doing so will disrupt the integrity of the process***.
  Feel free to put your own "stamp" on these talking points.

GC Ex. 36 (emphasis added). After almost two years of misrepresenting to employees the substance of the fruitless contract negotiations, the moment arrived that Respondent had been gearing up for since before Brill sent that e-mail. By the time Smith had gathered the last few signatures, Schmid—who is based out of King of Prussia, Pennsylvania—was already at the hospital. On October 24, 2018, Schmid had received a call from Rhonda Evans, letting her know

[22] Respondent claims privilege as to the portion(s) of this document that it redacted prior to production. Tr. 224–226.

that questions employees had been asking at huddles made her believe that a petition was going to be presented to Respondent imminently. Tr. 228: 17–22; 229: 5–11.

Immediately after receiving the call from Evans, Schmid called Bernstein and asked him to fly to Washington D.C. to the Respondent's campus from Florida. Tr. 230: 6–14. Schmid boarded a train from Pennsylvania to Washington, D.C. the next morning, October 25. Tr. 228: 23 to 229: 13. Around 3:30 that afternoon, Kim Russo called Schmid and told her that the petition had been received. Tr. 228: 12–16. Schmid had the petition in hand at around 4:30 p.m. Tr. 230: 15–18. By 8:00 that evening, Respondent had either validated or dismissed all of the signatures on the petition. Tr. 235: 17–19.

Before Schmid received the petition, none of the documents necessary to validate the signatures had been gathered. Tr. 229: 19–23; 230: 19–23. Upon receipt of the petition, Schmid asked human resources to run something called a Lawson report. Tr. 231: 4–9; 510: 18–19; Respondent Ex. 8. The Lawson list is a snapshot in time and only shows employees' information as of the day the list is pulled. Tr. 232: 18–22. The information appearing on a Lawson list comes from personnel action forms ("PAFs") that human resources staff enter into the Lawson system. Tr. 232: 23 to 233: 4. PAFs are intended to document certain changes in status for each employee. For instance, an employee who has moved from part-time to full-time, or from a non-unit per diem position to a bargaining unit position, should have a PAF in his or her personnel file showing each such change. Tr. 233: 4–5. Schmid testified that PAF forms exist for the purpose of updating the Lawson system to keep an accurate record of employee status. Tr. 233: 24 to 234: 1.

Schmid testified that, after she obtained the Lawson report she had requested, she also gathered a mid-month list of all employees working for Respondent. Tr. 517: 3–21; Respondent

Ex. 9. Schmid had human resources pull documents from the employees' files, such as offer letters and W-4s, in order to compare signatures to those on the disaffection petition. Tr. 521: 9–13; Respondent Ex. 10. With the assistance of Respondent supervisors Marcia Levinson and Elzbieta Kmiecik, Schmid validated 81 signatures on the disaffection petition. Tr. 231: 12–19; 235: 20 to 236: 5; 521: 20 to 522: 6. Respondent struck from the petition any employee who was listed as a per diem employee on the mid-month list. Tr. 231: 23 to 232: 3; 523: 5–9. Respondent did not strike employees from the petition who were in their probationary period. Tr. 235: 10–16.[23] While Respondent contends that each employee counted was a unit employee on October 25, Respondent concedes that it did not validate whether each employee it counted was part of the unit at the time they signed the petition. Tr. 526: 14–18. By Respondent's count, the unit consisted of 156 employees on October 25. Tr. 230: 18–19; R Ex. 8.

3. By e-mail the following morning, Respondent withdraws recognition, cancels all future bargaining sessions, and revokes the Union's access rights.

By e-mail sent at 7:59 a.m. on October 26, 2018, Respondent withdrew recognition of the Union. GC Ex. 28. The Union responded by telling Respondent that the Union was still willing and able to bargain on the previously scheduled dates of October 31 and November 1, 2018. Tr. 146: 21–23; GC Ex. 28. Respondent sent a reply reiterating its position. Tr. 146: 25 to 147: 1. When Respondent withdrew recognition, the parties had been negotiating a successor contract for nearly two years, and had reached tentative agreements on only four items: 1) partial

[23] Of the 81 signatures counted by respondent, at least 14 were from employees who had been hired within the previous two months; 6 of those 14 had been employed by Respondent for less than two weeks. A total of 37 signatures were from employees who were hired after the expiration of the previous contract.

preamble language; 2) a $50 uniform allowance; 3) a job postings proposal; and 4) a non-discrimination proposal. Tr. 73: 6–9.

E. After Withdrawing Recognition, Respondent implements changes to working conditions, announces these changes to unit employees, and tells employees that a benefit is new to them because the Union had not negotiated it for them.

On November 1, 2018, Respondent issued a memo to employees, advising them that their wage rates, transit benefits, and compensation structure were going to be changed. Tr. 236: 17–23; GC Ex. 29. Respondent opened the memo with: "Welcome EVS and Dietary Teams! We are delighted to welcome you to the GW Hospital team of non-union employees." A bit further down, Respondent wrote: "FIRST, WE WANT TO GIVE YOU AN UPDATE ABOUT THE ROLLOUT OF THE NEW PAY RATES AND BENEFITS YOU WILL NOW HAVE AS A NON-UNION EMPLOYEE:"

> Monthly Commuter Subsidy
>
> This benefit is added onto your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it. Moving forward, you will receive this benefit as follows, **starting with the pay period beginning November 11, 2018:**
>
> **Full-time: $100 per month**
> **Part-time: $50 per month**
>
> …
>
> **Pay**
>
> In the next few weeks, we will be transitioning you **to market-based pay rates** (which take into account your years of experience) for your job classifications. **Many of you will see significant increases, and everyone will receive at least a 3% increase in their pay.**
>
> Additionally, in July, all former bargaining unit members will also be eligible for an **additional increase – a merit based pay increase** determined by your performance evaluation.

GC Ex. 29 (capitalization and boldface in original).

Respondent admits in its Answer to the First Amended Consolidated Complaint that it both announced and made the changes described in the November 1 memo. GC Ex. 1-EE at paragraphs 9(a) and 10:

> Respondent admits only that on or about November 1, 2018, it announced its intent to transition to market-based pay rates and a merit-based pay program and that it implemented a monthly commuter subsidy beginning the November 11, 2018 pay period, and that it did so without affording the Charging Party an opportunity to bargain over those issues.
>
> GC Ex. 1-EE at paragraphs 9(a) and 10.

In addition to the above admission, the unit employees who testified in this matter admitted that they received a pay raise around November or December 2018. Tr. 285: 23 to 286: 3; 359: 24 to 360: 4.

F. Hearing Testimony of Unit Employees Selected by Respondent to Explain Their Reasons for Signing the Disaffection Petition.

1. Eight employees who signed the disaffection petition

William Barnes claimed that he signed the disaffection petition because he was a hard worker who did not have any problems, and therefore did not need a union representative. Tr. 280: 17–20.

Mary Collins testified that she signed the disaffection petition because she felt like the Union was not accomplishing anything and that bargaining got out of hand. Tr. 298: 17–25. Although Collins initially testified that she did not want to pay Union dues to get nothing in return, she ultimately admitted that at the time she signed the disaffection petition, she was not paying dues. Tr. 299: 9–14; 304: 25 to 305: 9. When pressed on cross-examination, Collins also admitted that she ultimately signed the disaffection petition because she had been waiting to get a pay increase in bargaining, and, because the Union was not successful at getting a new contract, she had not gotten a raise:

> Q. So you knew that the Union had been trying to get a contract from 2016 all the way through 2018. Correct?
>
> A. Yes.
>
> Q. And you were frustrated, as you said, because all this time waiting to try and get better pay and nothing had happened. Correct?
>
> A. Yes.

Tr. 310, l. 18–24, p. 311, l. 1.

Angelica Claros testified that she was hired in August 2018. Tr. 312: 11–12. Claros was a probationary employee at the time she signed the disaffection petition. Tr. 325: 19–24. She did not attend any of the bargaining sessions. Tr. 318: 9–11. Claros testified that, at some point, some unidentified people at work asked her whether she wanted a union. Tr. 313: 21–22; 314: 7–9; 320: 21–23. Claros's testimony has minimal probative value. Claros did not attend any bargaining sessions, was a brand new employee, and had no experience with the Union at any time during her employment with Respondent.

Noel Reyes testified he has worked for Respondent for about 16 years. Tr. 331: 6–13. Reyes signed the disaffection petition on July 3, 2018. Tr. 331: 7–17. Reyes testified that he signed the disaffection petition because the Union wasn't doing anything for him. Tr. 333: 12–15. On cross-examination, Reyes explained that from 2003 through 2016, he received a wage raise secured by the Union each year but that, after the collective-bargaining agreement expired, he had not received a raise for two years. Tr. 341: 4–13. He explained that the lack of raises after 2016 was what he had meant when he said that he felt the Union was not doing anything for the employees:

> Q. [by Mr. Godoff] Okay. But you also knew that starting in 2016, the expiration of the old contract, nothing had happened for two years. Correct?
>
> A. Yes.

> Q. Two years the Union had done nothing for you. Correct?
>
> A. Have done nothing – about that. Because that I know they were – I mean, they didn't have any contract. That way the Union didn't do anything for us.
>
> …
>
> Okay. We didn't have any raise during those two years, because we knew, I mean, that they didn't have any contract.
>
> Q. I completely understand. And you concluded the Union hasn't done anything, right?
>
> A. Yes.

Tr. 341: 14–17; 342: 4–9.

Vivian Otchere was hired in 2012. Tr. 344: 12–16. She claimed that she signed the disaffection petition because the Union did not answer her questions and because she felt like she was protecting her own job. Tr. 345: 19–25. But, like the other employees, Otchere also testified that she did not get a raise from 2016 until December 2018, after the Union was no longer the bargaining representative. Tr. 359: 18–25. She testified that when she was presented with the disaffection petition by "someone," she was told that if she signed she might get a wage raise. Tr. 360: 17–19.

Lewis Bellamy testified that he has been working for Respondent since 1996. Tr. 366: 14. He said he signed the disaffection petition because employees were "getting no results. We hadn't had a contract in two years." Tr. 367: 20–21. Bellamy did not attend bargaining personally, and relied on his coworkers for his impressions of what was happening at bargaining. Tr. 370: 19 to 371: 1. Bellamy testified that the employees had not had a raise for a while, and that he thought the wage raise proposals were less than wages from the previous contract. Tr. 368: 9–15. He also testified that he signed the disaffection petition because "I'm not getting any money." Tr. 368: 15.

Tsedale Benti started working for Respondent in March 2012. Tr. 447: 17–21. She testified that she signed the disaffection petition because she had not received assistance from the Union with a previous disciplinary issue and a dispute with management over classes, but also because she did not receive a wage raise. Tr. 449: 12 to 450: 16; 455: 22 to 456: 2. Regarding her wage raises, Benti admits that she received raises prior to 2016, but that these stopped when the contract expired. Tr. 456: 2–15: 457: 4–16. She was aware that her raises stopped because of bargaining issues between the Union and Respondent. Tr. 457: 13–18. She did not attend any of the bargaining meetings and did not want to know anything about bargaining because she only cared about her wage raises. Tr. 457: 19–25.

Freddie Ard first worked for Respondent in 1986, left to work somewhere else, and returned in 2016. Tr. 465: 21 to 466: 2. He signed the disaffection petition "to get a better benefit." Tr. 467: 9–11. Ard testified that he had come back to Respondent in order "to get a pay increase, but it was a pay lower." Tr. 468: 4–5. He testified that when he came back in October 2016, he was told that he would get a pay increase to $13.95 or $13.98 after his first 90 days. Tr. 476: 12–18. However, Ard's first 90 days were not completed until after the collective-bargaining agreement had already expired. Tr. 477: 6–12; GC Ex. 30. Because the parties were still bargaining over a successor agreement, Ard did not receive the increase he had expected to get upon his return. Tr. 476: 24 to 477: 1.

2. The two employees who led the anti-union campaign

Hardie Cooper was hired around 2012. Tr. 374: 20–24. Cooper and fellow EVS employee Eugene Smith started the disaffection petition, and led the efforts to get half of the unit to sign. Tr. 383: 19–25. Cooper's testimony about his circulation of the disaffection petition was confusing and contradictory. For instance, he could not provide details about how many

signatures he gathered on the petition, or even how he and Smith knew when it was time to present the petition to Respondent. Tr. 390: 8 to 391: 25. As for why he wanted to get rid of the Union, Cooper testified that he had been unable to get in touch with the Union when it was still at the hospital, and that he wanted better pay. Tr. 376: 4–7; 387: 11–13; 395: 19 to 396: 6.

As described above, Eugene Smith was the employee who presented the disaffection petition to Respondent on October 25, 2018. He was hired in 2010. During his efforts to get coworkers to sign the petition, Smith represented to employees that they would get a wage raise and travel stipend. Tr. 430: 15 to 431: 13. Smith also made comments to unit employees in which he praised Respondent's CEO Kim Russo . Tr. 432: 13–23. Like Cooper, Smith gave confusing and contradicting testimony about the origin and circulation of the disaffection petition, particularly with regard to: 1) the origin of the petition; 2) why the effort took so long, and: 3) how the last few signatures were obtained. Tr. 400–419. Smith said he wanted out of the Union because he felt he was throwing money away by paying dues and getting nothing in return. Tr. 398–99.

3. Evidence of pre-hearing interrogations

In June 2019, Respondent questioned unit employees in preparation for litigation of this matter. The employees called to testify explained that they were summoned from their shifts and told to report to an administrative office, where they met privately with Respondent's outside counsel. At hearing, counsel for the General Counsel questioned the employee witnesses about whether Respondent had provided them with certain assurances before beginning those meetings.[24]

[24] In *Johnnie's Poultry*, 146 NLRB 770 (1964), the Board set forth certain conditions under which an employer may interrogate an employee about Section 7 matters. Among the conditions are securing the employee's voluntary cooperation and providing assurances that no reprisal will

Barnes testified that, when he met with Respondent's counsel to answer questions, he was not given assurances by Respondent's counsel that no reprisal would result from his cooperation. Tr. 282: 8–22; 283: 1–8. When counsel for the General Counsel moved to strike Barnes's testimony on the grounds that Respondent had not complied with the requirements prescribed in *Johnnie's Poultry*, Respondent countered by offering the document entered as Respondent Ex. 11. Titled "Johnnie's Poultry Statement," and signed by Barnes, it recites the required assurances and states that they were provided. However, Barnes's explanation as to his understanding of what he signed conflicts with the language on the document (which Barnes had in front of him on the stand by this point).[25] Barnes testified that he understood the document to be "about the Union and I was told I wouldn't get into any trouble, no matter how – what I said or what decision I make. And if I didn't want – if I didn't like what I had, I could leave." Tr. 295: 3–8.

Reyes also testified that he was not given any assurances that he would not be retaliated against when Respondent questioned him prior to the hearing. Tr. 336: 8–10. As with Barnes, Respondent entered a document purporting to be Reyes's attestation that he was in fact given the necessary assurances. Respondent Ex. 13. Tr. 342: 14 to 343: 12. However, although Reyes had already testified that he was not given assurances of no reprisal—testimony that directly contradicts the language on the face of the document—Respondent did not elicit any testimony as to his understanding of the document.

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result from the employee's responses or refusals to respond. These conditions must be met before the employer proceeds with the interrogation.

[25] Barnes' testimony does not contain any statements about when he was presented with the "Johnnie's Poultry Statement", whether it was before or after he was questioned by Respondent's attorney. Respondent attempted to cure this deficiency in its Johnnie's Poultry defense, by introducing the self-serving testimony of its attorney Paul Beshears.

Otchere offered confusing and inconsistent testimony in response to questions about whether and when she had received assurances from Respondent's counsel. Tr. 353–63. Otchere stated that she had signed the document, but indicated that she had already talked to Respondent's counsel for ten to fifteen minutes about why she had signed the disaffection petition. Tr. 363: 11–15. As with the other employees, Respondent entered Otchere's attestation, but failed to clarify the problems raised in her direct testimony. Respondent Ex. 14; Tr. 361–64.[26]

IV. ARGUMENT

A. Respondent Failed and Refused to Bargain in Good Faith for Nearly Two Years.

Section 8(d) of the Act defines the duty of parties to "[m]eet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." The duty to bargain in good faith under Section 8(d) requires both parties to negotiate with a "sincere purpose to find basis of agreement." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

Section 8(d) also "does not compel either party to agree to a proposal or require the making of a concession." Nonetheless, an employer is "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953), cert denied 346 U.S. 887 (1953) (emphasis in original). The "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation

[26] On re-direct after counsel for the General Counsel had moved to strike Otchere's testimony, Respondent's counsel asked Otchere only whether she had signed Respondent Ex. 14, who had been there, and on what date. No effort was made to allow Otchere to clarify her earlier contradictions.

does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989). The Board, in determining whether an employer bargained in bad faith, considers relevant factors including: unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid-Continent Concrete*, 336 NLRB at 259–260 (2001).

It is not any one of these factors that is most persuasive, and the Board uses the totality of a party's conduct to decide whether it is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO*, 334 NLRB at 487 ("Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining."). The Board will find bad-faith bargaining when "the employer will only reach an agreement on its own terms and none other." *Mid-Continent Concrete*, 336 NLRB at 259 (citing *Atlas Guard Service*, 237 NLRB 1067, 1079 (1978)). As discussed below, the record evidence establishes that Respondent bargained in bad faith, with no intent to reach a successor contract with the Union, throughout the period between November 2016 and October 2018.

1. Respondent engaged in surface bargaining by proposing and adhering to contract terms that would have left unit employees with fewer rights than they would have in the absence of a collective-bargaining agreement.

The Board will infer bad faith 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. *PSO*, 334 NLRB at 487–488. Proposals that require a union to cede its representational functions support this inference. *Regency Service Carts*, 345 NLRB 671, 675 (2005). Then, once a party has staked such an initial position, its "intransigence or insistence on extreme proposals" constitutes evidence of an overall intent to frustrate the collective-bargaining process. See, e.g., *Reichhold Chemicals, Inc.*, 288 NLRB 69, 71 (1988). See also, *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). As discussed below, Respondent tendered one proposal after another containing terms to which the Union could not have agreed without ceding every shred of its representational function, and leaving employees worse off than if they continued working without a new contract. And, by the time Respondent withdrew recognition, it had made no significant movement or concessions on almost every one of these predictably unacceptable proposals.

a. Respondent's Unlawful Combination of Proposals – No Arbitration and No-Strike.

The Board has repeatedly held that the combination of no-strike provisions, broad management rights clauses, and ineffective grievance and arbitration procedures is unlawful. In *Target Rock*, the Board found that an employer engaged in bad-faith bargaining when it simultaneously proposed and then maintained: (1) a broad management rights clause; (2) a no-strike provision; and (3) an ineffective grievance and arbitration procedure. 324 NLRB 373, 386–87 (1997) enf'd. 172 F.3d 921 (D.C. Cir 1998) (citing *San Isabel Electric Services*, 225

NLRB 1073, 1079 fn. 7 (1976)). In *PSO*, the Board found unlawful surface bargaining where the employer: 1) proposed and maintained a broad management rights clause; 2) engaged in regressive bargaining; 3) proposed no-strike clauses; 4) proposed the absence of a meaningful arbitration provision; and 5) proposed that the employer has the unfettered ability to discipline and/or discharge without regard to just cause. 334 NLRB at 488–89.

In *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005), the Board found that the employer engaged in unlawful bargaining when it proposed and maintained: 1) a management rights clause granting the employer unfettered discretion in the creation of workplace rules and regulations and in discipline and discharge decisions; 2) employer discretion as to seniority, leave of absences, merit wage increases, and subcontracting; 3) grievance and arbitration clauses that excluded from arbitral review the employer's use of discretion under the management rights clause; and 4) a no-strike clause that prevented any strikes, picketing, stoppage, sit-down, stand-in, slow down, curtailment or restriction of production, or interference with work or similar actions. The *Regency Service Carts* Board found a bargaining violation because, under the employer's proposals, employees and the union would be left with no avenue to challenge the employer's decisions with regard to a wide range of working conditions. In *A-1 King Size Sandwiches*, 265 NLRB 850 (1982) enf'd 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1034, the Board found bad-faith bargaining where the employer: 1) insisted on unilateral control over merit increases, scheduling and hours, layoff, recall, granting and denying leave, promotions, demotions, discipline, assignment of work outside the unit, and changes to past practices; 2) proposed a broad no-strike clause; and 3) excluded discipline and discharge decisions from the grievance-arbitration procedure.

The above line of cases makes clear that Respondent engaged in surface bargaining when it proposed its March 29, 2017 no-strike and grievance and mediation proposals, along with a management rights proposal substantially identical to its initial offering. In making and adhering to this combination of proposals, Respondent unlawfully insisted that the Union cede its abilities and duties to represent the unit employees.

Respondent's defense of its position on these proposals is threefold: 1) the proposals were not final; 2) Section 10(b) bars finding a violation based on the proposals; and 3) Respondent withdrew its no-strike proposal in an effort to get some sort of quid pro quo agreement on mediation from the Union. These defenses are not persuasive.

First, Schmid and Bernstein repeatedly insisted at the hearing that the proposals Respondent made at bargaining were serious proposals. Moreover, according to Respondent's own bargaining notes, Respondent represented to the Union that its March 29, 2017 proposals were "serious" and "urgent," and that Respondent was "serious about making changes." Respondent Ex 3 at Bates RESP 000175-000176. Second, Respondent did not withdraw its no-strike proposal until June 7, 2018—three months after the Union had filed a charge about it. Compare GC Exs 1-A and 1-B *with* GC Ex 21 (e-mail notifying Union of Respondent's withdrawal of its no-strike proposal). Had Respondent not been maintaining its no-strike proposal as of June 2018, it would not have needed to send an e-mail withdrawing its no-strike proposal. Accordingly, there is no Section 10(b) timeliness issue with regard to the allegations based on these proposals.

Finally, even if Respondent attempted to cure a violation of the Act by withdrawing its no-strike proposal, it does not change that Respondent was in violation of the Act throughout the period during which it had been unlawfully maintaining these proposals, i.e., from March 29,

2017 to June 7, 2018. Even assuming Respondent tried to cure its conduct by way of cease and desist, Respondent never attempted to cure the effects that its unfair labor practices may have had on the unit. Of the eighty-one signatures on the disaffection petition that Respondent validated, thirty were collected during the period Respondent continued to maintain its no-strike proposal. Had the Employer declined to count those thirty signatures as part of the disaffection petition, it would have been well short of the fifty percent showing it needed in order to lawfully withdraw recognition.

Accordingly, as set forth above, counsel for the General Counsel respectfully urges that Respondent's long adherence to the combination of its initial no-strike and grievance and mediation proposals constitutes surface bargaining in violation of Section 8(a)(5).

b. Respondent's Unlawful Combination of Proposals – Unfettered Wage Discretion, Broad Management Rights, No Arbitration, and No just cause for discipline.

Even after Respondent withdrew its no-strike proposal, the remaining combination of proposals still constituted surface bargaining. In *Kitsap Tenant Support Services, Inc.*, the Board found that an employer violated Section 8(a)(5) when it proposed and maintained the following combination of terms: 1) unfettered discretion in determining wages and benefits during life of contract; 2) discretion as to discipline and discharges; 3) a management rights clause that provided the employer with exclusive rights over promotion, demotion, suspension, discipline, layoff, discharge, making reasonable rules and regulations, deployment plan and policy, operational manual adjustments, and right to enforce its own policies and manuals; and 4) a grievance procedure under which the union could not challenge decisions covered under the expansive management rights provision. 366 NLRB No. 98, slip op. 8 (May 31, 2018).

The *Kitsap* Board found that these bargaining proposals "evinced bad-faith bargaining" because the employer had sought to "deny the union any role in determining wages and benefits during the life of the contract." Id. at 9. The compensation provision in the employer's final contract proposal provided that the employer "reserves the right to reduce the rates paid if the Department of Social & Health Services reduces the benchmark rate, the Legislature reduces funding, or changes to health care laws and contributions occur." Id. at 3. Under this proposal, the union would be entitled only to receive notice of any wage rate changes, not to bargain over proposed changes in wage rates. Id.

In *Kitsap*, the employer's proposals regarding discipline and discharge contained "no limits on [the employer's] right to discharge unit employees (other than those limits imposed by law)." Id. at 9. Utilization of the progressive disciplinary procedure would be entirely at the employer's discretion, as the proposed contract provided that the employer "may" follow a progressive disciplinary schedule, and the "step to be utilized and the degree of discipline to be imposed is [sic] solely within the judgment and discretion of [Kitsap]." Id.

Similarly, the management rights clause at issue in *Kitsap* provided the employer with the "sole and exclusive . . . right to promote, demote, suspend, discipline, layoff, or discharge employees." The clause also would have granted the employer the exclusive right to "make . . . reasonable rules, regulations, deployment plan and policy and operational manual adjustments" and to "enforce the employer's policies and Operations Manual." 366 NLRB No. 98 slip op. at 9. The Board found that this language would "grant to the [employer] unilateral control over work rules, policies, and other regulations, which would obviously also affect employee discipline." Id.

Finally, the contract proposed in *Kitsap* would exclude from the grievance procedure the employer's exercise of the extraordinarily broad discretion provided it under many of these proposed provisions. Id. The employer's proposed management rights clause provided that the rights established therein "shall not be subject to the grievance procedure or to dispute resolution procedure." Id.

In *PSO*, the Board found the employer had engaged in bad-faith bargaining even without insisting on a no-strike proposal. 334 NLRB 487 (2001). The Board found in *PSO* that the employer had made clear in bargaining "that it was determined to secure a contract that would allow it to make unilateral changes in terms and conditions of employment during the life of the agreement." Id. at 488. The *PSO* employer's proposals: 1) permitted the employer to "chang[e] from time to time for business reasons" employee benefits such as vacation days, holidays, medical insurance, leave time, and life, disability, and on-the-job accident insurance; 2) included an expansive definition of "just cause" which provided for virtually no limitation on disciplinary actions; 3) included a grievance procedure that did not permit meaningful arbitrable review; and 4) included an expansive management rights clause. Id. at 488–489.

"Business reasons" were defined in the *PSO* proposals as including but not "limited to costs, efficiency, technology, skills, experience, or to beat competition and gain new or hold existing customers." The Board found that this definition of business reasons would permit the employer virtually unlimited unilateral control over employee benefits. Id. The grievance and arbitration procedure in *PSO* limited arbitration decisions to situations where the "arbitrator may adjust the penalty only if the union is able to prove that the employer's decision was arbitrary and capricious, and not taken for the reasons and the facts stated." Id.

The management rights clause at issue in *PSO* reserved to the employer the following rights:

> [to] schedule employees' work times, locations and assignments; change job, assignments, and create new or 'blended' positions which represent a mix of old unit positions or completely new unit jobs and work; set and change performance criteria and standards to be used as measurement for the performance evaluation of employees, and based on such employment evaluation, assign, promote, demote, transfer, or lay off employees pursuant to business reasons; assign supervisors or other non-classified employees to perform any bargaining unit work as the employer determines necessary (but this right shall not be used to permanently supplant regular classified employees); develop, post, use, modify, and enforce a set of company rules, such as but not limited to working and safety rules; transfer, contract, or subcontract work, in whole or in part, to another employer or employers without restriction for business reasons; consolidate or move working crews between the employer and others, establish, create, or consolidate any work, work crews, or jobs permanently or on a temporary basis, and create new positions or eliminate existing positions; for business reasons, create work, abolish work, leave it the same, consolidate, transfer, idle, or downsize; select the equipment and processes to be used by employees including the introduction of new technologies which may or may not change the method of work or otherwise require permanent changes to the workplace and retraining or cross-training; and for business reasons, provide employees premium pay or a bonus above the wage rates specified in the agreement and to determine whether these shall be given, retained, modified or eliminated.

Id. The Board found the combination of proposals in *PSO* unlawful. The Board reasoned that the employer had "insisted on unilateral control to change virtually all significant terms and conditions of employment of unit employees during the life of the contract." Id.

The Board has found that an employer's attempt to retain unfettered discretion over wages frustrates the bargaining process. See *McClatchy Newspapers*, 321 NLRB 1386 (1996). In *Woodland Clinic*, 331 NLRB 735 (2000), the Board observed that "unlimited managerial discretion over future pay increases, without explicit standards or criteria, would leave the union unable to bargain knowledgeably on the determination of employee wage rates and unable to explain to unit employees how such rates were formulated." Id. at 740. The Board acknowledged that "such a circumstance *would serve to destroy rather than further the*

bargaining process." Id. (emphasis added.) Here, both the merit and "market" components of Respondent's wage proposal provided Respondent with unfettered discretion over unit employees' wages, a point the Union made clear at the table. Then, Respondent refused to provide one scintilla of information in support of its proposal—information the Union specifically said it needed in order to both evaluate Respondent's proposal and explain the wage proposal to unit employees. At all times, Respondent made clear that the Union was to have no part in determining either the market wage rates, or the merit-based adjustments. Taken together, Respondent's conduct with regard to its wage proposal implicates the same concerns expressed by the Board in *McClatchy*:

> In sum, it is not the Respondent's bargaining proposal that we view as inimical to the policies of the Act, but its exclusion of the Guild at the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan, when the Guild has not agreed to relinquish its statutory role.

321 NLRB at 1391.

Respondent's conduct in this case is more egregious than that found unlawful in *PSO* or *Kitsap*. Like in *PSO*, Respondent's management rights proposals did not change in any significant manner over the course of nearly two years of bargaining. Here, the combination of Respondent's management rights and wage proposals would grant Respondent the right to: 1) hire, promote, demote, suspend, discharge, layoff, recall, and demote employees without cause; 2) transfer employees; 3) eliminate job classifications; 4) transfer or subcontract the employees' work; 5) unilaterally change employees' work schedules; 6) establish, reorganize, combine or discontinue the conduct of its business or operations temporarily or permanently , in whole or in part; 7) restructure jobs and discontinue any department or method; 8) determine the

number of employees as well as the existence, number, and type of positions to be filled by employees; 9) determine the use of part-time, per diem, agency and temporary employees; 10) determine the extent to which bargaining unit work will be performed at the facility; 11) allow supervisors to perform bargaining unit work; 12) determine the quality, quantity and pace of work and tasks to be performed; 13) establish, change, and enforce all work rules, regulations, policies, and practices; 14) select and change benefit plan carriers, insurers, administrators, fiduciaries and/or trustees; 15) maintain unfettered discretion over wages; and—perhaps most importantly—"*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*."[27] GC Exs. 2, 9, 18, and 19 (emphasis added).

In addition to the rights listed in its management rights and wage proposals, Respondent also proposed to delete any reference to for-cause language in its entirety and to provide only non-binding mediation as the endpoint for resolving the most serious disputes. In that respect, Respondent's proposals in this matter reserved unilateral control over all significant terms and conditions of employment during the life of the contract; insistence on such expansive discretion is unlawful under *PSO*.

The employer in *Kitsap* sought unfettered discretion over unit wages; reserved complete discretion over most terms and conditions of employment; insisted on the right to enforce its own policies and manuals; deleted just cause language from the discipline policy; and proposed no

[27] Here, unlike the employer in *Kitsap*, Respondent did not explicitly propose that the management rights provision would not be subject to the grievance procedure. However, the language of the provision is sufficiently broad to foreclose any disputes over its interpretation. Thus, like in *Kitsap*, the Union here would "be left with no avenue to challenge any of the Respondent's decisions with regard to the nearly exhaustive list of rights reserved. . . under the management rights clause." 366 NLRB No. 98, slip op. at 9.

binding resolution for grievances. As in *Kitsap*, the combination of proposals here should alone be sufficient to conclude that Respondent was engaged in surface bargaining.[28]

c. Respondent Engaged in Unlawful Regressive Bargaining When It Withdrew a Proposal Providing for Arbitration of Grievances Based on Employee Discharges.

"An employer's regressive proposals violate the Act when they are made in bad faith or are intended to frustrate agreement." *Management & Training Corporation*, 366 NLRB No. 134, slip op. at 4 (July 25, 2018) (citing *Quality House of Graphics*, 336 NLRB 497, 515 (2001)). In considering whether a regressive proposal is unlawful, the Board considers the totality of an employer's conduct, the timing of the regression, the regressive nature, whether the employer has justification for the regression, and whether the employer's reasoning for the regression is pretextual. Id. See also *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) ("Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining."). The Board evaluates a party's explanations to determine whether they "were so illogical or unreasonable as to necessarily warrant an inference of bad faith." 366 NLRB No. 134, slip op. at 4 (quoting *Graphic Communications International Union Local 458-3M v. NLRB*, 206 F.3d 22, 33 (D.C. Cir. 2000)).

Here, the timing of Respondent's regressive proposal, within the context of Respondent's other conduct, strongly suggests that Respondent made the April 5, 2017 grievance-mediation

[28] The employer in *Kitsap* insisted the Union agree that wages could be reduced in certain circumstances independent of the employer's operations. Here, Respondent does not even seek to restrict its discretion to situations beyond its control; while Respondent's wage proposal did not explicitly reserve a right to reduce wages, it provided for discretion so unfettered and non-grievable that the Union would have been powerless to seek redress for unilateral changes involving either increases or decreases in wages.

proposal in order to stage negotiations and frustrate efforts at reaching an agreement. As set forth above, Respondent's January 17, 2017 discipline proposal provided for final and binding arbitration for grievances based on an employee's discharge, a point discussed at length over the course of several bargaining sessions and directly addressed in the discipline proposals exchanged on January 31, 2017.[29] Respondent did not propose mediation as a final step at all until March 29, 2017—at the same bargaining sessions that Respondent also: 1) proposed to delete the longstanding union security provision; 2) proposed the no-strike/no-picket provision; and 3) reiterated its insistence on management rights language the Union had already indicated it could not accept.

It was not until the parties' May 16, 2017 bargaining session that Respondent admitted that its mediation proposal conflicted with its earlier discipline/arbitration proposal. Respondent Ex 3 at BATES RESP 000221. Respondent admitted this in response to the Union pointing out the discrepancy. Id. At that session, Respondent told the Union it would make sure its proposals comported with each other. Id. at BATES RESP 000229. On May 25, 2017, Respondent, by e-mail, ignored or scoffed at months' worth of proposals and discussions by reconciling the discrepancy in favor of its most recent, and regressive, position: that disputes over discharges would culminate in non-binding mediation, and that arbitration was completely off the table. GC Ex 17. Respondent had made no substantial concessions in the interim, nor did it explain any legitimate justification for furthering the parties' divide on this already-contentious issue.[30] The

[29] Respondent nonetheless attempted during the hearing to minimize the references to arbitration in that discipline proposal, and in Respondent's own bargaining notes.

[30] Respondent had never—and still hasn't—even provided a legitimate reason for insisting on its initial discipline proposal limiting arbitration to discharges.

Administrative Law Judge should therefore find that Respondent's regressive proposal is further evidence of its refusal to bargain in good faith.

d. Respondent failed to establish legitimate justifications for its insistence on drastic changes to contract language over which the parties had previously had little to no dispute.

Even non-regressive proposals can show a lack of good faith when the proposing party provides no legitimate justification for its positions. See, e.g., *Blue Jeans Corp.*, 177 NLRB 198, 206 (1969), enf'd. sub nom. *Amalgamated Clothing Workers of America v. NLRB*, 432 F.2d 1341 (D.C. Cir. 1970) ("[g]ood faith bargaining . . . does require that parties justify positions taken by reasoned discussions[.]"). Accordingly, a party's "failure to define, explain, or advocate [a bargaining] position" during bargaining should be considered as evidence of a lack of good faith. *Apogee Retail, NY, LLC*, 363 NLRB No. 122, slip op. at fn. 3 (February 17, 2016) (quoting *Palestine Coca Cola Bottling Co., Inc.*, 269 NLRB 639, 645 (1984)).

In *Kalthia Group Hotels, Inc.*, 366 NLRB No. 118 (June 25, 2018), the Board affirmed the ALJ's finding of surface bargaining where the employer proposed to delete a union security clause for purely "philosophical" reasons, without advancing any legitimate business justification, and made proposals to alter existing subcontracting and seniority language. In *Kalthia*, the employer "consistently maintained proposals to eliminate the union security clause without advancing any business justification, let alone a legitimate business justification; [i]nstead, [the employer] simply argued that people could voluntarily pay union dues, but that it should not be a condition of employment." The Board stressed that the employer's "bargaining posture regarding the removal of the union security clause from the CBA was designed to delay and frustrate bargaining in the hope that the union would be decertified before an overall agreement could be reached." Id.

In *Preterm, Inc.*, 240 NLRB 654, 673 (1979), the Board found unlawful bargaining when an employer refused to consider any union-security provision, asserted that it believed its employees should be able to choose whether to join the union, and refused to consider any alternative proposal. The Board found that the employer went into negotiations with a fixed mind on union security and had a "philosophical opposition" to it. Id. The Board found that an employer's "refusal to discuss union shop or any modified form thereof based upon its alleged 'philosophical opposition' thereto constitutes evidence of a refusal to 'confer in good faith' within the meaning of the Act." Id. The employer in *Preterm* also proposed using volunteers/subcontractors to do bargaining unit work, without any limitation, which the Board found to be further evidence of the employer's reluctance to arrive at a CBA. Id. at 673–674. The Board found that the employer's ultimate goal was not to reach an agreement, but to free itself of the need to deal with the union. Id. at 654.

Here, too, Respondent insisted on deleting the parties' longstanding union-security clause. It is true that "the existence of such a clause in previous contracts does not by itself obligate the parties to include in in successive contracts." *Challenge-Cook Bros.*, 288 NLRB 387, 388 (1988), and cases cited therein. Indeed, "Union security. . . [is a] mandatory subject of bargaining, and '[a] party. . . is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party.'" Id. at 389 (quoting *Atlas Metal Parts v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981)). Nonetheless, adherence to such a position must be "a reasonable bargaining stance under all the circumstances," and the adhering party must not have "asserted its proposal disingenuously or [have been] unwilling to discuss it with the Union." Id.

Respondent's unreasonable intransigence is sufficiently similar to that of the employers in *Kalthia* and *Preterm*, in that Respondent had a "philosophical opposition" to the inclusion of a union-security provision. Respondent Ex 3 at Bates RESP 000181-000182. Also, like in those cases, Respondent's proposed deletion of union security is just one among a pattern of predictably unacceptable proposals supporting an inference of bad-faith. As set forth above, Respondent also proposed an unlawful combination of proposals including broad and unlimited management rights, no just-cause language regarding discipline, no arbitration for any grievances, mediation for discharges only, no strikes or pickets, and unfettered discretion for Respondent in determining employee wages. Furthermore, Respondent also engaged in regressive bargaining. As with its other unlawful bargaining conduct, Respondent failed to establish any legitimate justifications for its unwillingness to move from its initial position on union security. Accordingly, without more than a "philosophical opposition" to union-security, Respondent's insistence on deleting this longstanding clause was also unlawful.[31]

2. While Engaged in Surface Bargaining, Respondent Communicated to Employees that the Union Was Delaying Bargaining and Preventing Employees from Obtaining Improved Benefits.

The Board has long found that employer communications to employees that undermine a union during the course of contract negotiations can constitute "away-from-the-table" evidence of bad-faith bargaining. See, e.g., *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961) (distinguishing lawful efforts to keep employees informed about the status of bargaining with the unlawful objective of subverting the union.). The Board is particularly suspicious of employer efforts to

[31] As noted above, Respondent failed to present evidence to support its other proffered justifications for insisting on this provision, i.e., that employees and recruiters had complained about "forced dues."

convey that it is the employer, rather than the union, that represents unit employees' interests at the bargaining table. See, e.g., *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011) ("In the context [of additional unlawful conduct], Respondent's denigration of the Union conveyed an implicit threat that employees' representation would be futile (i.e., that the Respondent would not fulfill its statutory obligations) and that employees would have to rely on the Respondent to protect their interests.") In *General Electric Co.*, 150 NLRB 192 (1964), the Board found bad faith where the employer's "policy of disparaging the union. . . was implemented and furthered" by its "take-it-or-leave it" approach at the table. Id. at 194–95. The Board explained why such coordinated efforts to undermine the union are unlawful, even if the employer has complied with the explicit requirements of Section 8(d):

> On the part of the employer, [the duty to bargain in good faith] requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees It is inconsistent with this obligation for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests.

Quoting the ALJ, the Board noted that "the employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees.") Id. at 195.

Here, Respondent issued bargaining briefs throughout the course of negotiations that materially misrepresented both parties' bargaining positions, accused the Union of incompetence, and blamed the Union for the continued wait for pay raises. Like the employer in *General Electric*, Respondent engaged in a campaign wholly inconsistent with its statutory bargaining duty. And, like the campaign in *General Electric*, Respondent's bargaining briefs compounded the effects of its bad-faith conduct at the table and, predictably, fomented

employees' discontent with the Union. See *Miller Waste Mills, Inc.*, 334 NLRB 466, 467 (2001) ("As the judge observed, 'It is not surprising that employees would become alienated from a Union which they believed had prevented a wage increase.'").

B. Respondent's Withdrawal of Recognition Was Unlawful.

1. Respondent's Unremedied Unfair Labor Practices Tainted Any Evidence of Employees' Disaffection.

Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to enjoy majority support among unit employees, and an employer may withdraw recognition only on the basis of objective evidence showing that the union has actually lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001). However, any evidence showing such a loss of support must have been "raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *LTD Ceramics*, 341 NLRB 86, 88 (2004) (citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996)). See also *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998) ("It is well established that an employer cannot rely on any expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the Union.") In *Lee Lumber*, the Board explained that this question of attribution depends on whether a causal connection exists between an employer's pre-withdrawal unfair labor practices and the showing of disaffection on which it based its withdrawal of recognition:

> Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between unlawful act and subsequent loss of majority support may be presumed.

Id. at 176–177. In cases where no *Lee Lumber* presumption applies, the Board considers the following factors in determining whether a causal connection has been established:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Master Slack Corp., 271 NLRB 78, 84 (1984).

As explained in the following sections, Respondent's surface and regressive bargaining, synonymous with a failure and refusal to bargain in good faith, warrant a presumption that such conduct tainted the subsequent showing of disaffection on which Respondent based its withdrawal of recognition. But even in the absence of a presumption, a *Master Slack* analysis clearly establishes an impermissible taint—and exhibits why *Lee Lumber* presumptions are warranted in cases where disaffection arises in the context of unremedied bad-faith bargaining violations.

a. Under *Lee Lumber*, Respondent's Unlawful Conduct Presumptively Tainted Employees' Purported Expressions of Disaffection.

In *Lee Lumber*, the Board indicated that it will presume a causal relationship between an unremedied "8(a)(5) refusal to recognize and bargain" and a subsequent showing of disaffection. 322 NLRB at 177 (*Lee Lumber I*). The Board explained that such pre-withdrawal conduct warrants this presumption because "the result of an unremedied refusal to bargain with a 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." Id. at 177 (citing *Karp Metal Products*, 51 NLRB 621, 624 (1943)). Accordingly, the Board explained: "If a union is unlawfully deprived 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. (citing *Caterair International*, 322 NLRB 64, 67 (1996)). In concluding that this foreseeability "does not depend on whether the employees actually know that the employer is unlawfully refusing to deal with the union," the Board explained why dragging out the bargaining process is so likely to cause disaffection:

> Lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive.

Id. The Board then held that "this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable time without committing any additional unfair labor practices that would detrimentally affect the bargaining." Id. at 178. In stressing that an employer cannot remedy bargaining violations without returning to the table in good faith, the Board explained that "unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates." Id. at fn. 34.

Tasked on remand with justifying its order for an affirmative bargaining order, the Board issued a supplemental decision in *Lee Lumber*. 334 NLRB 399 (2001) (*Lee Lumber II*). The Board explained that "when an employer has been adjudged to have unlawfully failed or refused to bargain with an incumbent union, the Board will order it to bargain in good faith, and the bargaining obligation is understood to bar any challenge to the union's majority status for a reasonable period of time (emphasis added)." *Lee Lumber II* at 399 fn. 7.

The Board applies the presumption of taint set forth in *Lee Lumber I*, and the six-month-minimum reasonable period for bargaining prescribed in *Lee Lumber II*, even when a party has in fact returned to the bargaining table after admitting in a settlement agreement that it had engaged in bargaining with no intention of reaching an agreement. *Lift Truck Sales and Services, Inc.*, 364 NLRB No. 47, slip op. at 1 (2016). In *Lift Truck*, the General Counsel had issued complaint alleging that the employer "[b]y its overall conduct had failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit," in violation of Section 8(a)(1) and (5) of the Act. Among the conduct specifically alleged in that complaint was: 1) regressive proposals that eliminated past contractual provisions; 2) predictably unacceptable proposals; 3) proposals that granted the employer unfettered economic discretions; 4) refusing to negotiate mandatory subjects relating to the Employer's proposal for merit wage increases; and 5) the employer's failure to offer explanations for its proposals. Id. at fn. 2. The parties resolved the matter through an informal settlement agreement and returned to the bargaining table. Id. Less than four months later, the employer made its last, best, and final offer, which the union membership rejected. A unit employee filed a decertification petition the same day. The Regional Director found that a reasonable period of bargaining had elapsed before the petition was filed, and therefore directed an election in which the union was overwhelmingly defeated. Id. at 2. Upon the union's request for review, the Board reversed the Regional Director and dismissed the petition, on the grounds that the employer had not bargained for a sufficient period of time.

The Board held that, because the employer had admitted the surface bargaining allegations in the informal settlement agreement, that settlement served as a bar to the filing of a subsequent decertification petition for at least six months after remediation of the unlawful

conduct. Id. at 2–3. After acknowledging that *Lee Lumber II* had "left open the question of what constitutes a reasonable period" in contexts other than where employers have "unlawfully refused to recognize or bargain with incumbent unions," the Board found the reasoning in that case "applies with equal force" where bad-faith bargaining has been admitted rather than adjudicated:

> We now find that a settlement agreement containing an admission of unlawful bargaining behavior shall be treated in the same manner as a Board-adjudicated finding of unlawful conduct. Accordingly, we will apply the *Lee Lumber II* standard in cases where, as here, the employer has admitted in a settlement agreement that it unlawfully refused to bargain.

Id.[32]

The same logic leading to the results in *Lee Lumber* and *Lift Truck* is applicable here: Respondent's unlawful failure to bargain in good faith with the Union should be presumed to have caused the subsequent employee disaffection. From the employees' perspective, Respondent's unlawful conduct predictably discredited the Union, conveyed a sense of futility in representation, and unlawfully triggered a predictable outcome: some employees wanting to abandon collective representation.

b. All Four *Master Slack* Factors support finding a causal relationship between Respondent's unlawful conduct and employees' expressions of disaffection.

In cases where no *Lee Lumber* presumption applies, the Board relies on a multi-factor test to determine whether a causal relationship exists. Under *Master Slack Corporation*, 271 NLRB 78 (1984), the Board considers the following criteria:: (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the

[32] Here, of course, Respondent had not remedied its bad-faith bargaining for any amount of time before it withdrew recognition.

possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. Id.

The Board has consistently held that *Master Slack* 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); *AT Systems West, Inc.*, 341 NLRB 57, 60–61 (2004) ("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.") (citations omitted). As discussed in the previous section, unremedied bad-faith bargaining can warrant a presumption that the *Master Slack* factors weigh in favor of finding causation. As explained below, this case represents a compelling example of how the *Master Slack* factors can all point to an inevitable conclusion of taint.

i. Factor 1: Respondent engaged in a pattern of continuing violations of its statutory bargaining duty between the beginning of bargaining and the withdrawal of recognition.

When signatures on a disaffection petition were gathered during or near the period in which the employer engaged in unfair labor practices other than bad-faith bargaining, the Board

will find that this temporal proximity factor favors finding a causal connection. See, e.g., *Gene's Bus Co.*, 357 NLRB 1009 (2011) (approximately seven months passed between manager's public derogation of and physical assault on the shop steward, and five to six months passed between direct-dealing incidents and the circulation of the decertification petition); *Bunting Bearings Corp*. 349 NLRB 1070 (2007) (month-long lockout ended just eight days before the employees executed the May 29 petition and fifteen days before the employer withdrew recognition); *AT Systems West*, 341 NLRB 57, 60 (2004) (nine months between unlawful direct dealing and circulation of decertification petition); *RTP Co*., 334 NLRB 466, 468 (2001) (finding "close temporal proximity" between the employer's unfair labor practices and its withdrawal of recognition where the unfair labor practices occurred two to six weeks prior to the antiunion petition on which the employer based its withdrawal of recognition).

Here, Respondent engaged in a continual pattern of surface bargaining during the period between December 2016 and October 2018. With the lone exception of the no-strike/no-picketing provision it withdrew in June 2018, Respondent had continued to adhere in almost all material respects to all of the above proposals at the time it withdrew recognition of the Union. The showing of interest manifested in the signatures gathered between March and October 2018 was thus contemporaneous with Respondent's ongoing unfair labor practices. And, not one of those signatures was obtained prior to the onset of Respondent's failure to bargain in good faith. As noted earlier in this brief, twenty-seven of the eighty-one signatures counted by Respondent were gathered within the two weeks between the bargaining brief blaming the Union for blocking pay raises, and the withdrawal of recognition, throughout which time Respondent was still engaged in surface bargaining. Accordingly, this first *Master Slack* factor should be weighted heavily in favor of a tainted disaffection petition.

ii. Factors 2 and 3: By prolonging negotiations while simultaneously undermining and denigrating the Union, Respondent's unfair labor practices were likely to have lasting, detrimental effects, including employee disaffection from the Union.

As discussed in the *Lee Lumber* analysis above, Board law makes clear that violations of Section 8(a)(5) are generally likely to have lasting, detrimental effects on employees, particularly where the unlawful conduct tends to drag out negotiations until enough employees give up on their union. The second *Master Slack* factor—the nature of the unlawful conduct, including possible lasting and detrimental effects—weighs overwhelmingly in favor of finding taint where, as here, an employer's conduct serves both to prolong bargaining, and to cast blame for such delays onto the party actually trying to negotiate in good faith. In such scenarios, the same is true for the third *Master Slack* factor. i.e., "any possible tendency to cause employee disaffection from the union," because such disaffection leads *directly* to precisely the kind of lasting and detrimental effect involved in all cases applying *Master Slack*: the employees' loss of their collective-bargaining representative due to an employer's unfair labor practices.

For instance, the Board has found that when an employer leads unit employees to believe they would receive more money and better working conditions without union representation, the conduct has a detrimental and lasting effect on the bargaining unit and causes disaffection. *Miller Waste Mills, Inc.*, 334 NLRB No. 69, slip op. at 5, (2001) ("We agree with the judge that the Respondent's January 2 letter to employees misrepresented the Union's bargaining positions and blamed the Union for preventing the employees from receiving their customary annual wage increase. As the judge observed, 'It is not surprising that employees would become alienated from a Union which they believed had prevented a wage increase.'"); *Detroit Edison*, 310 NLRB 564, 566 (1993) ("The Respondent's 8(a)(5) and (1) misconduct conveys to employees the notion

that they would benefit more, or receive greater consideration, without union representation. Such conduct improperly affects that bargaining relationship and precludes the Respondent from withdrawing recognition on the basis of a claimed good-faith doubt."). In a very recent case, the Board reiterated the principle that "'the possibility of a detrimental or long-lasting effect on employee support for the union is clear' where the employer's unlawful unilateral conduct, like here, suggests to 'employees that their union is irrelevant in preserving or increasing their wages.'" *Denton County Electric Cooperative, Inc.*, 366 NLRB No, 103 slip op. at 3 (June 12, 2018) (quoting *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001)). Here, Respondent engaged in conduct that communicated the same message to unit employees, but also did so while at the same time engaged in egregious surface bargaining that left the Union powerless to show otherwise.

The nature of Respondent's unfair labor practices at the table, i.e., bad-faith bargaining evidenced by surface and regressive bargaining, alone weigh heavily in favor of finding that the withdrawal of recognition was tainted. This failure to bargain in good faith at the table was amplified, and communicated directly to employees, by Respondent's pattern of conduct manifested in the bargaining briefs: misrepresenting and mischaracterizing both parties' positions, and blaming the Union for holding up negotiations—and pay raises. In tandem, Respondent's actions both at and away from the bargaining table show how the cumulative effects of failures to bargain in good faith are such compelling evidence of a causal connection under *Master Slack*, that this case merits a *Lee Lumber* presumption.

iii. Factor 4: Respondent's unlawful conduct had an objectively demonstrable effect on employees' morale and support for the Union.

The fourth *Master Slack* factor—regarding evidence of any actual effects of an employer's unlawful conduct—seeks "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." *AT Systems West*, 341 NLRB 57, 60 (2004)

Again, Respondent's surface bargaining here caused contract negotiations to drag on for nearly two years before Respondent walked away from the table. One direct consequence of the parties' ongoing failure to reach a new contract was that wages were frozen throughout the same period. The evidence of the effects of Respondent's unfair labor practices may not have been abundantly clear prior to May 2018. But, it was precisely at that point when Respondent ratcheted up both the nature and visibility of its bad behavior by: 1) making—and refusing to justify—a wage proposal that was predictably unacceptable to the Union; then 2) blaming the Union for standing in the way of raises when it predictably refused to give Respondent unlimited discretion in determining unit wages. By doing so, Respondent clearly accelerated the pace at which unit employees signed the disaffection petition.

In *Mesker Door, Inc.*, 357 NLRB 591 (2011), the Board found a causal connection between the employer's violations of Section 8(a)(1) and the disaffection petition circulated among its employees. There, where the pre-withdrawal violations "occurred in the midst of contract negotiations," the Board stressed that one violation was so close in time to a flurry of petition signatures that it "appear[ed] to have directly affected employees' support for the Union." Id. at 598. There, as the Board explained, "the disaffection petition had garnered 17 signatures in the week that it circulated before the May 4 speech, but an additional 18 employees

signed it during the 4 days after the speech, including about four employees who had refused to sign it before the speech." Id.

Here, despite the far broader timeline than that in *Mesker Door*, the objective evidence of the effects of Respondent's unlawful conduct is even more clear than in that case. In the first seven months, the disaffection petition started by Smith gathered 54 of the 81 signatures counted in Respondent's tally; the remaining 27—one-third of the total—were collected between October 13 and October 25. As the statements in *Mesker Door* regarding how the filing of NLRB charges during bargaining "would result in lost wage increases and lower bonus amounts," Respondent's protracted refusal to bargain in good faith, coupled with its statements blaming the Union for the ongoing wage freeze, would reasonably have a negative effect on employees' opinions of, participation in, and support for, the Union. Here, the evidence leaves no room for hypothesizing; despite Eugene Smith almost giving up on the disaffection campaign on more than one occasion, Respondent's conduct in October 2018 had the clear and immediate effect of producing a final windfall of signatures.

This fourth, evidence-dependent, factor should also be weighted heavily in favor of finding a causal relationship between Respondent's bad-faith bargaining and the withdrawal of recognition. Accordingly, counsel for the General Counsel urges the Administrative Law Judge to conclude that all four *Master Slack* factors overwhelmingly point to the same finding, and that Respondent unlawfully withdrew recognition from the Union.

c. The subjective testimony of the employee witnesses called by Respondent is irrelevant to determining whether Respondent's unlawful conduct tainted the showing of employee disaffection.

As set forth in its pre-hearing Motion in Limine, counsel for the General Counsel has objected, and continues to object, to any consideration of subjective witness testimony in this

matter. GC Ex 33. Nonetheless, counsel for the General Counsel acknowledges that there are cases in which judges and/or the Board have admitted, and even considered, subjective evidence when determining whether a causal relationship exists between an employer's unlawful conduct and employee expressions of disaffection. A review of those cases leads to two conclusions pertinent here: 1) rarely, if ever, has the causal relationship determination turned on subjective testimony; and 2) such testimony is far more likely to be considered in cases where objective evidence in the record cuts against finding a causal relationship. As explained in the preceding section, the record here contains objective evidence that overwhelmingly tips the scales against Respondent on all four *Master Slack* factors. The facts of this case thus square with those in which judges and the Board have given minimal weight to, or simply ignored, subjective employee testimony. Accordingly, the Administrative Law Judge was correct to deny Respondent's efforts to call additional employees and should disregard any testimony concerning subjective reasons for signing the disaffection petition.

There is no issue in this case toward which employees' subjective testimony is relevant. Counsel for the General Counsel's entire case would succeed on the basis of documents alone: the pleadings, proposals, bargaining notes, and bargaining briefs are sufficient to establish surface and regressive bargaining. To the extent more might be needed to prove that those violations caused the employees' disaffection, the timeline of signatures on the petition is sufficient. Because the violations alleged in the Complaint can be established by reliance on such objective evidence, any consideration of the employees' subjective testimony is unnecessary and unwarranted.

In some situations, such testimony might also pose a risk of prejudice to the General Counsel's case. Here, however, any potential prejudice to that case was outweighed by the

employee testimony that actually bolstered it. Ten employees testified at the hearing. Two, Hardie Cooper and Eugene Smith, claimed to have initiated and led the campaign to oust the Union. Of the other eight, at least six stated that they signed the disaffection petition largely because they had not received a pay raise since 2016.[33] This supports the General Counsel's assertion that Respondent's unfair labor practices directly caused the dissatisfaction manifested on the pages of the petition. By engaging in a protracted pattern of surface bargaining, Respondent kept the employees waiting for their raises; by blaming the Union for the delay, Respondent turned 27 more employees against a bargaining representative no one had ever before taken steps to remove. Counsel for the General Counsel has maintained throughout this proceeding that any evidence regarding those employees' subjective reasons for signing the disaffection petition is irrelevant to determining whether Respondent's bad-faith bargaining tainted the petition. Accordingly, even if any of the employees' testimony is considered relevant to determining the existence of a causal connection, counsel for the General Counsel notes that the majority of the employees called gave testimony that supports finding a violation under *Master Slack*. Of particular note is that six of the witnesses specifically acknowledged that they signed the disaffection petition at least in part because they had not received a pay raise during the previous two years. The other reasons provided in the employees' testimony substantially echo the content of Respondent's bargaining briefs. Thus, even if this factor is considered subjectively, the representative sample of subjective witnesses, hand-chosen by Respondent suggests that 60% of employees signed the disaffection petition because they did not receive a wage raise over the two year period during which Respondent bargained with no intention on

[33] Those six witnesses were Mary Collins, Noel Reyes, Vivian Otchere, Lewis Bellamy, Tsedale Benti, and Freddie Ard, III. Cooper was also upset about not receiving a raise, but testified that he had actually never gotten a raise during his seven years in the unit.

reaching a new contract. Nonetheless, even though the employees' testimony was, on balance, favorable to counsel for the General Counsel's case-in-chief, it should still be disregarded because it is duplicative of objective record evidence that is more than sufficient to conclude a causal relationship. Accordingly, the Administrative Law Judge properly denied Respondent's efforts to call additional employee witnesses.

C. Respondent Continued to Violate the Act After Withdrawing Recognition.

1. Respondent violated the Act by making unilateral changes to unit employees' terms and conditions of employment.

Under *Lee Lumber* and *Master Slack*, Respondent's withdrawal of recognition violated Section 8(a)(5) of the Act. Because Respondent was not privileged to terminate its bargaining obligation, it follows that the unilateral changes Respondent made after October 26, 2018 were also unlawful. Unilateral modification of wages or other mandatory subjects of bargaining can constitute a *per se* violation of Section 8(a)(5). In the event, as argued herein, the evidence establishes that the October 26, 2018 withdrawal of recognition was unlawful, Respondent was not privileged thereafter to take unilateral action regarding wages and other benefits. See, e.g., *Southern Bakeries, LLC*, 364 NLRB No. 64 (2016); *Narricort Industries, L.P.*, 353 NLRB 775, 776 FN 11 (2009); *Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004); *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009).

2. In its November 1 communication to unit employees, Respondent denigrated and undermined the Union, and conveyed the message that it no longer intended to deal with the Union.

In some circumstances, the Board finds that statements to employees that undermine or denigrate their union constitute interference. restraint, and coercion under Section 8(a)(1). See, e.g., *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011) (finding implied threat of union futility sufficient to bring the employer's statements outside the protections of Section

8(c).). As part of the November 1 announcement to the unit employees regarding their new transit subsidy, Respondent wrote: "This benefit is added to your paycheck. Previously the union did not negotiate this benefit on your behalf so you did not receive it." Like the employer in *Regency House*, Respondent "created an atmosphere of hostility toward the union," and the November remark was "more than a simple statement of its view of the Union." Accordingly, this statement constitutes an independent violation of Section 8(a)(1).

The communication also violated Section 8(a)(5). In *Wire Products Mfg. Corp.*, 326 NLRB 625 (1998), the Board found a violation of Section 8(a)(5) where the employer announced its intention to unilaterally change an employee benefit. There, even absent evidence that the employer had followed through, the Board found that the announcement violated Section 8(a)(5) "because it conveyed to employees the message that it no longer intended to deal with the Union as their exclusive representative regarding terms and conditions of employment." Id. at 627. See also, *ABC Automotive Products, Corp.*, 307 NLRB 248, 250 (1992) ("The damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby 'emphasizing to the employees that there is no necessity for a collective bargaining agent.'") (citations omitted).

D. The Record Evidence Establishes that Respondent interviewed employees without providing the assurances required under *Johnnie's Poultry*.

In *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), the Board explained that "the Board and courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 activity without incurring Section 8(a)(1) liability." Id. at 775. There are two "legitimate purposes" based on which an employer may engage in such interrogation: 1) "the verification of a union's claimed

majority status to determine whether recognition should be extended;" and 2) "the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense." Id.[34] Even where an employer validly cites a legitimate purpose, questioning employees about Section 7 matters constitutes a violation of the Act, unless the employer complies with certain safeguards. Id. The employer must communicate to the employee the purpose of the questioning, assure the employee that no reprisal will take place, and obtain the employee's voluntary participation. To be lawful, such questioning must take place within a context free from employer hostility to union organization and must not itself be coercive in nature. As for the permissible scope of such inquiries, the employer's questions "must not exceed the necessities of the legitimate purpose of the inquiry by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

In preparation for the trial in this matter, Respondent's counsel interrogated at least ten employees about their subjective state of mind, specifically their reasons for wanting, or not wanting, to be represented by the Union. The initial interrogations took place at Respondent's facility; employees were summoned from whatever they were working on and directed to report to an administrative office. Once there, they sat down with someone they had never met, who asked them why they had signed a disaffection petition that had led to the Union's departure—an event that employees were well aware had been cause for celebration among management.

[34] Counsel for the General Counsel notes that while this case involves a withdrawal of recognition, any *Johnnie's Poultry* privilege available to Respondent must be based on the "defense preparation" purpose. It is clear that the "verification of majority status" purpose contemplates situations in which an employer engages in some due diligence *before* recognizing, or withdrawing recognition from, a union.

Assuming Respondent's counsel strictly complied with the requirement that employees be advised of the purpose for the interrogation, each employee likely realized that Respondent was seeking testimony that would support Respondent's defenses.[35] It therefore cannot be said that the questioning was not inherently coercive, or that it took place in a context free of employer hostility to union organizing.

Additionally, with respect to witnesses William Barnes, Vivian Otchere, and Noel Reyes, the evidence indicates that they were interrogated by Respondent's attorneys *before* they were given the assurances required under *Johnnie's Poultry*. Based on their testimony, highlighted above, it is clear that at least these three employees were not given timely assurances that no reprisals would take place or that their voluntary participation was obtained before the interrogation began. For the foregoing reasons, Respondent should be found to have violated Section 8(a)(1) with regards to their interrogations of the subjective witnesses.

E. An affirmative bargaining order and attendant decertification bar is necessary to remedy Respondent's unfair labor practices.

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v.*

[35] This is distinguishable from those situations in which the interrogation seeks objective information, such as whether a given individual said or did something factually alleged in the charge. It also underscores the Board's sound policy of disfavoring the kind of subjective evidence that Respondent insisted be put on display at the hearing.

NLRB, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' [Section] 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. Although the Board continues to adhere to *Caterair*, supra, counsel for the General Counsel have examined the particular facts of this case as the court requires and urges the Administrative Law Judge to find that a balancing of the three factors warrants an affirmative bargaining order.

First, an affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition. At all relevant times, the Union was actively representing the unit employees and was bargaining for a successor collective-bargaining agreement to advance employees' interests with respect to their employment terms. However, Respondent unlawfully withdrew recognition from the Union based on a petition signed by employees, and received by the Respondent, while the Union was still trying to negotiate a contract in spite of Respondent's sham bargaining. Respondent's unlawful conduct undermined the collective bargaining process, defeating the Act's policies meant to ensure that the parties' bargaining relationship will be allowed to function. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable period of time, will not unduly prejudice the Section 7 rights of employees who may oppose continued union representation. The bar does not continue indefinitely, but rather only for a reasonable period of time to allow the good-faith bargaining that the Respondent's unlawful

withdrawal of recognition cut short. It is only by requiring the Respondent to bargain with the Union that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct.

Second, an affirmative bargaining order serves the purposes and policies of the Act by fostering meaningful collective bargaining and industrial peace, and by removing Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. Without an affirmative bargaining order, Respondent's unlawful conduct will be rewarded and the purposes and policies underlying the certification-year rule will be undermined.

Third, a cease-and-desist order alone would be inadequate to remedy Respondent's withdrawal of recognition because such an order would not provide the Union with time to bargain and would allow another challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated and before the unit employees have had a reasonable time to regroup and bargain through their chosen representative in an effort to reach an initial agreement. Such a result would be particularly unjust here because Respondent's pre-withdrawal unfair labor practices have continued unremedied for more than two years and, as a result, the Union needs to reestablish its representative status with the unit employees. Further, the Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. Counsel for the General Counsel respectfully urges that the Administrative Law Judge recommend to the Board that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

Furthermore, as set forth in the Complaint, counsel for the General Counsel seeks an order requiring Respondent to make the Union whole for all costs and expenses incurred during negotiations, and to make whole any employee negotiators for any earnings and/or leave they lost while attending bargaining sessions.[36]

V. CONCLUSION

The sum of the record evidence reveals Respondent violated the Act by unlawfully bargaining in bad faith and refusing to bargain with the Union; withdrawing recognition of the Union; denigrating the Union in its November 1, 2018 memo to employees; unilaterally changing the wages, compensation structure, and transit benefits of employees; and coercively interrogating employees about matters that are the subject of unfair labor practice proceedings

Counsel for the General Counsel respectfully urges the ALJ find that Respondent has violated the Act as alleged in the Second Amended Consolidated Complaint and order Respondent to cease its unlawful conduct, and to be subject to an affirmative bargaining order.

A. APPENDIX I – Proposed Order

The National Labor Relations Board orders that Respondent District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a limited partnership, and UHS of D.C., Inc., general partner, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

    a) Refusing to bargain in good faith with the Union for a successor collective-bargaining agreement.

[36] See, e.g., *Frontier Hotel & Casino*, 318 NLRB 857, 857 (1995) (finding reimbursement of negotiating expenses warranted where "egregious and deliberate surface bargaining. . . unnecessarily diminished [the unions'] economic strength.").

b) During negotiations with the Union for a successor contract, 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.

c) During negotiations with the Union for a successor contract, engaging in regressive bargaining such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.

d) During negotiations with the Union for a successor contract, maintaining and adhering to bargaining proposals that delete a longstanding union security provision.

e) During negotiations with the Union for a successor contract, maintaining and adhering to bargaining proposals that give Respondent unfettered discretion in employee wages.

f) Unlawfully withdrawing recognition from the Union after committing unfair labor practices that are likely to cause loss of union support among employees.

g) Refusing to bargain with the Union as the exclusive collective bargaining representative of all regular full-time and regular part-time employees of Respondent in the Environmental Services, Linen Services, Ambulatory Care Center, and Food Services departments.

h) Unilaterally implementing changes to employees' terms and conditions of employment and refusing to bargain over such changes.

i) Telling employees that they did not receive benefits because of the Union.

j) Coercively interrogating employees about the subject of an unfair labor practice without providing those employees the proper safeguards under the National Labor Relations Act.

k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a) Recognize and, upon request, bargain with the Union as the exclusive bargaining representative of the employees in the following unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All regular full-time and regular part-time employees of Respondent in the Environmental Services, Linen Services, Ambulatory Care Center, and Food Services departments.

b) On the Union's request, rescind any or all of the unilaterally implemented changes made in the terms and conditions of employment of employees since October 25, 2018.

c) Within 14 days from the Board's Order, Respondent will reimburse the Union for all costs and expenses incurred in its efforts to negotiate a successor contract.

d) Within 14 days from the Board's Order, Respondent will make whole the employee bargaining committee members named herein by payment of the amount of pay, plus interest and/or restoration of the paid time off each member incurred for its attendance the

bargaining sessions: Cynthia Bey, Pamela Brooks, Aisha Brown, Marcia Hayes, Sonya Stevens, and Arlene Smith.

e) Within 14 days after service by the Region, post a notice with the language set forth in Appendix II, in all places where Respondent customarily posts notices to employees, including but not limited to the following locations at The George Washington University Hospital located at 900 23rd St N.W., Washington, D.C. 20037: the bulletin boards located in the Linen Services Department, the office of the Environmental Services department, and the kitchen located outside of the cafeteria in the Food Services department. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered with any other material. Respondent should be required to keep the Notices posted for 60 consecutive days after the initial posting.

f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

B. APPENDIX II – Proposed Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region, a/w Service Employees International Union (the Union), is the employees' representative in dealing with us regarding wages, hours, and other working conditions of our employees in the following appropriate unit (the Unit):

> All regular full-time and regular part-time employees of the Employer in the Environmental Services, Linen Services, Ambulatory Care Center and Food Services Departments of George Washington University Hospital

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere 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.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that delete a longstanding union security provision.

WE WILL NOT, during negotiations with the Union for a successor contract, simultaneously maintain and adhere to bargaining proposals that give us unfettered discretion in your wages.

WE WILL NOT, during negotiations with the Union for a successor contract, engage in regressive bargaining, such as by proposing that discharges be subject to the grievance-arbitration procedure, and then later proposing a grievance procedure that culminates in non-binding mediation.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT fail or refuse to continue negotiations for a successor contract with the Union as the exclusive collective-bargaining representative of the Unit.

WE WILL NOT unilaterally make changes to the terms and conditions of employment of employees in the Unit without first giving notice to the Union,and affording the Union an opportunity to bargain collectively with respect to such changes.

WE WILL NOT tell you that you did not receive benefits because of the Union.

WE WILL NOT coercively interrogate employees about the subject of an unfair labor practice without providing those employees the proper safeguards under the National Labor Relations Act.

WE WILL recognize and, on request, bargain with the Union as your representative concerning wages, hours and working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL give the Union notice and an opportunity to bargain over any proposed changes to the wages, hours, and working conditions of employees in the Unit before putting such changes into effect.

WE WILL identify and, on the Union's request, rescind any changes that we have made unilaterally since October 26, 2018 to the wages, hours, and working conditions of employees in the Unit.

WE WILL compensate employees in the Unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since October 26, 2018.

WE WILL reimburse the Union for all costs and expenses incurred in its efforts to negotiate a successor contract.

WE WILL pay the following employee bargaining committee members for any pay and/or leave they lost attending bargaining sessions: Cynthia Bey; Pamela Brooks; Aisha Brown; Marcia Hayes; Sonya Stevens; and Arlene Smith. And, **WE WILL** file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

Barbara Duvall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August 2019, the foregoing Brief of the General Counsel, was sent by electronic mail, upon the following persons:

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