

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

**J.G. KERN ENTERPRISES, INC.
Respondent**

**Cases 07-CA-231802
07-CA-245744
07-CA-252759**

and

**LOCAL 228, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO
Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION**

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I. STATEMENT OF CASE AND INTRODUCTION

This case was tried on August 3, 2020, before Administrative Law Judge Paul Bogas (the ALJ). On issued October 6, 2020, the ALJ issued his Decision (ALJD), reported as JD 40-20. The ALJ concluded that J.G. Kern (Respondent) violated Section 8(a)(5) and (1) of the Act by: (1) failing and refusing to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment from October 15, 2018, to January 9, 2019; (2) since April 10, 2019, by stating that it would not consider any proposal for a union-administered benefits plan; (3) since April 17 and July 9, 2019, by refusing to provide the International Union and Charging Party with requested cost information regarding the existing benefits plans for bargaining unit employees; and (4) since November 25, 2019, by withdrawing recognition from the Charging Party as the exclusive collective bargaining representative of the bargaining unit employees.

On October 23, 2020, Respondent filed exceptions and a “Brief in Support of Objections”¹ to each of the ALJ’s conclusions but did not except to the ALJ’s Recommended Order and Notice to Employees. This brief constitutes Counsel for the General Counsel’s answer to Respondent’s exceptions and arguments therein.

II. BACKGROUND FACTS

Respondent is a Michigan corporation engaged in the manufacture, machining, and non-retail sale of automotive parts. (ALJD 2, ln 27-28; GC 1cc)². It has a facility located in Sterling Heights, Michigan. (ALJD 2, ln 27-28; GC 1cc). Allen Kern Sr., Vice President, Allen Kern Jr., Manager, and

¹ Counsel for the General Counsel assumes that Respondent intended to file a Brief in Support of Exceptions.

² “ALJD” refers to the Administrative Law Judge’s Decision; “ln” refers to line number; “Tr.” refers to transcript; “GC” refers to General Counsel exhibit; “R” refers to Respondent exhibit; and “fn” refers to footnote.

Sue Allen, Human Resources Manager, are admitted supervisors/agents within the meaning of Sections 2(11) and 2(13) of the Act. (GC 1cc). In addition, Respondent employed James Teague as a labor consultant beginning about November 2018. Teague is an admitted Respondent agent. (Tr. 7-8) From about October 15, 2018 through June 2018, Respondent's legal representative was attorney Johnathan Sutton. After Sutton's departure, around July 2019, attorney Christopher McHale became the legal representative of Respondent.

On October 3, 2018, the International Union was certified by the National Labor Relations Board as the collective bargaining representative of the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by the Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act. (ALJD 2, fn 2; GC 2)

The bargaining unit was comprised of approximately 200 employees in the Unit. (GC 1 a and i)

The International Union designated the Charging Party as its servicing representative of the Unit.

(GC 1cc) Paul Torrente was the president of the Charging Party until August 3, 2020; he thereafter

became an International representative. (Tr. 12-13) Diane Virelli was a representative for the

International Union until June 30, 2020. (Tr. 41-42) Both were assigned by the Charging Party and

International Union, respectively, to negotiate with Respondent on behalf of the represented Unit

employees. Torrente was the lead negotiator and Virelli provided assistance and support. (Tr. 55, 56)

Respondent's Failure and Refusal to Bargain

On October 8, 2018, a mere five days after the Regional Director for Region Seven certified the Charging Party as the collective bargaining representative, Torrente sent a letter to owner Allan Kern, Sr. asking about bargaining dates. (Tr. 15) Torrente's communication initiated a series of phone calls and emails between he and Respondent attorney Johnathon Sutton regarding possible

bargaining dates. (Tr. 16, 17, 36) On October 12, Torrente and Sutton exchanged emails regarding various issues at the facility. (GC 3) On October 15, Torrente emailed Sutton to advise him, among other things, that the Charging Party was available to negotiate at Respondent's earliest convenience and was available at any time to commence negotiations. (ALJD 3, In 5-8; GC 3). On October 17, at 5:19 p.m., Sutton sent an email that he would be available November 5 through 7 or November 26 through 28, but that his calendar was subject to change rather quickly. (ALJD 3, In 8-10; Tr. 65-66, GC3) Torrente responded the following morning that the Charging Party was ready to meet on November 5 through 7 and November 26 through 28. (ALJD 3, In 10-14; GC 3) Torrente did not receive further correspondence from Sutton. (ALJD 3-4, In 18-21, 35, 1-3) At this point, Torrente believed the parties were on track to meet on November 5, 2018.

On November 2, Torrente notified Sutton via email that he had not heard from Sutton since October 17 and was wondering where the parties would meet on November 5 for their scheduled negotiations. (ALJD 3, In 16-18; GC 4) On the same date, International representative Diane Virelli also emailed Sutton. (Tr.44-45, GC 12) On November 5, Sutton advised Torrente, Virelli, and certain other union representatives, via email, that Respondent was canceling all scheduled November negotiation sessions because Sutton was in Guam and because he sold his home in Houston, Texas. (ALJD 3, In 24-30; Tr. 19, GC 4) Sutton did offer to ask someone else to step in to get things started. (ALJD 4, In 5-7; Tr. 37, GC 4) Torrente immediately responded via email that the Charging Party needed to get the ball rolling for the benefit of its members. (Tr. 20, GC16) Torrente asked that a Respondent agent contact him via telephone or email by no later than November 8 so that the parties could schedule bargaining dates. (ALJD 4, In 8-11; Tr. 37, GC 16) Further, Torrente stated that it did not matter to him if Sutton or another representative contacted him. (GC 16) During Sutton's testimony, he testified that after he offered to provide a substitute, Torrente failed to ask that

someone else be substituted for Sutton (Tr. 66) Such testimony is disingenuous and clearly contradicted by Torrente's November 8 email he sent Sutton stating the opposite.³ (GC 16)

After sending this email to Sutton, Respondent's admitted agent James Teague contacted Torrente to say that he (Teague) was taking over for Sutton to schedule bargaining. (Tr. 21, 37) Torrente and Teague communicated throughout November via telephone calls and text messages.⁴ (Tr. 21) They scheduled bargaining for November 26 and 27. (Tr. 21) Shortly thereafter, Teague contacted Torrente to cancel the negotiation sessions scheduled for November 26 and 27, stating that the human resources representative was unavailable and on vacation. (Tr. 21, 22) Consequently, Torrente and Teague agreed to meet on November 30, but again Teague canceled the meeting, telling that his schedule "had flopped." (Tr. 22) Teague testified that Torrente and he did not discuss bargaining dates. That testimony should not be credited. First, Teague admitted he was hired by Respondent in November 2018 as a labor consultant; Second, Teague admitted he had "some" conversations with Torrente during this time frame; however, he does not elaborate as to what those conversations entailed. But given Torrente's efforts to schedule bargaining dates, the assertion that Torrente would be suddenly silent with Respondent's newly-hired labor representative about bargaining dates is bold and unbelievable. (Tr. 103)

On November 27, 2018, UAW International representative Virelli sent a certified letter to Respondent's Sterling Heights facility in which she requested, among other things, bargaining at any time between December 4 and 17, and December 20. (ALJD 4, ln 23-25; GC 13, Tr.46-47) Respondent failed to respond. (Tr. 47) Ultimately, in January 2019, over three months after the

³ Indeed, the ALJ noted the following: "Sutton's willingness to testify that the Union had not asked to bargain with someone else if Sutton was unavailable reflects poorly on Sutton's credibility as a witness. Based on Sutton's testimony, demeanor, and the record as a whole I find that he was an unusually biased and unreliable witness regarding disputed matters." (ALJD Fn 4.)

⁴ Paul Torrente credibly testified that he was unable to produce the text messages that were on his phone due to an issue he had the previous month with his cellular telephone. He lost information contained on his phone, including the text messages from James Teague. (Tr. 21-22)

International Union was certified as the bargaining representative, the Respondent met with the Charging Party to begin bargaining.

Respondent's unlawful failure to Consider a Union-Administered Benefit Plan and Provide the Charging Party with Relevant Requested Information

On January 10, 2019, the parties began negotiating an initial contract. (ALJD 4, ln 29-31; Tr. 15, 48) Inexplicably, Respondent's Sutton expected the Charging Party, at the outset, to submit a complete contract proposal. (ALJD 8, ln 26-28; Tr. 24, 57-58, 76-77) As the testimony of Virelli and Torrente indicate, the Charging Party and International Union had continuously sought information about insurance benefits in order to prepare proposals. (ALJD 5, ln 9-14, 27-30; Tr.24, 47) On April 10, 2019, in response to an unalleged information request regarding insurance benefits, Sutton emailed Torrente that there was no need for the Charging Party to present an insurance proposal because the Respondent would stay with its current plan. (ALJD 5-6, ln 30-36,1-6; Tr. 29, GC 6)

On April 17, 2019, Virelli sent Sutton a request for information to find out the economic components of Respondent's current insurance benefit plan. (ALJD 6, ln 13-46; Tr. 48-49, GC 14) Virelli explained to Sutton that the Charging Party needed this information to formulate and provide proposals. (Tr. 49, GC 14) She requested the following (some portions of the request are omitted because they were not alleged in the consolidated complaint):

BENEFIT DATA

A. General

- 1. Copies of the Summary Plan Descriptions for all benefit programs.*
 - 2. Plan documents for all benefit programs.*
 - 3. Eligibility criteria and duration of benefit continuation during period of leave, layoff and termination.*
 - 4. Cost information on each benefit program. (to the employee)*
 - 5. A complete census of the entire bargaining unit showing the following for each Employee:*
 - a. Date of birth*
- B. Health Care, what group and coverage*

For each plan (medical, prescription drug, dental, vision and hearing):

- 1. By plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately.*
- 2. The full premium charge or premium equivalent by category.*
- 4. COBRA premium rates listed by family status for each health plan offered to the membership.*
- 5. Projected 2017, 2018, 2019 and 2020 cost increases, if any.*

C. Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance

- 2. List the cost/\$1,000. List the total cost to the Employer.*

(Tr. 49, GC 14)

Virelli did not personally receive a response from Respondent. At some point, all parties admit that Respondent presented the Charging Party and International Union with a copy of its 2018 insurance plan, but it did not provide the requested information regarding Respondent's "costing." (Tr. 52) On May 2, 2019, Sutton emailed Torrente stating that the Respondent would not provide the following requested information: cost information for medical, prescription drug, dental, vision and hearing; full premium charge or premium equivalent by category; and COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 2019, and 2020 cost increases; and total cost to Respondent for life insurance, accidental death, dismemberment, and optional dependent insurance. (ALJD 7, ln 3-11; GC 10)

On July 9, 2019, Torrente sent via to then Respondent attorney Christopher McHale, an email wherein he requested the following information:

BENEFIT DATA

A. General

- 1. Copies of the Summary Plan Descriptions for all benefit programs. What insurance company?*
- 2. Plan documents for all benefit programs.*
- 3. Eligibility criteria and duration of benefit continuation during period of leave, layoff and termination. The Union's copy of the Employee handbook is not up to date.*
- 4. Cost information on each benefit program (to the employee) Single, parent with children, family, etc.*
- 5. An updated complete census of the entire bargaining unit showing the following for each Employee:*

a. Date of birth

B. Health Care, what group and coverage

For each plan (medical, prescription drug, dental, vision and hearing):

1. *By plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately.*
 2. *The full premium charge or premium equivalent by category.*
 4. *COBRA premium rates listed by family status for each health plan offered to the membership.*
 5. *Projected 2017, 2018, 2019 and 2020 cost increases, if any.*
- C. Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance*
2. *List the cost/\$1,000. List the total cost to the Employer.*
- (ALJD 7, ln 13-18; Tr. 24-25, GC 7)

On July 12, McHale responded via email that he would reach out to Sutton to see what Respondent had already provided. (ALJD 7, ln 18-18-20; Tr. 24-25, GC 7) On the same day, Torrente replied that the Sutton had refused to provide the requested information. (ALJD 7, ln 20-22; Tr. 25-26, GC 8) Further, Torrente alerted Sutton as to the Charging Party's statutory right to the information for the purpose of negotiations. (GC 8) On July 17, McHale said he would collect the information from Respondent and provide it once he had it. (ALJD 7, ln 25-26; Tr 27, GC 9) On July 24, Torrente advised McHale via email that the Charging Party had yet to receive any of the requested information. (Tr. 27-28, GC 10) In response, McHale provided Sutton's April 10 and May 2 emails. (Tr. 28-29, GC 6, 10). As noted above, Respondent's April 10 email merely notified the Charging Party that Respondent need not provide insurance proposals because Respondent was staying with its current plan. In its May 2 email, Respondent failed to provide several requested items, including the cost information for medical, prescription drug, dental, vision and hearing full premium charge or premium equivalent by category, and COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 219, and 2020 cost increases; total cost to Respondent for life insurance, accidental death, dismemberment, and optional dependent insurance. (GC 10) On July 25, Torrente demanded Respondent provide the requested information by the July 30 bargaining session. (ALJD 7, ln 29-31) Respondent never provided the Charging Party or the International Union with the twice-requested insurance information.

Respondent's unlawful withdrawal of recognition of the Charging Party as the exclusive collective-bargaining representative of the Unit.

On November 25, 2019, around 8:45 a.m., Torrente and Virelli arrived at an agreed-upon location for negotiations. (Tr. 32, 52) They arrived in separate vehicles and were parked next to each other. (Tr. 52) As Torrente and Virelli waited, Respondent's attorney Chris McHale and labor representative James Teague approached. (Tr. 32, 53) Teague stated he had good news and bad news. (Tr.53) The good news was that the Union (Charging Party) got the "day off," the bad news was that employees signed a petition that they no longer wished to be represented by the Charging Party. (Tr. 52-53,) McHale handed Torrente two documents. (ALJD 10, ln 2-6; Tr. 32, GC 15) One was a letter dated November 25, 2019 stating that on November 22, 2019, the Respondent had been presented with a petition signed by a majority of employees advising that they did not wish to be represented by the Charging Party. (Tr. 53-54, GC 15) The letter further provided that the NLRA prohibits an employer from bargaining with a union where the employer has a good faith certainty that the union does not enjoy majority status and as a result, Respondent had no choice but to withdraw recognition from the Charging Party. (GC 15) McHale then presented Torrente with a blank petition. (Tr 32) Teague stated that the Respondent was no longer going to bargain because employees did not want to be part of the Charging Party (Tr. 32)

After leaving, Torrente emailed McHale and asked for a copy of the petition that was signed by a majority of employees. (GC 11) McHale provided an emailed copy of the petition without signatures, along with the letter he presented to Torrente and Virelli. Regarding the petition, McHale stated that he was obligated to protect the identity of the employees who signed the petition. (Tr. 33-34, GC 11) Torrente responded that even if there was an uncoerced majority

that signed the petition, the various unfair labor practices committed by Respondent would prohibit it from withdrawing recognition from the Charging Party. (ALJD 10, 11-18; Tr. 33, Tr. 34, GC 11) McHale responded that Respondent's hands were tied, and it must respect the employees' Section 7 rights. (ALJD 10, ln 20-24; GC 11) Despite the outstanding unfair labor practices Respondent committed, it withdrew recognition from the Charging Party.

III. COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S EXCEPTIONS

A. The ALJ correctly found that Respondent failed to bargain in good faith and violated Section 8(a)(5) and (1) of the Act during the period from October 15, 2018, to January 9, 2019. (ALJD 14: 7-10)

An employer's bargaining obligation attaches no later than the date that its employees' union is certified by the Board. *See e.g., Beaird Industries., Inc.*, 313 NLRB 735, 736 (1994). In the case at hand, that obligation began on October 3, 2018; but as the record evidence establishes, Respondent delayed initial face-to-face bargaining for over three months.

Northeastern Indiana Broadcasting Co., Inc. 88 NLRB 1381 (1950) (The Board held that an employer violated its obligation to bargain in good faith where it delayed meeting for five weeks from the date when the union asked the employer for negotiation dates); and *Quality Motels of Colorado*, 180 NLRB 332 (1971) (The Board affirmed that employer violated its duty to meet at reasonable times when it delayed meeting for almost two months after the first negotiation meeting.)

After agreeing to meet on November 5 through November 7, and November 26 through November 28, Respondent's counsel, Johnathan Sutton, canceled all of the scheduled bargaining sessions, via email, on November 5, the very day bargaining was to begin. Respondent incorrectly states in its exceptions that Sutton only cancelled one November meeting, when in

fact he cancelled all November 2019 bargaining meetings. What Respondent seems to have conveniently forgotten is on October 17, Sutton offered to meet November 5 through 7, or November 26 to 28. Torrente promptly responded to schedule negotiations on November 5, 6 and 7, and added that the Union was available on November 26, 27, and 28, and asked Sutton where he wanted the meetings to occur. (ALJD 3 ln 5-14) On November 2, Torrente, via email, followed up with Sutton to see where they would meet for the November negotiations. Sutton did not bother to respond to the Charging Party until November 5, the first day the parties were scheduled to meet. Sutton stated he was not available on that day or ANY of the agreed to November negotiation dates. Contrary to Respondent's assertion, Sutton cancelled ALL November dates, not just one. In addition, Sutton's November 5 email stated that he was out of the country and would be otherwise occupied with the sale of his house. Sutton offered to provide a substitute for future negotiations and Torrente promptly agreed, stating he did not care who Respondent utilized for negotiations. It was not until December 12 that Sutton and Torrente spoke again. At that time, Sutton stated he could still not meet because of the sale of his Houston home.

The November sessions were first scheduled and then cancelled by Sutton, and Sutton was unable to meet in December because he was busy with other matters. As noted by the ALJ, Respondent cannot avail itself of the "busy negotiator" defense as an excuse for its failure to meet at reasonable times. In this regard, it is well settled that an employer's chosen negotiator is its agent for the purposes of collective bargaining, and that if the negotiator causes delays in the negotiating process, the employer must bear the consequences. *See, e.g., O & F Machine Products Co.*, 239 NLRB 1013, 1018-1019 (1978); and *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992). Respondent's legal counsel's excuses notwithstanding, Sutton's

unavailability does not absolve the Respondent from its obligation to bargain. See *Camelot Terrace*, 357 NLRB 1934, 1940 (2011), wherein the Board concluded that Respondent violated Section 8(a)(5) of the Act by a course of conduct that included repeatedly canceling scheduled bargaining sessions. Indeed, in that case, the Board noted that on one occasion, the Respondent's negotiator canceled meetings the day before they were to occur because his son became engaged and because his car was in the shop for repair.

Respondent's excuses fail as a matter of law because the Board has held that the unavailability of a party's chosen negotiator does not relieve the party of its duty to bargain. An employer acts at its peril when it chooses as a bargaining agent someone who is encumbered by conflicts. *First Student, Inc.*, 359 NLRB 208, 219–20 (2012), citing *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *O&F Machine Products Co.*, *supra* at 1019; and *Imperial Tire Co.*, 227 NLRB 1751, 1754 (1977). Indeed, Respondent refused to meet and cancelled bargaining sessions with the Charging Party and International Union at a critical stage in the Charging Party's role as the Unit's newly-certified bargaining representative—the beginning. Such conduct violates Section 8(a)(1) and (5) of the Act.

Respondent asserts that the Charging Party canceled a May 23, 2019 bargaining session and then left a June 2019 bargaining session early in an apparent attempt to justify the Respondent's cancelling of ALL November bargaining sessions. The argument is nonsensical. Indeed, there is no record evidence to even support this argument. As the ALJ stated, Sutton testified that he met with Union representatives Torrente and Virelli in May on both of the scheduled days. On the first day, they met with Sutton privately about negotiations. On the second day, Sutton again met privately with Torrente and Virelli, at their request, to "fine-tune some details on things that had already been reached." To say that the Charging Party or the

International Union canceled the May session is a mischaracterization of the record evidence. Regardless, there was no allegation before the ALJ regarding the Charging Party or the International Union's conduct while bargaining in May and June 2019, or at any time.

- B. The ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act since April 10, 2019, when it stated that it would not consider any proposal on union-administered benefits. (ALJD 14: 40-41)

Health insurance and other employee benefit plans are terms and conditions of employment and mandatory subjects of bargaining. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159-160 (1971); *Larry Geweke Ford*, 344 NLRB 628, 628 n.1 (2005); *Royal Motor Sales*, 329 NLRB 760, 770 (1999), enfd. 2 Fed.Appx. 1 (D.C. Cir. 2001); *Borden, Inc.*, 196 NLRB 1170, 1174-1175 (1972). An employer violates the Act where, as here, the employer states that during contract negotiations it will refuse to even consider union proposals on a mandatory subject of bargaining. *E.I. Dupont De Nemours & Co.*, 304 NLRB 792, 792 fn.1 and 802 (1991).

Respondent admits that April 10, 2019, it sent the Charging Party an email stating "there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan." Respondent argues that the April 10 email was a one-time statement and was not supported by any future actions of the Respondent. Respondent argues that in *E.I. Dupont*, the conduct of the Employer was exhibited throughout the course of negotiations. In *E.I. Dupont*, the Employer, during the thirteenth negotiation meeting, refused to consider a union's "horse trade," or compromise, which is plainly at odds with the required give and take of the collective-bargaining process in a serious attempt to resolve differences and reach a common ground. *Id.* at 802. Once Respondent sent the April 10 email to the Charging Party, it violated the Act. Further, while Respondent argues that it provided enough information for the

Charged Party to formulate health insurance proposals and met and negotiated after April 10, it in fact failed to provide the Charging Party and International Union with health care information it requested. By sending the April 10 email, Respondent told the Charging Party that it was explicitly refusing to even consider a union proposal on a mandatory subject of bargaining in violation of Section 8(a)(5) of the Act. Respondent continued this refusal when it failed to provide information relative to existing benefit plans, as discussed below.

- C. The ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, when it refused to provide the Charging Party and the International Union with multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees. (ALJD 16: 44-46)

It is well settled that an employer, on request, must provide a union with information that is necessary and relevant to the carrying out of its statutory duties and responsibilities in representing employees. The duty to provide information includes information relevant to collective bargaining negotiations, contract administration, and the determination of the merit of grievances filed under that contract. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 967 (2006).

Respondent argues one cannot use a flat line approach that information requests are presumptively relevant just because terms and conditions of employment are requested and it cites *West Penn Power Co.*, 339 NLRB 585, 587 (2003) that "[T]he duty to furnish requested information cannot be defined in terms of a per se rule." In response thereto it is Counsel for the General Counsel's position, which law is well established, that where the requested information concerns terms and conditions of employment within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995).

Moreover, a union may rely upon the presumption of relevance for information pertaining to

employees within the bargaining unit and has no further obligation to explain its significance unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004) quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001).

The information requested by the Charging Party in both April and July 2019 pertains to insurance benefits inured to the benefit of the Unit and, as a mandatory subject of bargaining, is presumed to be relevant. *Southern California Gas Co.*, 344 NLRB 231 (2005); *Curtis-Wright Corp.*, 145 NLRB 152 (1963). Respondent did not provide the information requested on April 17 nor on July 9, 2019 or give a reason for its failure to provide the information. In response to the April 17 request, Sutton merely told the Torrente on May 2 that Respondent would not provide the cost information for: each benefit program to the employee; the full premium charge or premium equivalent by category; COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 2019, and 2020 cost increases, and a list of cost/\$1000 to the Respondent.

When the Charging Party again requested insurance benefit information on July 9, 2019, Respondent's McHale first told Torrente he would check with Sutton about what information had already been provided, then told Torrente he would provide the information as soon as he received it. Ultimately, McHale resent an April 10 and May 2, 2019 email to Torrente from Sutton, thereby, again refusing to provide the Charging Party with the cost information noted above.

Generally, information concerning wages, hours and terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative and must be provided. *Southern California Gas*, supra at 235; *Curtis-Wright Corp.*,

supra at 156. When faced with a request for presumptively relevant information, the burden is placed on a respondent to show that the information is not relevant to the union's duty to represent the respondent's employees. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992).

Here, Respondent has not met its burden to show that the requested information is not necessary and relevant to the Charging Party's duty to represent Respondent's bargaining unit employees. Therefore, Respondent's failure to provide information concerning insurance benefits data for the bargaining unit employees is a violation of Section 8(a)(5) of the Act.

D. The ALJ correctly found that the disaffection petition was tainted by Respondent's multiple, unremedied, unfair labor practices and thus Respondent could not lawfully rely on that petition to withdraw recognition and violated Section 8(a)(5) and (1) by doing so.

Respondent argues that *Johnson Controls, Inc.*, 368 NLRB No.20 (2019) is at odds with the ALJ's determination that Respondent could not legally withdraw recognition simply because there were unresolved labor practices. In *Johnson Controls, Inc.*, the Board considered the issue of "anticipatory withdrawal" where the employer advised the union that it would withdraw recognition upon the expiration of the existing collective bargaining agreement. As the ALJ pointed out in the case at hand, Respondent's reliance on *Johnson Control, Inc.* is misplaced. The Board in *Johnson Controls, Inc.* did not address or modify the standards set forth in *Master Slack* to determine whether a disaffection petition was tainted by the employer's unremedied unfair labor practices. There is no disputing that if an employer has a good faith belief that a union no longer enjoys majority support of the bargaining unit, it can withdraw recognition. What Respondent ignores is that the nature of its outstanding unfair labor practices have a tendency to erode employee support and ultimately lead to employee disaffection. *Master Slack*, 271 NLRB 78 (1984)

Master Slack is an objective standard. Thus, there is no need to question employees as to why they did or did not support the Charging Party. "[I]t is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard." *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007). The Board has held that "An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Id.* quoting *Garden Ridge Mgt.*, 347 NLRB 131, 134 (2006) (citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (Lee Lumber II). But see *Lexus of Concord, Inc.* 343 NLRB 851, 852 (2004), wherein the Board concluded, "In cases such as this one, where the [ULP] does not involve a general refusal to recognize and bargain with the union, 'there must be specific proof of a causal relationship between the [ULP] and the ensuing events indicating a loss of support.'" citing *Lee Lumber II*, 322 NLRB at 177. In the case at hand, Respondent refused to bargain with the Charging Party for the first three months following the certification. This general refusal was during a three-month period most critical to the Charging Party in establishing itself as the newly elected bargaining representative of the unit employees. Moreover, Respondent refused to bargain over an essential term and condition, and failed to provide relevant requested information needed by the Charging Party for meaningful negotiations.

The Board assesses "the tendency of unfair labor practices to cause disaffection, instead of relying' on employees' recollection of subjective motives for withdrawing support from the union." *St. Gobain Abrasive*, 342 NLRB 434, 434 fn2 (2012). Individual employee sentiments cannot negate findings of a causal relationship between Respondent's unlawful conduct and employee disaffection. *Hillhaven Rehabilitation Center*, 325 NLRB 202 (1997), enfd. denied in part on other grounds, 178 F.3d 1296 (6th Cir. 1999). In the case at hand, Respondent's refusal to bargain with the Charging Party for the first three months after certification, and its refusal to bargain over healthcare, a

mandatory subject of bargaining, and its refusal to provide the Charging Party relevant requested information, as noted above, are objective evidence of taint that undermined the Charging Party.

Under *Master Slack*, the Board considers the following to determine whether a causal relationship exists between the unremedied unfair labor practices and the loss of union support: (1) the length of time between unfair labor practice(s) and withdrawal of recognition; (2) the nature of the violation(s), 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 the employee morale, organizational activities, and membership in the union. *Id* at 84.

As to the first factor, the withdrawal occurred concurrently with Respondent's unlawful withholding of presumptively relevant information requested by the Charging Party regarding insurance benefits. As to the second factor, Respondent's unlawful delay in scheduling bargaining dates, coupled with its failure to provide the requested information, hampered the Charging Party's ability to put forth meaningful proposals on a mandatory subject. Thus, Respondent's delay had a lasting impact both on unit employees and on the Charging Party, as it was forced to "make up" the lost time by rushing to get proposals together. Additionally, beginning in April 2019 and continuing through Respondent's unlawful withdrawal of recognition, Respondent failed and refused to provide the Charging Party and the International Union with insurance benefit information needed to bargain about benefits and wages. Therefore, the Charging Party's hands were tied when trying to negotiate insurance and wages, again objectively undermining the Charging Party in the eyes of the employees. These subject matters are at the heart of collective bargaining and are the primary reasons why employees opt for collective bargaining representation. As to the third factor, Respondent's unlawful three-month delay in bargaining occurred at a critical time for the Charging Party--the start of its relationship with Unit employees. Indeed, unit employees witnessed the futility of a newly elected representative unable to do perform the most basic of functions: scheduling a meeting with Respondent. See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enf'd, 156 Fed. Appx.

331 (D.C. Cir. 2005)(An employer's refusal to bargain during part or all of the certification year has taken from the union the opportunity to bargain during the period when unions are generally at their greatest strength). The Charging Party was at a disadvantage when negotiating because of the three-month delay and Respondent's failure and refusal to provide the requested insurance information leading to employee disaffection. Under the last factor, the effect of the conduct on employees is evident by their signing of the disaffection petitions.

In its brief, Respondent contends that to establish that an employer's unremedied unfair labor practices tainted employee sentiment toward its duly elected union representative, the General Counsel must establish that the employees were actually aware of the employer's unfair labor practices. This is incorrect. General Counsel does not have to prove that employees actually knew of the unfair labor practices and this assertion is entirely speculative on Respondent's behalf. *Hearst Corporation, San Antonio Light Division.*, 281 NLRB 764, 765 (1986) (The Board is "unwilling to allow the Respondent to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior, but rather shall hold it responsible for the predictable consequences of its misconduct."); *Wire Products Mfg. Corp.*, 326 NLRB 625, 630. Accordingly, in the face of unremedied unfair labor practices and under a *Master Slack* analysis, Respondent's withdrawal of recognition from the Charging Party was unlawful and a violation of Section 8(a)(1) and (5) of the Act.

IV. APPROPRIATE REMEDIES

A. Extension of certification year under *Mar-Jac Poultry Co.*

To ensure that employees are accorded the services of their selected bargaining agent for a period covered by the law, the Board construes the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with a union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd, 350 F.2d 57

(10111 Cir. 1965). The Board also recognizes that such a remedy is warranted where an employer's refusal to bargain with a newly certified union during part or all of the year immediately following Certification deprives the union of the opportunity to bargain during the time of the union's greatest strength. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enf'd, 156 Fed.Appx. 331 (D.C. Cir. 2005), citing *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991). Here, unit employees were deprived of any representation for the first three months following certification.

Additionally, if the *Mar-Jac* remedy for delay in bargaining is granted because of Respondent's refusal and failure to bargain during the initial three months of the certification year, then Respondent's November 25, 2019 withdrawal of recognition is unlawful as it would have been occurred within the extended certification year. Therefore, if a *Mar-Jac* remedy is granted for a period longer than 53 days, then Respondent unlawfully withdrew recognition during the certification year notwithstanding whether the factors in *Master Slack* have been met.

B. Bargaining Schedule

The Board has held that, in appropriate circumstances, it may order unusual remedial relief to rectify particularly serious unfair labor practices. *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978); *Crystal Springs Shirt Corporation*, 229 NLRB 4, 4 fn. 1 (1977); *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). In cases involving refusals to bargain, the Board has held that the standard for imposing additional remedies is whether there is aggravated unlawful conduct which has "infected the core of the bargaining process." *Camelot Terrace*, 357 NLRB 1934 (2011) (reimbursement for negotiating expenses). In *All Seasons Climate Control, Inc.*, 357 NLRB 718, fn 2 (2011), the Board upheld the Judge's remedial order directing extra remedies which included the imposition of a bargaining schedule of 15 hours per week and monthly progress reports. *All Seasons* involved significantly more instances of unfair labor practices and cumulatively more egregious conduct than this case. Nonetheless, if the measure of the need for extraordinary bargaining is

whether a Respondent has struck at the core of the bargaining process, then an additional remedy of a bargaining schedule in the pending case is justified. Respondent delayed three months of bargaining, time that cannot be made up with the extension of the bargaining year. Strict adherence to a bargaining schedule will allow the parties to complete a collective bargaining agreement or reach a good-faith impasse in negotiations.

V. CONCLUSION

Based on the facts described above and established Board precedent, the evidence fully supports the ALJ's factual findings and conclusions that Respondent unlawfully violated Section 8(a)(1) and (5) of the Act by failing and refusing to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment from October 15, 2018, to January 9, 2019; since April 10, 2019, by stating that it would not consider any proposal for a union-administered benefits plan; since April 17 and July 9, 2019, by refusing to provide the International Union and Charging Party with requested cost information regarding the existing benefits plans for bargaining unit employees; and since November 25, 2019, by withdrawing recognition from the Charging Party as the exclusive collective bargaining representative of the bargaining unit employees. Further, the evidence and established Board precedent supports the ALJ's findings that a *Mar Jac* remedy and bargaining schedule are appropriate.

Counsel for the General Counsel respectfully submits the ALJ's conclusions that Respondent violated Sections 8a(5) and (1) of the Act should be affirmed, along with the appropriate remedies, and that Respondent's exceptions should be denied in their entirety.

Dated: November 17, 2020

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CERTIFICATE OF SERVICE

I certify that on the 17th day of November 2020, I served copies of the Counsel for the General Counsel’s Answering Brief to Respondent’s Exceptions to the Administrative Law Judge’s Decision on the following parties of record electronically:

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