

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

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

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Answering Brief to Respondent's Exceptions

Pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, Counsel for the General Counsel ("CGC") files this Answering Brief in Response to Respondent's Exceptions to the Administrative Law Judge's Decision ("ALJD") in this matter.

I. INTRODUCTION

As explained below, the ALJD is fully supported by the record evidence and is consistent with established Board precedent, while Respondent's exceptions are contrary to both. Counsel for the General Counsel therefore respectfully requests that the Board overrule Respondent's exceptions in their entirety and adopt the ALJD.

An examination of the record does not support Respondent's eighteen exceptions to the September 4, 2019 decision of Administrative Law Judge Michael Rosas ("ALJ"). Rather, the record contains credible evidence that fully supports the ALJ's findings of fact and conclusions of law. Accordingly, Respondent's exceptions and brief raise no issues of fact or law that warrant reconsideration of the rulings, findings, and conclusions reached by the ALJ.

The bargaining relationship between Respondent and 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region (the "Union") is more than two decades old. Tr. 29: 11–12. Prior to the unlawful withdrawal of recognition, the Union represented a bargaining unit of about 150 regular full-time and regular part-time employees in the Environmental Services, Linen Services, Ambulatory Care Center, and Food Services departments of Respondent (the "Unit"). Before 2016, collective bargaining agreements ("CBA") were reached between Respondent and the Union within a very short period. The most recent CBA between the parties expired on December 19, 2016. GC Ex. 30. Prior to the expiration of the CBA, the parties began negotiations for a successor CBA. The unfair labor practices alleged in the Complaint stem from Respondent's conduct throughout those negotiations, which ended when Respondent unlawfully withdrew recognition in October 2018.

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Respondent's exceptions primarily attempt to cast the Union as the bad actor during the 2016–2018 negotiations. Respondent's exceptions include dramatic—and false—assertions that the Union was dilatory in responding to Respondent's bargaining proposals. Respondent repeatedly makes this claim in an attempt to argue that it was the Union's inaction, rather than Respondent's own bad-faith intransigence, that created the combination of proposals that the ALJ found to be unlawful. EXC p. 1. This assertion defies common sense, since the record evidence establishes that Respondent made and adhered to an egregiously unlawful combination of proposals, in spite of the Union's counterproposals and protestations. Perversely, Respondent appears to concede implicitly the bad-faith nature of several individual proposals, as well as its combination of proposals, only to defend itself with a ludicrous argument that it is inoculated from its failure to bargain in good faith because the Union did not do enough to challenge its bad-faith conduct. As this Answering Brief will explain, the ALJ correctly found that the Union did in fact respond to each of Respondent's proposals shortly after each one was made, and that with regard to the proposals at issue here, Respondent invariably rejected the Union's counters and held firm to its initial positions.

The record shows, and the ALJ found, that Respondent's conduct in bargaining foiled the Union's efforts to reach a successor CBA. Over nearly two years of waiting for the parties to reach that agreement, unit employees went without the annual raises they had come to expect under the terms of previous CBAs. As shown through the testimony of Respondent's hand-picked subjective employee witnesses, the lack of raises was a primary catalyst for the Unit's disaffection with the Union. This disaffection culminated in the circulation of a petition, on which Respondent relied in withdrawing recognition from the Union. Respondent followed up

that unlawful withdrawal of recognition with immediate and substantial unilateral changes to the Unit's terms and conditions of employment.

Respondent attempts to compartmentalize or sever each example of bad-faith conduct found by the ALJ. But the test is whether, under all of the circumstances, the preponderance of the evidence warrants an inference that a party failed to bargain in good faith. Similarly, Respondent's frequent claims that its agents never uttered certain magic words (which, at the table, would only constitute additional evidence of its bad faith) does not mitigate the overwhelmingly compelling circumstantial evidence on which the ALJ properly based his conclusions. Accordingly, and as set forth in detail below, CGC respectfully request that the Board dismiss Respondent's exceptions and adopt the ALJ's findings.

II. ARGUMENT

A. Answer to Respondent's Exceptions 1-4 and 7-9

In exceptions 1-4 and 7-9, Respondent maintains that it bargained with the Union in a lawful manner and that its proposals, whether considered alone or in combination with each other, were lawful. Even a cursory review of the record is sufficient to show the specious nature of Respondent's arguments. The ALJ correctly concluded that Respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by bargaining in bad faith with no intent of reaching a successor CBA. In reaching this conclusion, the ALJ correctly relied upon the combination of proposals that Respondent presented, then adhered to, at bargaining. Because Respondent does not deny that it made these proposals, its arguments depend on counterfactual hypotheticals about how the Union could have sought concessions. R Ex. 1.

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. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487-88 (2001). Proposals that require a union to cede its representational functions support this inference. *Regency Service Carts*, 345 NLRB 671, 675 (2005). 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).

1. **Respondent's adherence to its No Strike and No Arbitration proposals is unlawful (Answer to Exceptions 1 and 2)**

Respondent's exceptions 1 and 2 must be dismissed because they misconstrue the facts in the record and misapply well-established Board law.

Exception 1: Respondent takes exception to the ALJ's statement that the Hospital conceded that its **No Strikes or Lockouts** proposal was unlawful. No such admission was made.

Exception 2: Respondent takes exception to the ALJ's "finding of fact" regarding lawfulness of the Hospital's **Grievance and Mediation** and **Discipline** proposal, alone or in combination, as the ALJ misstates the course of bargaining, misreads the proposal and fails to address the Union's failure to meaningfully counter the proposal.

The Facts of Respondent's No Arbitration Proposal: On January 17, 2017, Respondent tendered a discipline proposal. Tr. 39: 18–22; 186: 22 to 187: 14; 554: 3–14; GC Ex 4; R Ex. 1 at RESP 3561–3563. This proposal was substantially different from the parties' longstanding discipline provisions contained in Article 22 of the prior CBA, which Respondent conveniently fails to mention to the Board. GC Ex 30. Among the new proposals were: 1) deletion of "just cause" language; 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.”¹

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.² Tr. 51: 9–13; 201: 3–5; 568: 8–19; GC Ex. 11; R Ex. 1 at RESP 3601–3603. This grievance and mediation proposal substantially tracked the language of Respondent's January 17 discipline proposal which excluded from mediation any discipline short of discharge. See GC Exs. 4 and 11; Tr. 123: 2–3. Taken together, the grievance and discipline proposals meant that disputes related to disciplinary actions, other than discharge, would not be able to be challenged by the Union to any neutral decisionmaker.³

On April 5, 2017, the Union orally countered the grievance and mediation proposal. R Ex. 3 at RESP 181–203. 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 184–187. Respondent's bargaining notes also establish that Respondent considered the Union's oral challenge to be a counterproposal. *Id.* at 220–230.

In an effort to break a stalemate that still existed on September 5, 2018, the Union presented Respondent with a grievance and arbitration proposal that had been lifted from contracts between the Union and hospitals in New York. Tr. 139: 22–23; 144: 11–13; 214: 6–20;

¹ The Union countered with its discipline proposal the next session, on January 31, 2017. GC Ex. 6.

² Respondent's only justification for the upheaval of the parties' longstanding grievance and arbitration procedure was because the Union had prevailed on a single arbitration, and because Respondent “prefers this approach.” R Ex. 3 at RESP 185

³ At the hearing, Respondent referenced Section 301 as an avenue to seek redress for contract violations. Under Respondent's proposal, lawsuits were prohibited unless the alleged breach involved a provision subject to mediation. Tr. 123: 6–11.

GC Ex. 23. Respondent would not agree to any portion of the Union's grievance and arbitration proposal. Tr. 143: 15–21.

The Facts of Respondent's No Strike Proposal: In addition to proposing the deletion of just-cause and arbitration provisions from the CBA, and other proposals more fully discussed below, Respondent also proposed sweeping revisions to the parties' no-strike provision at the March 29, 2017 session. GC Ex. 12. 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; R Ex. 1 at RESP 3610–3611. The Union explained to Respondent on March 29 that a CBA 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. Respondent's lead attorney negotiator Steven Bernstein admitted that at the time it withdrew its no-strike proposal, Respondent 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. Indeed, Respondent asserted to the Union at bargaining, and continues to argue in its exceptions, that it withdrew its No Strike proposal only as of June 7, 2018, while the No Arbitration proposal was still pending, and Respondent reserved rights to

consider reinstating the No Strike proposal if the parties later agreed to arbitration. See EXC p. 8 at FN 6. Accordingly, the ALJ was correct in his conclusion that Respondent essentially conceded its No Strike proposal was unlawful in combination with its No Arbitration proposal. ALJD at 36: 4-7.

The Law: Respondent relies upon three federal court decisions in support of exceptions 1 and 2. Respondent primarily relies upon a non-binding Fifth Circuit case, *NLRB v. Cummmer-Graham Co.*, 279 F.2d 757 (5th Cir 1960). Foremost, *Cummmer-Graham* is not precedent under which the current case should be considered. Even if the Board considers *Cummmer-Graham*, the Fifth Circuit stated “[w]e do not hold that under no possible circumstances can the mere content of various proposals and counter proposals of management and union be sufficient evidence of a want of good faith to justify holding to that effect.” *Id.* at 761. The *Cummmer-Graham* decision is also easily distinguished from the current action, because in *Cummmer-Graham*, there were no allegations that the employer proposed to delete a union security provision, insisted on a broad management rights provision, engaged in regressive bargaining, or insisted on removing references to just cause from a discipline provision. The record here establishes all of the above, plus more.

Also misplaced is Respondent's reliance on *Drake Bakeries v. American Bakery Confectionery Workers, Intl.*, 370 U.S. 254 (1962) and *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), since neither is relevant to the issues raised here. In both *Drake* and *Textile Workers*, the Supreme Court's sole consideration was whether an arbitration provision in an existing CBA can be enforced. *Drake*, 370 U.S. at 261; *Textile*, 353 U.S. at 448. Whether and to what extent proposals can evidence bad faith bargaining was not at issue in either the *Drake* or *Textile Workers* decisions. Accordingly, neither are applicable to the instant action.

Answering Brief to Respondent's Exceptions

By contrast, the Board has repeatedly held that the combination of no-strike provisions, broad management rights clauses, and ineffective grievance and arbitration procedures are considered 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. Accordingly, CGC respectfully urges the Board to dismiss Respondent's Exceptions 1 and 2 and to adopt the ALJ's findings and conclusions that Respondent's long adherence to its initial no-strike and grievance and mediation proposals constitutes surface bargaining in violation of Section 8(a)(5).

2. **The Union's September 5, 2018 Management Rights Proposal was lawful (Answer to Exception 3)**

Exception 3: Respondents take exception to the ALJ's findings that the Hospital failed to negotiate its **Rights and Duties of Managers, Supervisors and Licensed Clinical Staff ("Management Rights")** proposal for "nearly two years," and that combined with its **Wage** proposal, gave itself unfettered discretion, as the ALJ misstates the course of bargaining, misreads the proposals, fails to address the Union's failure to meaningfully counter the proposals, and misapplies the cited case law.

The Facts of the Parties' Management Rights Proposals: On December 6, 2016, Respondent proposed a new, expansive, and fundamentally different, management rights provision from what was in place in the parties' prior CBA. Tr. 33: 20-25; GC Ex. 2. Concurrent with the management rights proposal, Respondent proposed a zipper clause that included language eliminating the parties' right to refer to past practices. R Ex. 1 at RESP 3541. 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.*" R Ex. 1 at RESP 3541 (emphasis added); see also Tr. 579: 2–20; 613: 24–614: 3.

On February 1, 2017, the Union tendered a counterproposal, indicating the Union's acceptance of many of Respondent's enumerated subsections. R Ex. 2 at RESP 3761-3763. The Union also agreed to Respondent's introductory language, with the exception of a portion permitting Respondent to subcontract services or products. The Union did not agree to seven significant subsections in Respondent's proposal, that are further discussed below.

On March 28, 2017, Respondent tendered its supposed counterproposal 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." GC Ex. 9; Tr. 51: 1–2.⁴

Given Respondent's unwillingness to move from its original proposal, the Union determined that the parties would not be able to reach a contract as long as they continued to bargain off of that proposal. Accordingly, 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.⁵ Tr. 106: 7–13; 139: 22; 145: 18–19; 214: 24 to 215: 3; 577: 23 to 578: 1; GC Ex. 25. The September 5 proposal was categorically

⁴ Respondent's non-attorney lead negotiator Jeanne Schmid ("Schmid") admitted during her hearing testimony, "We didn't change the position." Tr. 248: 18

⁵ Like the other September 5 proposals, 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. The Union communicated its willingness to negotiate the proposal language. Tr. 142: 4–5.

rejected by Respondent without any consideration, and Respondent in fact renewed its March 28 proposal, which was essentially the same as Respondent's original December 2016 proposal. EXC p. 10; R Ex. 3 at RESP 386. Accordingly, the ALJ was correct in finding that Respondent's position on management rights was unchanged from its December 2016 management rights' proposal throughout the nearly two years of bargaining. ALJD at 36: 12-17.

Argument re. the Union's management rights' proposal: Respondent's allegation that the Union engaged in bad faith through its September 5, 2018 management rights' proposal is based upon a false assertion that Respondent's original management rights' proposal was tentatively agreed to by the Union. In reality, it is undisputed that at least seven subsections (E, I, L, M, T, W, and X) were not yet agreed upon between the parties at the end of the March 28, 2017 bargaining session. EXC p. 9. These are significant subsections giving Respondent the 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. GC Ex 2 and 9; Tr 103-105. These subsections, which Respondent insisted on throughout bargaining, prevented the parties from reaching tentative agreement on management rights. The Union did not withdraw from a tentative agreement on management rights because there was no such agreement.

Moreover, Respondent has acknowledged its understanding that the Union's September 5, 2018 management rights proposal was made to break the stalemate between the parties. R Ex. 3 at RESP 386 ("It's to move us forward."). In response to Respondent's

breathless display of shock and awe upon receiving the September 5 proposal, the Union explained to that it was also willing to go back to the management rights provision in the previous CBA to break the stalemate. *Id.* at 386 (“I understand up until yesterday we said we could live with old contract.”) and 388 (“Tell us you’re willing to go back to the contract and we can discuss if you are willing.”). The Union told Respondent that its September 5, 2018 counterproposal was presented in hope that it might persuade the Employer to reexamine its position that the sort of overly broad management rights clause upon which Respondent had long insisted was necessary. *Id.* However, Respondent continued to refuse to consider modifying its December 6/March 28 management rights proposal in any significant respect. *Id.* at 386-388.

As set forth above, the Union provided a legitimate explanation to justify its decision to submit a counterproposal that looked substantially different from Respondent’s March 28, 2017 counterproposal. Based on the foregoing, the Union’s September 5, 2018 counterproposal did not demonstrate bad faith or an attempt to frustrate, rather than engage in, meaningful bargaining, in a manner that would affect the ALJ’s factual findings and conclusion that Respondent acted unlawfully. CGC requests that the Board dismiss Respondent’s exception 3.

3. Respondent’s adherence to its Management Rights and Wage proposals, in combination, is unlawful (Answer to Exceptions 3 and 4)

Exception 4: Respondent takes exception to the ALJ “legal analysis” that the Hospital “delayed” in producing a **Wage** proposal, that once produced, its proposal was “unprecedented,” “spurred further rancor,” and was “doomed on arrival,” that the Hospital refused to negotiate the proposal, and that it gave the Hospital “unfettered discretion,” as the ALJ misstates the course of bargaining, misreads the proposal and fails to address the Union’s failure to meaningfully counter it.

The Facts of Respondent’s Wage Proposal: On April 6, 2017, the Union made an initial wage proposal. Tr. 111: 7–18; 579: 25 to 580: 18; R Ex. 2 at RESP 3780–3782.

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. Over a

year after receiving the Union's wage proposal, Respondent countered with a wage proposal unlike any the parties had ever exchanged in past CBA negotiations. ALJD 22: 14-21; Tr. 60: 12-13; 203: 10-12; 581: 18-23; GC Ex. 18; R Ex. 1 at RESP 3641-3643. This wage proposal provided for a new compensation structure that incorporated market-based adjustments based on employees' overall experience and merit wage increases for employees that Respondent, in its sole discretion, deemed worthy. ALJD 22: 15-21.

Respondent argues that its initial wage proposal did not give it unfettered discretion, because the proposal included non-discretionary bonuses and non-discretionary differentials. EXC pp. 12-16. However, 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.⁶ GC Exs. 18-19. 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." R Ex. 3 at RESP 307. 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.

⁶ Respondent again conveniently fails to mention to the Board the high levels of unilateral discretion its wage proposals included for itself.

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Respondent also 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 because the unit employees had never received a performance evaluation. Tr. 66: 24–25; 114: 9-15; 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.⁷ Tr. 67: 14–24; 205: 7–9.

The Union tendered a counter on May 21, 2018 which 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.⁸ 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. Respondent

⁷ As described above, even if such cases were grievable, the Union would not be able to move them to arbitration, under the Respondent's proposed CBA terms.

⁸ Respondent claims in its exceptions that Godoff's testimony is belied with respect to the Union's verbal counter on May 21 based upon Respondent's own bargaining notes. EXC p. 15. Respondent admitted at trial that its bargaining notes did not capture everything that occurred at bargaining. Tr. 598: 22-25. Furthermore, Respondent made a second wage proposal on May 21, in which it rejected the Union's verbal counter, and reasserted its own wage proposal. GC Ex 19 p. 1 ("GWUH Second Proposal of 05/21/18"). Accordingly, Respondent did adhere to its wage proposal even after it was challenged and verbally countered by the Union.

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. 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.⁹ 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.

Respondent also was not willing to modify or negotiate the discretionary aspect of its "merit wage" provision. At the August 1, 2018 bargaining session, Respondent told the Union that the 2 percent non-discretionary wage increase Respondent was proposing was "not on the table" if the Union did not agree to the discretionary merit portion of Respondent's wage proposal. ALJD at 24: 32–35; R Ex. 3 at RESP 352. In essence, Respondent was not willing to consider a wage increase for the Unit at all unless the Union would agree to Respondent having discretionary control over the amounts. 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.

The Law: Respondent argues that its management rights and wage proposals, alone¹⁰ or in combination, were lawful. EXC pp. 10-17. Respondent first attempts to distinguish this case from *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (2018) through two

⁹ When Respondent finally provided the appendix, it contained only ranges of pay, without reference to where any individual unit employee might fall. GC Ex 18 p. 4.

¹⁰ Respondent relies on *St. George Warehouse, Inc.*, 341 NLRB 904 (2004) and *Coastal Electric Coop.*, 311 NLRB 1126 (1993) in support of its assertion that a broad management rights proposal alone is not unlawful. This is a red-herring argument as CGC has not argued, and the ALJ did not find, that Respondent's proposals *alone* are unlawful. All consideration of Respondent's proposals are in conjunction with Respondent's other proposals and actions.

arguments: 1) that the employer in *Kitsap* added two provisions in its second proposal; and 2) that the management rights proposal in *Kitsap* was not subject to the grievance and dispute resolution process. EXC p. 11. Respondent's comparison of the instant action to *Kitsap* is based upon a skewed reading of the Board's findings in that case.

In *Kitsap*, 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. *Id.* at 8.

The *Kitsap* Board found that these bargaining proposals "evidenced 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. 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. 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." *Id.* 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 ALJ correctly found in the instant action that Respondent's proposals essentially mirrored those found to be unlawful in *Kitsap*. See ALJD at 35-36. As set forth *supra*, Respondent's management rights proposals did not change in any significant manner over the course of nearly two years of bargaining. 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— 16)“*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.*” 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.¹¹ In that respect,

¹¹ Although Respondent did not explicitly propose that the management rights provision would not be subject to the grievance procedure, the language of Respondent's grievance and mediation proposal is sufficiently broad to foreclose any disputes being challenged. Thus, like in *Kitsap*, the Union here would “be left with no avenue to challenge any of the Respondent's

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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 *Kitsap*. As in *Kitsap*, the combination of proposals here should alone be sufficient to conclude that Respondent was engaged in surface bargaining.

Respondent also takes issue with the ALJ's reference to *McClatchy Newspapers*, 321 NLRB 1386 (1996) and *Woodland Clinic*, 331 NLRB 735 (2000). EXC pp. 16-17. The ALJD is correct that both cases are applicable to the instant action. In *McClatchy*, the Board found that an employer's attempt to retain unfettered discretion over wages frustrates the bargaining process. *Id.* The Board held 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. 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.)

In the instant action, both the "merit" and "market" components of Respondent's wage proposal provided Respondent with unfettered discretion over unit employees' wages, a point repeatedly made clear at the table. At all times, Respondent insisted that the Union would have

decisions with regard to the nearly exhaustive list of rights reserved. . . under the management rights clause." 366 NLRB No. 98, slip op. at 9.

no part in determining either the market wage rates, or the merit-based adjustments. Respondent held that position throughout bargaining, and even insisted on this discretion as part of the package, that “without merit [discretion] this [wage increase proposal] is not on the table.” ALJD at 24: 32–35; R Ex. 3 at RESP 352. Accordingly, the ALJ was correct in finding that Respondent’s management rights and wage proposals, taken together and in consideration of Respondent’s other proposals, were unlawful. ALJD at 36: 12-17; 41: 1-5.

4. Respondent’s adherence to its No Union Security proposal is unlawful (Answer to Exception 7)

Exception 7: Respondents take exception to the ALJ’s finding that its **Union Security** proposal was unlawful, as an employer is entitled to propose the elimination of **Union Security**, the Hospital (via Steve Bernstein, not Jeanne Schmid) provided multiple grounds in support of its proposal, and the ALJ improperly placed the burden on the Hospital to “substantiate” its stated business justifications.

The Facts of Respondent’s No Union Security Proposal: At the same March 29, 2017 session discussed above, 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.¹² 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: 10.¹³ At bargaining, Bernstein also explained that a third reason—which he described at the table as “philosophical”—involved Respondent’s belief that it

¹² Respondent also proposed to delete the parties’ longstanding dues remittance provision. R Ex. 1 at 3598–3600.

¹³ Respondent neither called any witnesses nor produced any documents in support of these proffered justifications.

should not be “compelling employees to pay anything as condition of [employment] when it comes to rendering fees to a third party.”¹⁴ R Ex. 3 at RESP 181–182.

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. R Ex. 2 at 3771. Respondent failed to counter the Union's April 6 proposal. On September 5, 2018, in an effort to break the stalemate between the parties', the Union presented a counterproposal on union security.¹⁵ Tr. 83: 6–8; 145: 1–2; 214: 21–23; 575: 23–25; GC Ex. 24. This counterproposal was categorially rejected on September 5, with Respondent's assertion that they were “not going to have a union security clause.” R Ex. 3 at RESP 384. Respondent continued to adhere to its original position of removing the union security clause in its entirety from the CBA. R Ex. 3 at RESP 366 and 384–385. At the October 10, 2018 bargaining session, Respondent refused to further discuss union security, referring the Union to its prior proposal. *Id.* at RESP 403.

The Law: Respondent's primary argument in exception 7 is its claim that its three reasons for having a No Union Security proposal were sufficient justification under *Kalthia Group Hotels, Inc.*, 366 NLRB No. 118 (June 25, 2018). EXC pp. 25-27. Respondent's three reasons for its proposed No Union Security provision includes: 1) an objection from a few employees to a dues obligation; 2) a claim that its recruiting efforts were hindered; and 3) Respondent's philosophical opposition to such a provision.

¹⁴ 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.

¹⁵ As with the other September 5 proposals, the Union had pulled the language for this proposal 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.

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Respondent failed to provide any evidence that its recruiting efforts were in any way hindered by the Union Security provision. ALJD at 37. The dues obligation claim is encompassed in Respondent's philosophical opposition to the Union Security provision and is not based upon any claim of a legitimate business justification. *Id.* Furthermore, Respondent's bargaining briefs referred only to the philosophical justification. R Ex. 3 at RESP 181-182. Accordingly, the ALJ was correct in relying on *Kalthia*, in finding that Respondent unlawfully proposed and insisted on deletion of the union security provision. ALJD at 37: 20-28.

In *Kalthia*, 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. 366 NLRB No. 118 (June 25, 2018). 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." *Id.* at 19. 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.* at 19-20.

As Respondent correctly points out, "[u]nion 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.'" *Challenge-Cook Bros.*, 288 NLRB 387, 389 (1988) (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 employer in *Kalthia*, in that Respondent established only a “philosophical opposition” to the inclusion of a union-security provision.¹⁶ Also, like in *Kalthia*, Respondent's proposed deletion of union security is just one among a pattern of predictably unacceptable proposals supporting an inference of bad-faith. 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.

5. Respondent's adherence to its Discipline proposal and its Regressive Bargaining is unlawful (Answer to Exceptions 8 and 9)

Exception 8: Respondents take exception to the ALJ's finding that the Hospital's **Discipline** proposal was unlawful, alone or in combination, and/or because it sought to eliminate the “just cause” standard.

Exception 9: Respondents take exception to the ALJ's finding that the Hospital engaged in “regressive” bargaining when it corrected a reference to “arbitration” in its **Discipline** proposal, as a correction of a mistake, especially prior to a Tentative Agreement, is not regressive.

The Facts of Respondent's Discipline Proposal and Regressive Bargaining:

Respondent's January 17, 2017 proposal on discipline, described above, 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. Tr.

¹⁶ Respondent seems to argue here that the ALJ should have deemed Respondent's other proffered justifications legitimate merely because the record reflects that Bernstein and Schmid stated them at the table. As set forth above, these proffered justifications were not supported by evidence that even hinted at a legitimate business justification.

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42: 11 to 44: 4; 118: 22 to 119: 3; 188: 4–15; 189: 7–13; GC Ex. 46; R Ex. 3 at RESP 98–112, with emphasis at RESP 00107. Upon receipt of the proposal, the Union immediately objected 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.

Contrary to Respondent's exceptions, the evidence presented at hearing supports the finding by the ALJ that Respondent's reference to arbitration in its discipline proposals was not a "mistake". EXC p. 29. Specifically, when pressed on cross-examination, Respondent's attorney and lead negotiator Steven Bernstein admitted that reference to arbitration in Respondent's discipline proposal was not a mistake and that the parties actually discussed the applicability of arbitration 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; R 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.

On January 31, 2017, the Union presented a counterproposal to Respondent's article on discipline. Tr. 46: 6–7; GC Ex. 6; R 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

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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. Contrary to Respondent's assertions in its exceptions and supporting brief, it did not resolve this discrepancy at the April 5 bargaining session. Tr. 56: 15–16. The 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.

The Law: 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. *Management & Training Corporation*, 366 NLRB No. 134, slip op. at 4 (July 25, 2018); 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."). As Respondent correctly points out in its exceptions, 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." *Management & Training Corporation*, 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 proposal in order to stage negotiations and frustrate efforts at reaching an agreement. ALJD 36: 43-45, 37: 11-39, 40: 1-2. Although Respondent attempts to discount its earlier arbitration proposal, in reality, Respondent's January 17 discipline proposal and the parties' January 31 discipline proposals all provided for binding arbitration for terminations. ALJD 12: 12-19, 36: 7-9. Moreover, Respondent's own bargaining notes establish that this provision was discussed to a sufficient extent that Bernstein was forced to concede at hearing that the arbitration discussions and proposals were not a mistake. Tr. 597: 5 to 599: 6; 608: 24 to 609: 23. Respondent did not propose mediation as a final step of the grievance process 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. R Ex 3 at RESP 221. 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's only explanation for regressing from arbitration to mediation was a false claim that it made a mistake by proposing arbitration initially. Respondent continues to argue "mistake" as its justification for its regressive bargaining even today, an argument that is belied by Bernstein's testimony. EXC p. 28. Accordingly, the Board should affirm the ALJ's finding that Respondent's backpedal was not a mistake at all, but was instead an unexplained—and thus unlawful—regression. ALJD at 37.

B. Union tested Respondent's Willingness to Bargain (Answer to Exceptions 5 and 6)

Exception 5: Respondents take exception to the ALJ's findings that the Hospital's combination of proposals (specifically, **No Strikes or Lockouts, Grievance and Mediation, Management Rights, and Wages**) constituted bad-faith surface bargaining in violation of Section 8(a)(5) and (1), as the proposals were not unlawful, either individually or in combination, and the ALJ misstates the course of bargaining (and specifically, improperly finds "adherence"), fails to address the Union's failure to meaningfully test the Hospital's willingness to bargain about the proposals, and misapplies the cited case law.

Exception 6: Respondents take exception to the ALJ's failure to substantively address the Union's refusal to test the Hospital's willingness to bargain about the alleged objectionable proposals.

The Facts: The ALJ correctly found that Respondent adhered to its unlawful proposals after the Union "tested" Respondent's willingness to bargain. The timeline of this test:

Grievance and Mediation (No Arbitration)

March 29, 2017, Respondent original written proposal. GC Ex. 11.

April 5, 2017, Union verbal counter, rejected by Respondent. R Ex. 3 at RESP 181-203, 220-230.

May 25, 2017, Respondent e-mails its adherence/entrenchment in original position. GC Ex. 17.

September 5, 2018, Union attempts to break stalemate with new written counter. GC Ex 23.

September 5, 2018, Respondent verbally rejects Union counter. Tr. 143: 15-21.

Discipline

January 17, 2017, Respondent original written proposal. GC Ex 4.

January 17, 2017, Union verbal counter. Tr. 44: 1-26; 189: 23-190: 12.

January 31, 2017, Union written counter. GC Ex. 6; R Ex. 2 at RESP 3742-3745.

January 31, 2017, Respondent written adherence to original position. GC Ex. 7; Tr. 45: 12-17.

April 5, 2017, Respondent written adherence to original position and proposal to delete arbitration as a dispute resolution mechanism for terminations. GC Ex. 14.

April 5, 2017, Union verbal response. Tr. 56: 4-10; 556: 6-18.

May 25, 2017, Respondent e-mails written confirmation of adherence to April 5 position. GC Exs. 15 and 17.

No Strike

March 29, 2017, Respondent original written proposal. GC Ex. 12.

March 29, 2017, Union verbally rejects proposal as being unlawful. Tr. 51: 16-25; 120: 3-10.

June 7, 2018, Respondent withdraws proposal after charge is filed. GC Ex. 21.

Management Rights

December 6, 2016, Respondent original written proposal. GC Ex. 2

February 1, 2017, Union written counter. R Ex. 2 at RESP 003761-3763.

March 28, 2017, Respondent written adherence to original proposal. GC. Ex. 9.

September 5, 2018, Union attempts to break stalemate with new written counter. GC Ex 25.

September 5, 2018, Respondent verbally rejects proposal. R Ex. 3 at RESP 00386.

Union Security

March 29, 2017, Respondent original written proposal. GC Ex. 10.

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April 5, 2017, Union verbal response. R Ex. 3 at 00181-182.

April 6, 2017, Union written response. R Ex. 2 at 003771.

September 5, 2018, Union attempts to break stalemate with new written counter. GC Ex. 24.

September 5, 2018, Respondent verbally rejects. R Ex. 3 at RESP 366, 384-385.

Wages

April 6, 2017, Union original written proposal. R Ex. 2 at RESP 003780-3782.

May 18, 2018, Respondent original written proposal. GC Ex. 18.

May 21, 2018, Union verbal counter. Tr. 69: 20-24.

May 21, 2018, Respondent written counter. GC Ex. 19.

May 18-October 11, 2018, Union verbal response. R Ex. 3 at RESP 301-412.

By the end of the parties' October 11 bargaining session, the parties had agreed on very little, and Respondent had repeatedly 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. ALJD: 36-37.

The Law: 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). Although the Act does not compel a party to make a concession, 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 does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001).

In determining whether an employer bargained in bad faith, the Board 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 258, 259–260 (2001); see also *Atlanta Hilton*, 217 NLRB at 1603. It is not any one of these factors that is most persuasive and the Board examines the totality of the party's conduct to decide whether a party has unlawfully endeavored to frustrate the possibility of arriving at an agreement. *PSO*, 334 NLRB at 487. The Board will find that an employer has engaged in bad faith bargaining when “the employer will only reach an agreement on its own terms and none other.” *Mid-Continent*, 336 NLRB at 259, citing *Atlas Guard Service*, 237 NLRB 1067, 1079 (1978).

In support of exceptions 5 and 6, Respondent primarily relies on *Audio Visual Services Group, Inc.*, 367 NLRB 103 (2019) (“PSAV”). A review of the *PSAV* decision, however, actually amplifies the unlawfulness of Respondent's actions in this case. The parties in *PSAV* had only five bargaining sessions over an 8-month period. *Id.* at 8. Unlike the instant action, the bargaining in *PSAV* resulted in the parties agreeing to numerous CBA provisions, including the inclusion of **union security** and **dues checkoff** provisions. *Id.* The employer in *PSAV* also never proposed a **no-strike** provision. *Id.* generally. The employer in *PSAV* also demonstrated a willingness to bargain over **wages** and did not propose wages in a manner that suggested the union could ‘take it or leave it.’ *Id.* at 8. Right off the bat, the proposals in *PSAV* are significantly different than those of this case, where Respondent refused to consider a union security or dues checkoff provision, adhered for 14 months to its demand for a no-strike provision, and told the Union that its wage proposal was ‘not on the table’ if the Union did not agree to Respondent's wage terms. ALJD 24: 32– 35; R Ex. 3 at RESP 352.

More differences between *PSAV* and this case are visible through the discipline, arbitration, and management rights proposals. The employer in *PSAV* agreed from the start of

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bargaining to arbitration as the resolution to grievances. *Id.* at 1. By the end of the parties' bargaining sessions, the employer in *PSAV* also agreed to the grievance and arbitration provision that was substantially proposed by the union. *Id.* at 4. The employer in *PSAV* initially proposed a management rights clause that gave it 'sole discretion' over discipline and subcontracting. *Id.* at 2. However, within a month of that initial proposal, the *PSAV* employer modified its management rights proposition to limit subcontracting to necessary business operations and special skill and workload requirements. *Id.* at 3. Two months later, the employer agreed to further limit its subcontracting rights to situations where bargaining unit employees lack skills or are unavailable for work or when the employer did not have the equipment for the work. *Id.* at 4. By the end of the parties' bargaining sessions, the *PSAV* employer agreed that disputes over subcontracting could be grieved and arbitrated. *Id.* In *PSAV*, the employer initially proposed a "reasonable belief" discipline provision containing no progressive discipline scheme. *Id.* at 1. However, by the end of the parties' bargaining sessions, the employer gave up its "sole discretion" language and agreed to a progressive discipline provision that could only be skipped for repeat offenses and/or certain particularly egregious conduct defined in the tentative agreement. *Id.* at 4. Here, however, Respondent did not make any similar concessions, and as of the time of its unlawful withdrawal of recognition, continued to insist upon, among other things, unlimited discretion to make unilateral decisions such as: disciplining employees without just cause; the use of contractors and supervisors to perform bargaining unit work; no arbitration for grievances, changing employees' benefits; conducting investigative searches of employees; and determining the existence of unit work, which positions are in the Unit, and whether unit work would even be performed at all. Most of these objectionable proposals were not even brought to

the table for discussion by the employer in *PSAV*, a notable difference that highlights Respondent's egregious conduct in this action.

The Board in *PSAV* also found that the union did not test the employer's bargaining because at the time the charge was filed, the employer did not have an opportunity to respond to the union's bargaining proposal. *Id.* at 8. The instant case stands in stark contrast with *PSAV* in this regard. On March 12, 2018, the initial charge in Case 5-CA-216482 was filed, alleging unlawful bargaining through Respondent's no arbitration, no strike, and management rights proposals. GC Ex. 1. Respondent had adhered to its no arbitration proposal since April 5, 2017, its no strike proposal since March 29, 2017, and its management rights proposal since December 6, 2016. *Supra* at p. 27. Before the initial charge was filed, Respondent had many opportunities to move from its unlawful proposal, respectively nine bargaining sessions from its April 5, 2017 no arbitration proposal, ten from its March 29, 2017 no strike proposal, and twenty from its December 6, 2016 management rights proposal. EXC p. 3. In short, the parties had long been involved in bargaining, and the Union had repeatedly "tested" Respondent's positions. Respondent's overarching argument—that it should not be found to have bargained unlawfully in bad faith because the Union did not sufficiently cower to Respondent's outlandish proposals and manufactured Respondent's own "adherence" to unlawful proposals—is a misplaced invitation to reach a decision unsupported by years of Board precedent.

On September 7, 2018, the first amended charge was filed, adding an allegation of unlawful regressive bargaining. GC Ex. 1. Since Respondent's regressive bargaining did not occur until April 5, 2017, Respondent had seventeen months and fifteen bargaining sessions to cure its unlawful regression, but refused to do so. EXC p. 3. The third amended charge was filed on June 2, 2019, adding allegations to the unlawful bargaining of Respondent's adherence

to no union security and unfettered wage discretion. GC Ex. 1. Since this charge was filed after Respondent cut off bargaining, Respondent was in full control of its non-opportunity to cure the unlawful bargaining.

The parties met over a nearly two-year period, with thirty bargaining sessions. In this entire time, Respondent refused to move off of its unlawful combination of proposals, with the exception of withdrawing its No Strike proposal after the initial charge was filed. The record reflects that, contrary to Respondent's assertions, the Union did test and respond to Respondent's proposals both verbally and in writing throughout the thirty bargaining sessions, in an effort to reach a CBA. After twenty-six of the bargaining sessions were unsuccessful, the Union attempted to make progress in the negotiations through its September 5, 2018 bargaining proposals, which were proposed to break the stalemate and try to get Respondent to see reason. The Union went beyond its own obligations, bargaining against itself on multiple occasions, all in an effort to get Respondent to move off its original proposals. Despite the entire record showing Respondent's bad acts in bargaining, Respondent insists upon claiming victim status, pointing to *PSAV* and falsely claiming that the Union did not sufficiently test its patently unacceptable proposals. The ALJ did not find this posturing by Respondent to be credible, and CGC urges the Board to reject Respondent's disingenuous arguments and affirm the ALJD's findings and conclusions. ALJD at 36-37.

C. Respondent's Bargaining Briefs (Answer to Exception 10)

Exception 10: Respondents take exception to the ALJ's finding that its "Bargaining Briefs" led to employee disaffection as they were lawful and non-coercive, and there was no record evidence to support the conclusion.

The Facts: It is undisputed that Respondent issued "bargaining briefs" to the Unit employees after the majority of bargaining sessions. EXC p. 31; GC Exs. 3, 5, 8, 13, 16, 20, 22, 26, 27, 37, 40. As the ALJ correctly found, these bargaining briefs "continually disparaged the

Union during bargaining, misrepresented the parties' bargaining positions, including its wage proposals, and blamed the Union for the lack of pay raise." ALJD 38: 10–12. This ALJ conclusion was based upon the ALJ's comparison of the bargaining briefs to the record evidence showing what actually occurred in bargaining. See e.g., ALJD 8: 36-40, 9: 1-2, 10: 1-7, 11: 15-40, 12: 1-8 and 28-35, 13: FN 28, 15: 36-40, 16: 1-29, 17: 12-19, 23: 12-15, 24: 42-44, 25: 1-8, 27: 7-47, 28: 1-2 and 30-43, 29: 1-33, 37: 41-47, 38: 1-31, 39: 32-35, 40: 25-28, 41: 13-25.

A review of the record also provides support for the ALJ's finding that the October 12 bargaining brief "triggered a stampede of disappointed unit employees to sign the petition." ALJD 41: 7-8. Specifically, it is undisputed that there were 156 employees in the Unit at the time the disaffection petition was submitted to Respondent. Tr. 231: 10-11. Accordingly, the petition would need seventy-eight valid signatures for the Union to have lost majority support. Respondent authenticated eighty-one signatures on the disaffection petition. Tr. 231: 10-19; 235: 20-25; 236: 1-5. Of the eighty-one signatures, twenty-seven signatures occurred between the October 12, 2018 bargaining brief and the October 25, 2018 Respondent review of the disaffection petition. R Ex. 7. The ALJ was therefore accurate in his finding that a 'stampede' signed the petition as a result of the October 12 bargaining brief.¹⁷

The record also supports the ALJ's finding that Respondent's October 12, 2018 bargaining brief misrepresented the parties bargaining positions, including wage proposals, and blamed the Union for the lack of pay raise. ALJD 38: 10-12. Respondent's October 12, bargaining brief blames the Union for the Unit not receiving a wage raise. GC Ex 27. This bargaining brief also falsely claims that the Union did not ask for information regarding the

¹⁷ Respondent alludes to signatures that pre-dated this "stampede," ignoring the importance of the large number of employees that signed the disaffection petition in this time period, absent which a majority of employees would not have expressed their disaffection.

Employer's wage proposal for a five month period. *Id.* In reality, at the May 18 and 21, July 31, and August 1, 2018 bargaining sessions, the Union repeatedly asked for details about the Employer's bargaining proposal and documents to support the Employer's wage proposal; while the Employer continued to delay and avoid providing this information and documentation to the Union. R Ex 3 at Bates RESP 305-354. The October 12 bargaining brief also represents that if the CBA is signed, Respondent would provide wage raises immediately upon ratification of the CBA. GC Ex 27. Left out from the October 12 bargaining brief is that Respondent continued to adhere to its other unlawful proposals, which prevented the parties from reaching a CBA. Accordingly, the ALJ was correct to find that the bargaining briefs, including the October 12 brief, "served to undercut unit employees' support for the Union." ALJD 38: 10-14.

The Law: 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 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

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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. ALJD at 38: 10-14. 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.¹⁸ 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.'"). Tracking the analysis of

¹⁸ Among Respondent's arguments in support of Exception 10 is that the ALJ improperly relied on the bargaining briefs "to bolster his 8(a)(5) findings." EXC at 34. This argument relies on a faulty premise, i.e., that because the ALJ concluded that the bargaining briefs did not constitute violations of Section 8(a)(1), the ALJ could not consider the briefs when examining the allegations in the Complaint that Respondent breached its statutory duty to bargain in good faith with the Union.

the ALJ, the bargaining briefs are thus persuasive evidence of Respondent's bad faith in negotiations. Accordingly, Respondent's Exception 10 should be dismissed.

D. Master Slack and Lee Lumber (Answer to Exceptions 11 and 12)

Exception 11: Respondents take exception to the ALJ's decision insofar as he improperly applied *Lee Lumber*, as this is not a refusal to bargain case.

Exception 12: Respondents take exception to the ALJ's decision insofar as he misapplied the *Master Slack* factors in finding that unremedied unfair labor practices caused disaffection, as there were no unremedied ULPs, and even if there were, they were too remote in time, they were not of a nature to lead to employee disaffection, and they did not cause employee disaffection.

Upon expiration of a CBA, an incumbent union is presumed to enjoy majority support among unit employees, and an employer may only withdraw recognition 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). In *Lee Lumber*, the Board explained that this question of attribution depends on whether a causal connection exists between an employer's pre-withdrawal ULPs 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 below, Respondent's surface and regressive bargaining is synonymous with a failure and general refusal to bargain in good faith, warranting a presumption that its conduct tainted the disaffection petition and withdrawal of recognition. Even without a presumption, a *Master Slack* analysis establishes an impermissible taint of the disaffection petition.

1. *Lee Lumber*

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. 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).

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 at 2-3.¹⁹ 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. Accordingly, CGC urges the Board to dismiss exception 11 and affirm the ALJ's conclusion that under *Lee Lumber*, Respondent's "unlawful failure to bargain in good faith with the Union is presumed to have caused the subsequent employee disaffection." ALJD at 39: 30-35.

2. *Master Slack*

Under *Master Slack Corporation*, 271 NLRB 78 (1984), the Board considers the four factors set forth above in order to determine whether a causal relationship exists. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). The ALJD correctly concludes that analysis of all four factors results in the conclusion that a causal relationship exists between the bargaining unfair labor practices and the withdrawal of recognition. ALJD at 40: 1.

a. **Factor 1: No time passed between the ULPs and Withdraw 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*

¹⁹ Here, of course, Respondent had not remedied its bad-faith bargaining for any amount of time before it withdrew recognition.

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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. 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, the Board should affirm the ALJD's finding that the first *Master Slack* factor suggests a causal connection between the timing of the signatures on the disaffection petition and the bargaining unfair labor practices. ALJD: 40: 1-23.

b. Factors 2 and 3: The ULPs had lasting, detrimental effects, causing 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. Accordingly, the ALJD correctly concludes that *Master Slack* factors two and three are weighted in finding a tainted disaffection petition. ALJD at 40: 25-37.

c. Factor 4: The ULPs had a demonstrable negative 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 was also correctly found by the ALJ to be weighted heavily in favor of finding a causal relationship between Respondent's bad-faith bargaining and the withdrawal of recognition. ALJD at 40: 39-45, 41: 1-10. Accordingly, counsel for the General Counsel urges the Board to adopt the ALJ's conclusion that consideration of *Lee Lumber* and the *Master Slack* factors result in the conclusion that Respondent unlawfully withdrew recognition from the Union.

E. Withdraw of Recognition was Unlawful (Answer to Exceptions 13 and 18)

Respondent's exceptions 13 and 18 should be dismissed because it is immaterial and misapplies well-established Board law.

Exception 13: Respondents take exception to the ALJ's decision insofar as he found the withdrawal of recognition to be unlawful, and *ipso facto*, post-withdrawal unilateral changes to be unlawful as well, as the Hospital had received objective evidence of the Union's loss of majority support (at a larger margin than recognized by the Act) and unremedied ULPs, if any, were not of the variety to cause employee disaffection.

Exception 18: Respondents take exception to the ALJ's finding that at all relevant times the Respondents recognized the Union as the exclusive bargaining representative

of the employees and that the Union was the exclusive bargaining representative of the employees.

The Facts: As set forth above, the ALJ correctly found that Respondent's withdrawal of recognition was unlawful under both *Lee Lumber* and *Master Slack*. Therefore, the validity of signatures on the petition and number of employees in the Unit is irrelevant because of Respondent's unlawful bargaining conduct, tainting the signatures.

The Law: Respondent's citation to *Mkt. Place, Inc.*, 304 NLRB 995 (1991) is also non-persuasive. In *Mkt. Place*, the Board adopted an administrative decision in which it was found that the employer in *Mkt. Place* did not commit any ULPs prior to the withdraw of recognition, thereby making the withdrawal of recognition lawful, and further removing any obligation of that employer to bargain with that union after the withdraw. The circumstances of *Mkt. Place* do not exist in the instant action, where the ALJ found Respondent unlawfully failed in its bargaining obligation and unlawfully withdrew recognition. Accordingly, Respondent's bargaining obligation continued even after this unlawful withdraw of recognition and Respondent was not privileged 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).

F. ALJ's Credibility Determinations were Proper (Answer to Exception 14)

Exception 14: Respondents take exception to the ALJ's credibility determinations as they relate to Jeanne Schmid and every employee witness that testified, as they grossly misstate and inaccurately portray the sworn testimony and record evidence, as well as the ALJ's reliance on and characterization of bargaining notes which demonstrates bias.

Respondent's exception 14 should be dismissed because it makes a meritless attack on the ALJ's credibility findings. The Board has long held that a judge's credibility determinations will not be overturned "except where the clear preponderance of all relevant evidence convinces

[the Board] that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). Contrary to Respondent's assertion, the ALJ's credibility determinations are fully supported by a preponderance of relevant evidence.

Respondent's first prong of exception 14 is its objection to the ALJ's finding that Jeanne Schmid was not credible in her testimony that she did not learn of the disaffection petition until July, August, or September 2018. EXC at 40. Contrary to Respondent's assertion, this credibility determination was not only based on the December 11, 2016 email, but also based on Schmid's "recollection of other salient facts." ALJD 31: FN 82. Regardless of whether Schmid was familiar with the December 11, 2016 email, it is undisputed that Respondent was aware of the disaffection petition as early as December 2016, and was crafting its bargaining briefs in a manner to encourage dissemination of the petition. GC Ex. 36; Tr. 217: 9-25, 218: 1-9. It is therefore immaterial whether Schmid herself knew of the disaffection petition in 2016. Moreover, the ALJ's credibility determination with respect to this one fact did not extend to his credibility determination with respect to Schmid overall. Indeed, the ALJ relied upon Schmid's testimony in support of his findings throughout the ALJD.

Respondent's second prong of exception 14 is its objection to the ALJ's credibility determinations with respect to nine of the ten subjective witnesses.²⁰ EXC at 40-41. Respondent first objects to the ALJ's finding that the testimony of Eugene Smith and Hardie Cooper was not credible. EXC 41. Respondent does not cite to any evidence that contradicts the ALJ's credibility determinations with respect to Smith and Cooper. *Id.* With respect to the credibility

²⁰ Contrary to exception 14, Respondent's brief does not include an argument opposing the ALJ's credibility finding that Lewis Bellamy "signed the petition on August 29, 2018 because the Union was not getting results from bargaining over two years, specifically pay raises." Compare ALJD 31: 1-2 with EXC 41: FN 26.

determinations for the other seven witness, Respondent does not dispute that five of the seven witnesses testified that they signed the petition because the delayed bargaining that resulted in a lack of wage raises.²¹ Id. at 41-42. Respondent admits that this testimony is in the record, and was elicited on cross-examination. Id. Accordingly, Respondent's objection to the ALJ relying on this testimony is without merit. Furthermore, even without this subjective testimony, the ALJ found Respondent's withdraw of recognition to be unlawful under the objective considerations of *Lee Lumber* and *Master Slack*. ALJD 39: 30-35; 40: 1-45; 41: 1-25. Respondent's exception 14 should be dismissed, and the Board should adopt the ALJ's credibility determinations.

G. *Johnnie's Poultry* is a Moot Issue (Answer to Exception 15)

Respondent's exception 15 is immaterial and, even if granted by the Board, would not change the underlying undisputed facts of the case. The ALJ dismissed the General Counsel's *Johnnie's Poultry* allegation, a conclusion to which CGC has declined to file any exception.

Accordingly, Respondent's exception to the ALJ's consideration of *Johnnie's Poultry* is wholly

²¹ Tsedale Benti 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. 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.

Vivian Otchere 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.

Noel Reyes testified that he signed the disaffection petition because the Union had not secured a wage raise for the employees after 2016 and so he felt the Union was not doing anything for the employees. Tr. 341: 14-17; 342: 4-9.

Mary Collins testified 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 wage raise. Tr. 310, l. 18-24, p. 311, l. 1.

Freddie Ard 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. 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.

immaterial to an analysis of Respondent's violations of the Act. Accordingly, CGC submits that Respondent's 15th exception should be dismissed in its entirety.

H. ALJ Recommended Remedy is Proper (Answer to Exceptions 16 and 17)

Exception 16: Respondents take exception to the ALJ's issuance of an affirmative bargaining order, including the provisions that require bargaining for a minimum of 15 hours per week, submission of written bargaining progress reports every 15 days to the Region's Compliance Officer (along with copies to the Union), and payment to employee union committee members for earnings or leave lost while attending bargaining sessions, as neither the facts nor the law support such an extraordinary remedy, the remedy is solely punitive in nature, and the remedy is not tailored to achieve compliance with the Act.

Exception 17: Respondents take exception to the ALJ's incorrect recitation of the Hospital's alleged availability for negotiations, as he misstates the record and ignores the Union's restricted availability.

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. 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. All three factors weigh in favor of affirming the bargaining schedule and order in the instant case.

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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 unlawful 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 unlawful withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. Accordingly, CGC respectfully urges that the Board adopt the ALJ's recommendation of a bargaining schedule and order as part of the remedy in this case.

I. Exception 19 is unsupported and should be summarily dismissed.

Exception 19: Respondents take exception to the ALJ's Conclusions of Law, Remedy, Order, and Appendix in their entirety because they are not supported by the facts or law, as more fully outlined in the preceding exceptions.

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board, any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. Exception 19 is a general exception to the ALJD and Respondent provides no support it other than its arguments in exceptions 1-18. Accordingly, CGC stands on its prior arguments in opposition to exception 19.

III. CONCLUSION

For the foregoing reasons, CGC respectfully requests that Respondent's exceptions be dismissed in their entirety and that the ALJ's decision, including his findings, conclusions, recommendations, and proposed remedy, be adopted by the Board in its entirety.

Answering Brief to Respondent's Exceptions

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CERTIFICATE OF SERVICE

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