

CHARGING PARTY'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO ALJ'S

DECISION ISSUED SEPTEMBER 24, 2019

Respectfully submitted,

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

In The Matter of:

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

Cases 05-CA-216482
05-CA-230128
05-CA-238809

and

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

CHARGING PARTY'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO ALJ'S

DECISION ISSUED SEPTEMBER 24, 2019

1199 SEIU, United Healthcare Workers East, MD/DC Region ("1199 SEIU"), by and through its undersigned attorneys, hereby files its Response to the Exceptions to the Decision of Administrative Law Judge Michael A. Rosas of September 4, 2019 (hereinafter "JD" at page number).

I. STATEMENT OF THE CASE

Respondent is the operator of an acute care hospital located in Washington, DC. 1199 SEIU represents employees working in Respondent's Environmental Services and Dietary departments.

This consolidated case pertains to a complaint issued by the National Labor Relations Board ("Board") alleging that Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. sections 151-169 ("Act") by: (a) refusing for nearly two years to bargain in good faith or with any intention to reach agreement on a successor collective bargaining agreement with 1199 SEIU; (b) bargaining regressively with 1199 SEIU; (c) withdrawing recognition from 1199 SEIU after nearly two years of bargaining in bad faith and regressive bargaining; and (d) implementing, immediately after withdrawing recognition, unilateral changes to bargaining unit employees' terms and conditions of employment.

The case was tried before Judge Rosas on June 20, 2019. Judge Rosas issued his Decision on September 4, 2019 (JD-69-19). In that Decision, Judge Rosas found as a matter of law that Respondent had violated Section 8(a)(1) and (5) of the Act by bargaining in bad faith and with no intention of reaching a successor collective bargaining agreement with 1199 SEIU by:

- (a) Adhering to bargaining proposals that provided the bargaining unit with less rights than they would have had without a collective bargaining agreement;
- (b) Engaging in regressive bargaining;
- (c) Adhering to a proposal to delete a long-standing union security provision;
- (d) Maintaining proposals that granted Respondent unfettered discretion on wages;
- (e) Unlawfully withdrawing recognition from 1199 SEIU after engaging in unfair labor practices likely to cause 1199 SEIU to lose bargaining unit support.

Respondent takes exception to these conclusions of law and to the remedy Judge Rosas has proposed and to the Decision's Appendix. Respondent's exceptions, however, are supported by neither facts nor law.

II. STATEMENT OF FACT

Respondent is jointly owned by George Washington University and by District Hospital Partners, L.P., a subsidiary of Universal Health Services, Inc. 1199 SEIU is a labor organization which represents approximately 150 regular full-time and regular part-time staff of Respondent's Dietary and Environmental Services departments.

The bargaining relationship between Respondent and 1199 SEIU, which is more than two decades old, has been governed throughout by a series of collective bargaining agreements. The parties' most recent collective bargaining agreement was effective from December 20, 2012 through December 19, 2016. G.C. Ex. 30.

On November 21, 2016, the parties initiated what 1199 SEIU expected to be negotiations toward a successor collective bargaining agreement. Although, the expiring collective bargaining agreement and the collective bargaining agreement that preceded it had both been negotiated by the parties without counsel, when the parties convened on November 21, 2019, both Universal Health Services, Inc., Human Resources Vice President Jeanne Schmid ("Schmid") and outside counsel, Steven Bernstein ("Bernstein"), represented Respondent.

During the term of the expiring collective bargaining agreement, the relationship between the parties had been remarkably uncontentious. Only a single disagreement as to a contractual matter – a matter involving issues of procedural arbitiability of two grievances—had been processed to

arbitration. Tr. at p. 538. And, neither party had ever made use of any of its so-called “economic weapons.”

Nevertheless, from the very first, Respondent made manifest its intention to rewrite the parties’ expired agreement virtually in its entirety. R. Exh. 3 at 177 (“We made the point on day one our goal to renegotiate start to finish more clear [articles] remains our goal today.”) By February of 2017, Respondent already had proffered proposals for wholesale revisions to articles of the expired collective bargaining agreement, as well as one for a new “zipper clause” and a new article on solicitation and distribution.

For purposes of negotiating agreement with respect to this host of proposals, however, Respondent was willing to devote no more than two consecutive days in each month. JD at 13:10-14; R. Ex 3 at 150 (“Willing to make 2 full days a month.”) And, by May 16, 2017, Respondent already was warning the bargaining unit employees that: “ The reality is that, in similar circumstances, even in renewal negotiations, it has often taken two, three, or even more years to reach an agreement in other hospitals.” Bargaining Brief of May 16, 2017. (Emphasis added.)

Among Respondent’s many proposals was a proposal entitled “Rights and Duties of Managers, Supervisors and Licensed Clinical Staff (“Management Rights”). R. Exh. 1 at 3542-3543. This proposal reserved to Respondent, among other rights, 1) the right to: (a) discharge bargaining unit employees “at will;” (b) use contractors and supervisors to perform all bargaining unit work without limitation; (c) to determine whether positions were or were not bargaining unit positions; and (d) to determine what was and what was not bargaining unit work. JD at 9:9-15.

Among Respondent's many proposals was a proposal entitled "Grievance and Mediation." GC Exh. 11. In this document, Respondent proposed to replace Article 18 of the expired collective bargaining agreement, which provided for the arbitration of unresolved grievances. In its place, this proposal provided for mediation "non-binding upon either party," of "disputes arising under this Agreement concerning the interpretation and application of the Agreement to the facts of the particular grievance involved" and for circumscribed access by bargaining unit members to the courts; (" . . .no employee may sue in court for breach of any provision not subject to mediation.") GC Exh. 11.

Among Respondent's many proposals was a proposal entitled "No Strikes or Lockouts." GC Exh. 12. In this document, Respondent proposed to prohibit "strikes, picketing (informational or otherwise), slow-downs, sit-ins, boycotts, work stoppages. . . concerted in failure or refusal to perform assigned work, or any other action which shall interrupt or interfere with patient care or the normal or orderly operation of the Hospital. . ." The proposal made it clear that it was "intended to apply regardless of the motivation for the strike. That it, that it was intended to prohibit "strikes over alleged violations of this Agreement, strikes over issues excluded from grievance. . . procedures." And, it further stated that, "[a]ny statutory right under the National Labor Relations Act that an employee may otherwise have to engage in activities prohibited by this Article are specifically waived by the Union."

On May 21, 2017, 1199 SEIU warned Respondent that the combination of an expansive management nights proposal, a proposal for no binding arbitration, and a prohibitive no-strike proposal, had been found by the Board to be unlawful. R Exh. 3 at 221. On March 12, 2018, 1199 SEIU filed with the Board unfair labor practice charges alleging that Respondent had

violated the Act by advancing such a combination of proposals. On June 7, 2018, counsel for Respondent notified the Board that it had withdrawn its proposed no-strike clause.

Among Respondent's many proposals was a proposal to delete in its entirety the provisions for union-security and dues checkoff, which had been included in Articles 2 and 3 of the expired agreement. GC Exh. 10.

Among Respondent's many proposals was a proposal entitled "Discipline." GC Exh.4. As had Respondent's Management Rights proposal, this proposal, too, provided for the imposition of discipline without "cause." As originally submitted to 1199 SEIU on January 17, 2017, and as resubmitted on January 31 and April 5, 2017, this proposal provided that "terminations are subject to the full grievance and arbitration procedure."

On May 25, 2017, Respondent's counsel sent an email to the undersigned counsel. In that email, Respondent's counsel notified undersigned counsel that Respondent had revised its Discipline proposal "to reconcile some of the discrepancies that you had pointed out at prior sessions." R. Exh. 1 at 3627. Attached thereto, was a Discipline proposal revised to state: "Documented verbal, written and final written warnings may only be grieved, terminations are subject to the full grievance and mediation procedure." (Emphasis in original.)

On May 18, 2018, almost a year after 1199 SEIU made its initial wage proposal, Respondent made a proposal on wage of its own. GC Exh.18. Respondent's proposal included increases in shift differentials and certain performance bonuses. But, its central elements were two.

First, Respondent called for two possible individual merit based wage increases. One might be effective in August 2019, a year and three months in the future. The other, might be

effective in August of 2020. But, whether or not any merit increase would be given at all on these dates was a matter for Respondent's discretion, to be exercised on or before August 2019 and August 2020. R Exh. 3 401 ("...it is based on how the hospital does").

In the event Respondent did decide to grant any merit increases in August 2019 and/or August 2020, the increases received by employees were to be based on their performance evaluations. The criteria for these performance evaluations were to be "[d]etermined by the Hospital." R. Exh. 3 at 303. 1199 SEIU could grieve employees' performance evaluations and only in the event they resulted in an employee's discharge. R Exh. 3 at 310 (Q: "So the annual review that's going to affect your wage is not going to be grievable?" (A. [by Ms. Schmid]: "Correct.") And, left solely to Respondent's unfettered discretion was the relationship between the amount of any increase an employee was to receive and the outcome of the employee's performance review. R. Exh. 3 at 307 (Q: "Are you going to negotiate what those ranges are each year?", A. [by Ms. Schmid: "No the ranges are set for the hospital as a whole, it will be the same range for non-union employees and applied exactly the same way.")

The second major component of Respondent's wage proposal was what Respondent referred to as a "market based adjustment." Tr at p. 61. What Respondent proposed to do was place bargaining unit employees within a pay range in accordance with their credited years of experience.

The Respondent initially advised 1199 SEIU that the pay ranges for these "market" adjustments had been derived from some sort of market survey. When 1199 SEIU asked for the survey, 1199 was told that there was no survey; and that the market based adjustments would be based upon some anecdotal evidence that the Employer had as to what the market supposedly

was paying. R. Exh. 3 at 323” And, Respondent’s Schmid asserted that, “It’s management’s discretion to place {bargaining unit employees} by years of experience.” R. Exh. 3 at 317.

At the next scheduled session, the Respondent presented a second pay proposal virtually indistinguishable from its first, to which it attached an Appendix B. General Counsel Exhibit 19. This appendix set forth an hourly rate range for each of the active bargaining unit job titles, i.e., the range of rates that the Respondent proposed to pay an employee, based on the number of years of credited experience the employee has in his or her job classification. When asked where the Respondent planned on placing current employees within the ranges delineated in Appendix B, the Respondent replied: “To respond to that, we know that’s going to take a process we have not undertaken.” R. Exh. 3 at 317. No such process ever was undertaken prior to Respondent’s withdrawal of recognition from and refusal to bargain with 1199 SEIU.

At a session on August 1, 2018, Respondent verbally advised 1199 SEIU that it had increased its original base pay offer; and that it proposed to offer a minimum “market-based adjustment” of 2%. R. Exh. 3 at 351. At the same session, Respondent notified 1199 SEIU that all of the elements of its Wage proposal were contingent upon 1199 SEIU’s acceptance of its proposed merit wage payment system. R. Exh. 3 at 352 ([Schmid]: “. . . it is part of a package . . . and consideration for agreeing to merit, so without merit this is not on the table.”); ([Bernstein]: “we’re not trying to carve out portions of it, it all comes as one. . .”)

On October 26, 2018, Respondent withdrew recognition of 1199 SEIU. Exh 28. 1199 SEIU replied by telling Respondent that it was still willing to bargain on the previously scheduled dates of October 31 and November 1, 2018. Tr. at 146; GC Exh. 28. Respondent answered by restating its position.

After two years and 30 meetings, at only 4 of which neither party passed the proposal to the other, the parties were able to reach tentative agreement on only 4 items: (a) some hortatory preamble language; (b) a fifty dollar uniform allowance; (c) a non-discrimination proposal; and (d) a proposal on job postings. Tr. at 73.

III. ARGUMENT

A. The Respondent's Maintenance of and Adherence to a Combination of Proposals on Management Rights, Grievance and Mediation, No-Strikes and Wages Violated Sections 8 (a)(1) and (5) of the Act (Exceptions Nos. 1, 2, 3 and 4.)

In its Brief in Support its Exceptions to the ALJ's September 4, 2019 Decision ("Brief"), Respondent contends that "it is unclear" whether the ALJ took issue with Respondent's proposals, on Management Rights, Grievance and Mediation, No-Strikes and Wage, "alone or in combination." Brief at p. 10. In its Brief, Respondent then disaggregates this combination of proposals that it maintained and adhered to in negotiations; and presents legal support for the proposition that maintaining and adhering to any one of these proposals alone was not violative Section 8(a)(1)and (5) of the Act.

There is, however, no merit to Respondent's contention that the ALJ was not clear as to whether it was "alone or in combination" that he concluded that Respondent's proposals violated Section 8 (a)(1) and (5) of the Act. To the contrary, in his Decision the ALJ stated, in terms, that it was "in making and adhering to such a combination of proposals, the [Respondent] unlawfully endeavored to strip [1199 SEIU] of its role in representing bargaining unit employees in violation of Section 8 (a)(5) and (1) of the Act." JD-37:11-13. And, while Respondent's

exposition of cases, addressing whether maintaining and adhering to any one of these four proposals alone does or does not violate the Act, might make for an interesting law review article, it is patently inapposite here.

In the instant case, what the ALJ found was that Respondent's Management Rights proposal reserved to the Respondent rights to:

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 employee's 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. Along with its management rights proposal, the Hospital also proposed to nullify past practices.

JD 9:10-15

In this case, the ALJ further found that Respondent also had "tendered a proposal to replace Article 18 (grievance and arbitration) with a grievance and non-binding mediation provision.. . ." JD 15:16-17. That is, the ALJ found that Respondent proposed to eliminate any internal means with which bargaining unit employees could contest effectively Respondent's exercise of those rights extensively to control terms and conditions of bargaining unit employment, that were delineated in Respondent's Management Rights proposal.

In this case, the ALJ further found that Respondent also had proposed a "no-strike proposal, which would have precluded picketing and the use of "economic weapons" in response to contract violations while violation of Federal Law. . ." JD 13:40; JD 14:1-2. That is, the ALJ further found that Respondent had also proposed to prohibit bargaining unit employees from using concerted activity effectively to contest Respondent's exercise of Management Rights, no matter how arbitrary and capricious.

In this case, the ALJ further found that Respondent also had presented a proposal on Wage that required 1199 SEIU consent to a wage proposal that was “unrestricted, ambiguous and unpredictable” JD 36: 44-45. That is, the ALJ found that Respondent’s Wage proposal required 1199 SEIU to agree that any and all increases in bargaining unit pay were to be determined solely in accordance with Respondent’s total discretion.

The ALJ concluded that Respondent’s “prolonged adherence” to this particular combination of proposals “constituted bad faith surface bargaining in violation of Section 8 (a)(5) and (1) of the Act.” JD 36-37 What is more, the ALJ made clear just why he had so concluded. Thus, he stated that this particular combination of proposals gave Respondent:

“ . . . unfettered discretion to change virtually all aspects of bargaining unit operations, including wages, benefits, hiring, promotion and transfer, disciplinary action without just cause, work schedules, supervisors performing bargaining unit work, the use of part-time per diem agency and temporary employees, and work rules.”

JD. 36.

Indeed, with this particular combination of proposals, the ALJ stated, Respondent “unlawfully endeavored to strip the Union of its role in representation bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act.” JD 37:11-14.

In support of his conclusions and the legal and factual analysis upon which they are based, the ALJ cites any number of cases, in which the Board has found violative of Section 8(a)(5) and (1) proposed combinations like those advanced by Respondent. See, e.g., Kitsap Tenant Support Services, Inc., 366 NLRB at 9 (2018) (unfettered discretion over wages, broad management rights clause, ineffective grievance procedure) Target Rock, 324 NLRB 373, 386-87 (1997) enf’d 172 F. 3d 921 (D.C. Cir. 1998)(broad Management Rights, ineffective arbitration procedure and no-strike provisions found unlawful); A-1 King Size Sandwiches, 265

NLRB 850 (1982) enf'd 732 F. 2d 872 (11th Cir. 1984) cert den. 469 U.S. 1034) (expansive management rights, broad no-strike and exclusion of disciplinary decisions from grievance-arbitration procedure found unlawful); 675 Public Service of Oklahoma, 334 NLRB 487, 498 (2001)(broad management rights, no-strike, and a “virtually meaningless arbitration provision” found unlawful).

A review of Respondent’s Brief, on the other hand, reveals not one citation to a Board decision sustaining the lawfulness of such a combination of proposals as the ALJ found in this instance to be violative of Section 8(a)(5) and (1) of the Act. Such a review reveals not one citation to a Board decision sustaining the lawfulness of proposals that would, as the ALJ found they would in this instance, “have left the Union and the employees with substantially fewer rights and protections than they would have had without any contract at all.” Public Service of Oklahoma, supra.¹

B. 1199 SEIU Did Test the Respondent’s Adherence To Its Proposals (Exception Nos. 5,6)

In its Brief, Respondent asserts that the Board cannot find that Respondent violated Section 8(a)(5) and (1) of the Act, by “making and adhering to such a combination of proposals” as the ALJ found violative of the Act. For, Respondent further asserts the Board will not find an

¹ Respondent does cite Arkansas La Gas Co. as holding that “company-proposed changes in no-strike, management rights, arbitration and grievance. . .not so onerous or unreasonable as to bespeak bad faith.” Brief at pp 19-20. (Emphasis added.)But, Respondent’s characterization of the holding in that case is wholly inaccurate. As but one example of this inaccuracy, we would point out that the Board in Arkansas La Gas Co. actually found that “both parties were proceeding on a premise of a proposed contract that provided for binding grievance arbitration.” Id. at 887.

employer failed to bargain in good faith if the union failed to test the employer's willingness to bargain", citing Audio Visual Services Group, Inc., 367 NLRB 103, p.6 (2019) Brief at p. 22 (Emphasis in original). And, Respondent contends that, "the Union refused to bargain any of the proposals that it did not like. . ." Id. Brief at p. 22.

Respondent's characterization of the law and the facts at issue in Audio Visual Services Group must be rejected, however. As an initial matter, we would point out that Audio Visual Services Group hardly seems apposite here. For example, unlike this case, in that case, the Board found that, "The Respondent did not seek to retain such expansive and unfettered control that it would required the Union to cede substantially all of its representational function." Id. (Emphasis added)

Unlike this case, in that case, the Board found that, over the course of some 8 months:

The parties only had five bargaining sessions. The first of which was primarily devoted to establishing ground rules. Nevertheless they still reached tentative agreements on a number of contract provisions. . .

Id. The Board found that after the fifth session, the Union, upon filing unfair labor practices, just "walked away from bargaining" (Id.), before Respondent had any "opportunity to respond to the Union's final contract proposal. . ." Id. And, it was on the basis of these findings of fact that the Board concluded that "we simply cannot find that the Union had sufficiently tested the Respondent's willingness to bargain at the time it filed its bad-faith bargaining charge and ended bargaining." Id.

In the instant case, of course, the ALJ did find that Respondent sought to retain control over terms and conditions of employment so expansive that it would have required 1199 SEIU to cede substantially all of its representational function. And, in this case, the parties certainly did

not meet on only four occasions to negotiate employment terms and conditions. In this case, the parties met thirty times over close to three years, ostensibly to negotiate terms and conditions of employment. At only four of these meetings did neither party pass a written proposal to the other. Indeed, by October of 2017, a year before the last day of bargaining, Respondent's counsel announced that: "By my count the employer has submitted 19 proposals, the union has submitted 19 proposals. . . ." R. Exh. 3 at 273. And, in this case 1199 SEIU did not file an unfair labor practice charge and walk away. 1199 SEIU continued to bargain for 7 months after it filed its unfair labor practice charges. It was the Respondent who walked away from the table, in disregard 1199 SEIU's request for Respondent's return.

Moreover, Respondent's claim, that 1199 SEIU "refused to bargain any of the proposals that it did not like," simply cannot withstand scrutiny. For example, Respondent would have it that 1199 SEIU "did not like" and, therefore, did not test Respondent's willingness to bargain over Management Rights.

But, Respondent may not have it so. Respondent introduced the Management Rights proposal on December 6, 2016. On February 1, 2017, 1199 SEIU presented Respondent with a counter. Not only did 1199 SEIU bargain with respect to this proposal that "it did not like." In exchange for moderation of some of Respondent's proposed rights-- to discharge employees "at will," to the indiscriminate use of subcontractors and supervisors to do bargaining unit work, to define what was and what was not bargaining unit work, etc.-- 1199 SEIU offered tentative agreement to twenty-two of the twenty-six of the enumerated rights set forth in Respondent's proposal.

All of the willingness to bargain on Respondent's part that 1199 SEIU's counter elicited, however, was this: other than agreement to "receive from the Union constructive suggestions"

that it was entirely free to take or leave, Respondent agreed to change not a single word of the December 6, 2016 proposal. As Schmid candidly acknowledged at hearing, “We didn’t change the proposal.” Tr. at 248.

It is true that 1199 SEIU also “did not like” Respondent’s March 29, 2017 proposal to replace Article 18 of the parties’ expired agreement with a proposal for non-binding mediation of grievances. But, 1199 SEIU did test Respondent’s willingness to bargain in this regard at the parties’ very next meeting. Thus, at this meeting, 1199 SEIU made clear its own position that the parties should maintain their long-standing grievance and arbitration procedure.” R.Exh. 3 at 184-187 And, 1199 SEIU attempted to get from Respondent some understanding of why Respondent thought that this change in the parties’ grievance dispute resolution mechanism was necessary. R. Exh 3 at 185. Respondent’s only reply was that “my client prefers this approach.” Id.

On May 25, 2017, Respondent simply reissued its Grievance and Mediation proposal, as if there had been no discussion of its content and modified only language on grievances concerning discipline short of discharge which would not even be subject to mediation. GC Exh. 17. And, at no other time prior to October 28, 2018, did Respondent further modify its Grievance and Mediation proposal in any way.

To be sure, 1199 SEIU “did not like” Respondent’s No-Strike clause, either. But, 1199 SEIU tested Respondent’s willingness to bargain about this clause, just as soon as it was presented. R. Exh. 3 at 176-178; (“After months of negotiations new proposal on a no-strike clause with no labor dispute in twenty years, never had a picket line, never had anything but health[y] positive labor management relations. Why all of a sudden is the no strike clause a significant concern that would postpone a raise . . .?”); Tr. At p.560 ([Bernstein]: “I mean

verbally, I think the Union expressed some concern over this provision around the date it was tendered maybe a couple of sessions thereafter. . . “).

1199 SEIU also tried to point out that agreements to a no-strike clause usually were viewed by bargaining parties as necessary correlate as the counterpoint for agreement to the arbitration of grievances. R. Exh. 3 at 187 (“crucial if not in arbitration procedure no-strike clause. . .”)

At the parties’ May 16, 2017 session, 1199 SEIU notified Respondent that its combination of proposals on Management Rights Grievance and Mediation and No-Strike was a combination that the Board had held in the past to constitute unlawful surface bargaining. R. Exh. 3 at 221 (“. . .the combo of broad no-strike clause, very broad management [rights] proposals and no binding labor arbitration is an unfair labor practice held by the board (NLRB)”). Nevertheless, from March 29, 2017 until June 7, 2018, Respondent refused to change even a single word of its No-Strike proposal.

It is true that on June 7, 2018, 15 months after Respondent first proposed its No-Strike clause, Respondent did withdraw it. R. Exh. 1 at 3655-56. Respondent would have it that withdrawal of the No-Strike proposal was evidence of the malleability of the Respondent’s position in that regard.

But again, Respondent really may not have it so. As we have indicated above, in March of 2018 1199 SEIU filed with the Board in Region 5 unfair labor practice charges against Respondent. 1199 based those charges of surface bargaining upon the combination of proposals that Respondent had maintained and adhered to: an expansive management rights clause, no arbitration of grievances and a no-strike clause with “fairly broad proscriptions” on the use of

economic weapons. Tr. at 561. Respondent had been notified that an investigation of these charges, by a Board agent by the name of Bisi Dean, was underway.

And, Respondent withdrew its No-Strike clause in what was tantamount to an admission that the clause was, in combination with Respondent's proposals on management rights and grievance and mediation violative of the Act. That is, Respondent withdrew its No-Strike clause not because of any wish to demonstrate its willingness to advance negotiations by "bidding against itself," but in what turned out to be a vain effort to avert the issuance of a Board complaint on 1199 SEIU's unfair labor practice charges. Certainly it was for no other reason that, unlike any other changes that Respondent made to its proposals, Respondent made certain that withdrawal of this particular proposal was communicated to Ms. Dean "for your investigative file." R. Exh. 1 at 3655; Tr. at 564 ("I thought it was important for Ms. Dean to know that because we'd not yet tendered a position statement, but I was certainly aware that a ULP charge was pending, containing allegations consisting in part, of the no-strike clause at issue.")

Finally, we would note in this connection that 1199 also "did not like" Respondent's proposal on Wages. To begin with, 1199 SEIU particularly "did not like" the fact that Respondent only presented its Wage proposal on May 18, 2018, 17 months after the parties first meeting and more than a year after 1199 SEIU's initial wage proposal. R. Exh. 1 at 3641-3648. Not altogether unexpectedly, 1199 SEIU felt that this lengthy delay in tendering its Wage offer actually did not display any real willingness on Respondent's part to bargain with respect to the matter of wages at all.

Still, 1199 SEIU did try to test Respondent's willingness to bargain over Wages. As an initial matter, 1199 SEIU questioned why the merit raises proposed by Respondent were

scheduled for August 2019 and 2020; more than one year and two years from the day that they were proposed. R. Exh. 3 at 306. Respondent assured 1199 SEIU that it had no need to be concerned because there were yet to be specified “market rate” adjustments.

When it presented its proposal, Respondent announced that Respondent would determine for itself what the “merit pool” would be “based on performance of the Hospital.” R. Exh. 3 at 306. 1199 SEIU then asked if Respondent would agree that at least the yearly ranges of these merit increases were to be negotiated. Respondent replied that they would not. R. Exh. 3 at 307. ([Schmid]: “No, the ranges are set for the hospital as a whole, it will be the same range for non-union employees and apply exactly the same way. . .”). 1199 SEIU then queried whether Respondent would be willing to negotiate some minimum merit increase for satisfactory performers. Respondent replied that there would be no such minimum. R. Exh. 3 at 396. And, 1199 SEIU asked whether 1199 SEIU could grieve the annual performance reviews upon which merit increases were to be based, Respondent answered that they would not. R. Exh 3 at 310. ([Godoff]: “So the annual review that’s going to affect your wage is not going to be grievable?”; [Schmid]: “Correct.”)

In reply to 1199 SEIU’s efforts to test it, Respondent demonstrated no more willingness to bargain with respect to “market-rate” increases than it had with respect to the merit increases. Thus, as we have previously indicated, Respondent simply would not divulge to 1199 SEIU how it had gone about determining “market-rates.” R. Exh. 3 at 323. ([Schmid]: “We are using our information and knowledge of the market. . . it is based off of the market, we are not using a study.”) Respondent never did reveal where it intended to place bargaining unit employees in

accordance with their experience. R. Exh. 3 at 317. And, Respondent made it quite clear that, “It’s managements discretion to place them by years of experience” Id.²

At the end of the day, then, this record leaves no room to doubt that 1199 SEIU amply tested Respondent’s willingness to bargain over proposals that 1199 SEIU “did not like.” That record also leaves no room to doubt that Respondent’s reaction to these tests of its disposition was a prolonged intransigence.

C. Respondent’s Union Security Proposal Was Unlawful (Exception No. 7)

On March 29, 2017, Respondent proffered its proposal to delete in its entirety Article 2 of the parties’ expired agreement. G.C. Exh. 10. Article 2 had contained the prior contract’s provision for union security. On March 29, 2017, the Respondent offered, as justification for its proposal, the suggestion that Union dues might be a “hindrance to recruiting.” R. Exh. 3 at 181.

Respondent offered nothing further in this regard. On March 29, 2017, Respondent also suggested that it had heard employees “[anecdotally. . .over years. . .expressed concerns about condition to pay dues.” Id. But, Respondent never indicated just what these “concerns” were nor by whom they were expressed.

On the other hand, what Respondent could be quite certain about was that it had a “philosophical” reason for its proposal. That is, that Respondent was “philosophically” opposed

² In it’s Brief, Respondent emphasizes that two “components of the Hospital’s Wage proposal were non-discretionary” Brief at p. 13 (emphasis in original) As we have noted above, however, Respondent would not permit 1199 SEIU to agree to these two proposals alone. Again, as we have noted, Respondent made these two proposals an indivisible part of its wage “package”, a package that included merit increases and “market-rate” increases, which were left to Respondent’s unfettered discretion.

to: “[c]ompelling employee’s to pay anything as a condition of employ[ment] when it comes to rendering fees to a third party.” R. Exh. 3 at 182.

And it was this reason that Respondent offered to the bargaining unit as explanation of opposition to Union security. G.C. Exh. 16 at p. 2 (“ . . .that employee should have a choice as to whether or not to pay union dues and should not be fired, as the union is insisting.”)

In his decision the ALJ found no reason to deem legitimate business justifications, Respondent’s vague allusions to recruitment “hindrances” or to undelinated employee “concerns.” JD-37: 20-23. In its Brief, Respondent has been able to identify nothing in the record herein, which proves them to have been anything more substantial. And, under these circumstances, the ALJ, citing Kalthia Group Hotels, Inc., 366 NLRB No. 118 (2018), really could only conclude that Respondent:

. . . unlawfully insisted on eliminating the parties’ long-standing union-security, basing its position on philosophical grounds. . . without laying out a legitimate business justification.

Id.

To be sure, in its Brief Respondent maintains that Respondent’s proposal on union security was but an initial proposal, and not a proposal to which it was wedded. The record herein indicates, however, that 1199 SEIU countered the proposal on April 6, 2017. R. Exh. 2 at 3771. And from that date until the date that Respondent withdrew recognition from 1199 SEIU, Respondent made no change in its “initial proposal” whatsoever. And, if Respondent really was waiting for a “tailored counter” from 1199 SEIU at the time of the withdrawal of recognition, as Respondent maintains in its Brief, Respondent certainly never said so.

D. Respondent Unlawfully Bargained Regressively Concerning Arbitration of Discharge Grievances (Exception Nos. 8,9)

At a session on January 17, 2017, Respondent offered a proposal with respect to employee discipline. GC Exh. 4. As noted above, that proposal explicitly states that discharges were subject to “the full grievance and arbitration procedure.”

When the proposal was proffered by Respondent, Respondent was not silent in this regard. To the contrary, Respondent adamantly defended its position that only discharges could be grieved to arbitration. R. Exh. 3 at 107. ([Bernstein]: “. . .we think arbitration is for end process not along the way. . .not to arbitrate unless result in termination.”)

In its Brief, Respondent argues that its proposal to permit discharges to be grieved to arbitration was an “error,” a “mistake.” The record, however, makes it evident that the proposal was deliberately submitted Respondent.

In this connection, we would point out that, on January 31, 2017, Respondent submitted a counterproposal on Discipline, to an 1199 SEIU counterproposal on Discipline, insisting on the right to grieve final written warnings as well as discharges to arbitration. We would further point out that Respondent’s own counterproposal provided, as had Respondent’s previous proposal on Discipline, that discharges only could be grieved to arbitration. R. Exh. 1 at 3567-3569. And, Respondent made this counterproposal with full understanding of just how “significant” the right to grieve serious discipline to arbitration was to 1199 SEIU. Tr. At 607. ([Bernstein]: “I understood how significant--“)

On March 29, 2017, Respondent introduced a Grievance and Mediation proposal which, as noted, provided for mediation as the sole dispute resolution mechanism for all unresolved

grievances. Then, on April 5, 2017, issued a new proposal on Discipline which, once again, provided for the arbitration of discharge grievances. When it was presented, 1199 SEIU pointed out to Respondent the apparent contradiction in this regard between its proposals on Discipline and Grievance and Mediation.

On May 25, 2017, Respondent sent an email to 1199 SEIU, notifying it that it was submitting revised proposals on Discipline and Grievance and Mediation, in order to “reconcile some of the discrepancies that you had pointed out.” R. Exh. 1 at 3627. These revisions eliminated the provision for arbitration of discharge grievances set forth in his three prior proposals on Discipline. That is, Respondent eliminated a provision paramount importance to 1199 SEIU. Nevertheless, Respondent treated this complete change of position as if it were no more than a housekeeping matter; the correction of a typographical error.

It is, then, altogether unsurprising that the ALJ did not find that Respondents proposal for arbitration of discharge grievances, which Respondent had submitted on three separate occasions and discussed at length with 1199 SEIU, had been submitted in “error.” It is equally unsurprising that the ALJ refused to accept as good cause for Respondent’s regressive bargaining in this regard the peculiar justification for it that Respondent had offered. And, in view of the fact that this change in position was made so shortly after Respondent’s delivery to the bargaining table of its unlawful combination of proposals on Management Rights, Grievance and Mediation and No-Strikes, the ALJ’s conclusion that this “unexplained, dubious regressive proposal “suggested bad faith” seems beyond cavil.

E. It Is Lee Lumber That Is The Applicable Law With Respect To Respondent's Withdrawal Of Recognition

In Lee Lumber and Building Material Corp., 322 NLRB 177 (1996), aff'd in part 117 F. 3d 1454 (D.C.Cir. 1997), the Board restated its position that an employer may not lawfully withdraw recognition from a union based on a showing of employee disaffection for the union, where it has committed unfair labor practices that are likely to have affected the union's status, caused employee disaffection, or improperly affected the bargaining relationship itself. The Board held that where an employer has engaged in a general refusal to bargain with an incumbent union, connection of that unlawful conduct to the union's alleged loss of majority support is to be presumed. And, the Board further 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." Lee Lumber, supra, at p.178.

In the instant case, the Respondent has engaged in a general refusal to bargain. To be sure, Respondent certainly has pretended an interest in reaching a collective bargaining agreement with the Charging Party. But, the pretense, as the ALJ properly concluded was all too apparent. And at the end of the day, sham bargaining is simply a general refusal to bargain in disguise. Radisson Plaza Minneapolis, 307 NLRB 94 (1992), enf'd. 987 F.2d 1376(8th Cir.1993).

The Respondent has argued that Lee Lumber is inapposite, because in Lee Lumber the Board stated that it was in cases of a "general refusal to recognize and bargain" that the causal relationship between the unfair labor practice and the subsequent loss of majority support was to

be presumed. And, the Respondent has argued that in the instant case there was not both a simultaneous refusal to recognize and a refusal to bargain by Respondent.

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

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

. . . [employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by its employees is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with the union., standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether. . .

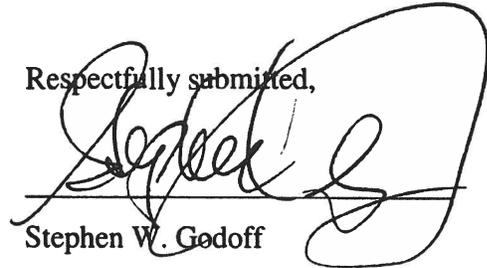
Or, as the Board itself stated, if a union is deprived, as a result of an employer's unlawful refusal to bargain, "of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them."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

That is precisely what occurred in the instant case. In this case, then, a causal relationship between the Respondent's unlawful acts and the Charging Party's subsequent loss of majority support must be presumed; and the Respondents withdraw of recognition on the basis of a tainted petition deemed violative of Section 8 (a)(1) and (5) of the Act.

IV. CONCLUSION

For all of the reasons set forth above, Respondent's Exceptions to the ALJ's findings should be dismissed in their entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen W. Godoff", is written over a horizontal line. The signature is stylized and cursive.

Stephen W. Godoff

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Date: November, 13, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlr.gov, and duly served electronically upon the following named individuals on this 13th day of November, 2019:

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