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VIA ELECTRONIC FILING
Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington DC 20770-0001

March 19, 2021

Re: CWA v **New Concepts For Living, Inc.**, 22-CA-187407; 22-CA-197088; 22-CA-195819;
22-CA-208390 and related cases 22-CA-205843

Dear Ms. Rothschild,

Please convey to the Board that for the reasons set forth herein, the Employer believes that the Administrative Law Judge has fairly and accurately ruled upon these matters, and no further responsive pleadings are required. Additionally, we decline to utilize ADR, as well.

As it was in the beginning, so shall it be in the end: The last remaining souls who desire CWA to bargain for employees at New Concepts work for Region 22.

The Employer's initial brief of the case, filed over two years ago, may provide useful references in support of the findings by Judge Gardner. It is attached hereto for the convenience of the Board. We presume it was included in the Record transmitted to the Board, but in light of the volume of documents and transcripts filed in this case over 5 years of litigation and a two week trial, it may prove useful to the Members in elucidating the conclusions and findings of the ALJ.

It is axiomatic that deference should be applied to the ALJ's credibility determinations because he had the "opportunity to observe the witnesses he hears and sees and the Board does not."¹

¹ Felix Frankfurter, writing on the importance of demeanor evidence in *Universal Camera v. N.L.R.B.*, 340 U.S. 474, 496-497, 71 S. Ct. 456, 95 L. Ed. 456 (1951) As to the two union witnesses adjudged less credible, the Judge did not point out, but might have that Mr. Yeager, the union's lead witness, had a rocky start. The Judge himself noted that despite Yeager's protestations of searching for his (not produced) bargaining notes, the elusive notes were all along sitting on his counsel's table, thus:

TR p.100: [7] Q ... is there any reason why you [8] didn't produce the notes today?

[9] A. *We attempted to try to find the notes. We were unable to [10] locate them...*

TR p. 103: JUDGE GARDNER: And do they happen to be present [16] in the Courtroom to your knowledge, counsel?

17 MS. PINARSKI (CWA): Yes, they are.

18 JUDGE GARDNER: ...So maybe you can produce [19] those to the Respondents.

20 MS. PINARSKI: Okay.

Similarly, the Judge did not point out, but could have that Mr. Baldicanis' testimony regarding the polling place was wholly controverted by photographic evidence and the live testimony of every witness for the employer: "TR p280 MS. SLAHETKA (NLRB) Q: What did the ballots look like?

3 BALDICANIS: It was a small sheet of paper with just the yes or no box [4] on it.

5 Q Were there any other words on the paper? 6 A No."

That the General Counsel disfavors those determinations in this case is unsurprising, yet the record speaks for itself, without the faintest hint of partiality or implausibility. We are confident the Board's review of the Decision and the Record will confirm the highest standards of probity and impartiality were observed throughout.

There are numerous factual errors in the General Counsel's brief, where "uncontroverted" is used repeatedly as a euphemism for "strenuously alleged" but the record in the case speaks for itself.

A decertification petition filed in October, dismissed in December, after no more than a brief, innocuous and oblique exchange with two employees (who both testified the conversation had no effect on them) is at the center of the tempest in the Region's teapot.

You should know that not once did the Region acknowledge that the residents in these adult homes are HIPPA protected, and despite multiple witnesses trying to educate them as to why that prevented the union from barging into homes, or for that matter recording in them, still they complain about lack of access. As a healthcare lawyer I strongly encourage you to provide training for staff in HIPPA, emphasizing it isn't an anti-union conspiracy, it's for the protection of people just like our residents, and it is entitled to the same deference as other acts of Congress.

Further, the Employer would like to note its obvious objection to any involvement in the case by General Counsel-Nominee Jennifer Abruzzo, who was Special Counsel to the Charging Party throughout its litigation of this matter.

Sincerely,

/s/

Brent W. Yessin, Esq.
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Q Was there a place for you to mark the ballot privately [18] such as a barrier or a separate room?

19 A No.

20 Q So where did you mark the ballot?

21 A Behind my hand on the table.

In fact, that was refuted by every other employee witness, a retired Judge, HR and management witnesses, and as the documentary evidence confirmed, "As for the poll itself, it is clear that, though not perfect, Respondent attempted to follow the Board's gold-standard procedure for a valid election, mimicking the Board's Excelsior list, the Board's Election Notice, the setup of the voting place, the presence of observers, a private place to mark ballots, and a secure ballot box." One need not look too hard for reasons to doubt Baldicanis' credibility.

ATTACHMENT: BRIEF OF THE EMPLOYER: MARCH 2018

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 22**

NEW CONCEPTS FOR LIVING, INC.,

Case Nos.

and

22-CA-187407

22-CA-195819

22-CA-197088

COMMUNICATION WORKERS LOCAL 1040

22-CA-205843

22-CA-208390

BRIEF OF THE EMPLOYER NEW CONCEPTS FOR LIVING

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I. INTRODUCTION

After two and a half years of life and litigation now in the parties' collective rear view mirrors, it is time to make a sober assessment of where we indisputably find ourselves: the (vast) majority of employees at New Concepts for Living do *not* wish to be represented for purposes of collective bargaining by CWA Local 1040.

We know that because they told us that. In their mass exodus of fax-machine jamming withdrawals, with their lopsided vote, and in their genuine exuberance to roll downtown to Washington Place to attest to that most curious phenomenon: actual affection for and confidence in their employer. The legal issues lay out dryly for debate below, and with 9 days of transcripts and a forest of documents there will be plenty of quotes and quibbles to fill the pages of our briefs, but the nagging truth is that the employees, like pesky voters everywhere, sometimes have a mind of their own and have to reckon with, self-determinant creatures that we are.

Before we descend to the Seventh Ring of Minutia and debate whether proffered reasons for bargaining positions are so illogical or unreasonable as to warrant this inference, or justify that one, it pays to remember what the Act is... and what it is not. It is *not* a pop quiz of confusion for lay people where only a perfect score passes. Real people – even practitioners – get the details wrong every now and again. It *is* the tool that Congress gave us, and along with it the mandate, to see the *will* of the employees, and not their perceived interest (as we define it), is respected.

II. THE PARTIES

The record will reflect that Respondent, New Concepts for Living (“NCFL”), is a small, non-profit, grant-funded service providing assistance to mentally disabled individuals, operating in certain northern New Jersey communities (NCFL). Its employees provide care, transportation

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and assistance to the mentally disabled. NCFL employed approximately 80 to 90 full time and part time employees in the effected bargaining unit at its 13 residential (or “group”) homes and a day center and administrative office in Rochelle Park, NJ at all times pertinent to this matter.

NCFL’s CEO at all times pertinent hereto has been Steve Setteducati; Adam Fishman its Associate Executive Director (effectively the second in command), Janice Hoyda its Human Resources Manager and Cheryl O’Reilly it’s Human Resource Specialist, responsible for labor relations at the company and a member of the bargaining team throughout.

George Corliss was the company’s lead negotiator for the first two bargaining sessions when negotiations began for a successor contract in August of 2016, and was replaced by James Cusack (“Cusack”) prior to the 3rd bargaining session on January 12, 2017, until the last session in August 2017. O’Reilly and Fishman appeared at every bargaining session for NCFL. Of those named above, only George Corliss did not appear as a witness, though he is mentioned prominently in the testimony of several witnesses.

The Communications Workers of America, Local 1040 (CWA or “union”) served as the exclusive bargaining agent of the employees for an undetermined amount of time, but at least since 2007, the start date of the oldest collective bargaining agreement in the record. It was removed by withdrawal of recognition following a *Struksnes* poll in a 61-9 vote against exclusive representation in September 2017.

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Carolyn Wade has been at all times pertinent hereto the President of CWA Local 1040; whose chief negotiator for the first two bargaining sessions was Principal Staff Representative Robert Yeager (“Yeager”), who was replaced in January 2017 by CWA outside attorney Annemarie

Pinarski. Donna Ingram, the CWA's Staff Representative for the NCFL bargaining unit at all material times was also a member of the bargaining committee, attending all sessions. They were joined at all sessions in 2017 by Ruth Barrett, an International Representative, and others including Duwaine Walker of CWA Local 1040. Bargaining unit member Bryan Baldicanis attended two sessions and served as a resource person for the union at NCFL's Rivervale Group Home. Of those named above, only Walker did not testify, although he is mentioned briefly by several witnesses.

A consolidated complaint in the above referenced matters was filed May 29, 2018. The matter was the subject of 9 days of hearings between September 26^m 2018 and November 20, 2018, Judge Jeffrey Gardner presiding. The parties were invited to submit post trial briefs following the close of the hearing.

III. STATEMENT OF FACTS

The Company: NCFL's new CEO, Steve Setteducati arrived at the company in January 2016, having previously served the non-profit on its Board of Directors². It was, and is, a small employer, with a single source of income (state Medicaid funding) derived from services it provides to developmentally disabled adults, most in residence at one of the company's "group" or residential homes. The company's reimbursement formula was changing to a "fee for service" model some time in 2017. That model would require updated and improved billing and record keeping, and would reward providers for higher acuity, or more difficult, residents and consumers of services³.

² TR1265

³ TR1268/1-16

Setteducati had a private sector background, and was formerly Mayor of Emerson, NJ, a nearby Borough. The company was in the process of opening two new homes to give it a total of 13. Adam Fishman has been at NCFL 10 years, with operational responsibilities, but both Janice Hoyda and Cheryl O'Reilly were hired into Human Resources in the first half of 2016. Cheryl was solely responsible for labor relations, and came to serve on the company's bargaining team.

The Union: Donna Ingram took over as staff representative in late 2015, and while it is not uncontroverted⁴, the record reflects a consensus of union officials and employees alike that she inherited a bargaining unit that had not been serviced well by the union for quite some time. The last full contract negotiation was 2007. The 2007-2011 CBA⁵ seems to have been extended by agreement of the parties in 2011, but expired in November 2012.

In July of 2013 the then expired contract was extended through November 2014 by Memorandum of Understanding⁶. Consequently, the last raise employees received appears to have been 2013, and employees and union officials alike, apart from Mr. Yeager as noted, reported concerns over the apparent neglect of the unit⁷. Starting pay under the expired extension was \$9.50/hour.

In April 2016, Ms. Wade reached out to Mr. Setteducati to arrange bargaining dates⁸. In the exchange of emails between the parties, Mr. Setteducati requested to see any contracts and extensions that might be in place, and was informed by Mr. Yeager that they were still "*trying to*

⁴ Only Robert Yeager contended that the unit had been "effective[ly]" serviced prior to Ms. Ingram's arrival. TR52/3-5; Ms. Ingram, when asked on cross, "You felt like you had some cleanup work to do...? Answered "yes." TR411/1-3

Note: Citations to the official, multi-volume transcript will be designed by page number "TR52" followed by line number(s), i.e., "/3-5". Exhibits will GC or R and the number, followed by /page where appropriate.

⁵ GC2

⁶ GC3

⁷ TR410/8-22; TR411/1-3

get a handle on what occurred during the period in question (the two years prior)...” but asked to resume negotiations later that summer, in August. Pursuant to that request, the parties at long last began bargaining for a successor contract to the 2007 agreement in August 2016.

Regardless of the CWA’s physical absence from the unit for more than two years, and the expiration of the 2013 extension, the company continued to comply with the terms of the expired contract, including dues check-off. The terms of the card required notice of withdrawal to be provided by the member in writing, by either January 1st or July 1st, annually, or authorization renewed automatically.⁹

Bargaining Timeline: With attorney George Corliss at the helm for the company, joined by Adam Fishman and Cheryl O’Reilly, negotiations began August 30, 2016, with Robert Yeager and Ms. Ingram representing for the CWA at a site arranged by the company in nearby Ramsay, NJ. That same cast met again in September 28th, and GC exhibits 4 – 8 reflect the documentary exchange between the parties.

Both sides exchange proposals, including the union’s demand for an immediate raise to \$13/hr plus rising to \$14/hr on 1/1/2017, \$15/hr on 1/1/2018 and \$16/hr 1/1/2019. for a total of between \$6/hr and \$6.50 over the course of the proposed 4 year contract. CWA also demanded changes to arbitration (cost sharing), shift differential, bulletin boards and notice of job postings¹⁰. The company proposed a year to year deal, with merit pay and changes to grievance and arbitration (panel of arbitrators, split costs), the recognition clause, dues check-off and union security,

⁸ R7/1 and 6

⁹ R7/1

¹⁰ GC4

including moving to agency shop.¹¹ More details on those specifics emerged through evidence both documentary and testimonial, some of it conflicting, which will be more fully briefed below.

After a decertification petition was filed, then withdrawn¹², between October and December of 2016, the parties agreed to resume bargaining January 12th and 13th. When play resumed, both teams had changed captains: James Cusack had replaced George Corliss as lead negotiator for NCFE, with Ms. O'Reilly and Mr. Fishman remaining; Annmarie Pinarski of Weissman & Mintz replaced Robert Yeager as lead negotiator, though Yeager remained on the team as did Ms. Ingram. They were joined by Ruth Barrett, an International Representative from CWA in Trenton, and Duwayne Walker of CWA Local 1040. The union team was joined on two occasions by Bryan Baldicanis and once by another employee, Ms. Price who is mentioned only passingly throughout.

On December 28, 2016, several weeks after the decertification petition (which led to the first charge in the above captioned case) had been withdrawn, the employer posted a memo from Mr. Setteducati (which is the genesis of the second charge) notifying employees of the pending deadline to withdraw their dues check-off authorization before December 31st.¹³

That touched off a stampede of withdrawals that caught the attention of CWA officials, by their collective admission.¹⁴ In response, union officials agree they sent several "teams" to do home visits and worksite visits, distribute literature, mail the homes, make calls and try and stem the

¹¹ G6

¹² GC34/GC35

¹³ GC1-V

¹⁴ TR470/15; TR1035/1-3; TR1079/9-12

tide. Within days, the vast majority of bargaining unit members had signed withdrawal cards and sent them to the union, as well as the company, to stop payroll deduction of dues

Just before bargaining resumed in January, Ms. Pinarski made an information request on behalf of the union, which Mr. Cusack addressed. The parties seem to agree that the company furnished what information it had in response to that request, but shortly thereafter, apparently on or about February 1st, the union made a second information request (attached as Exhibit A to the Complaint, GC1) that is the subject of much of the testimony at the hearing.

The union contends that it is entitled to the financial information contained in its February 1st information request because it alleges that Mr. Cusack “pled poverty” in the first January bargaining sessions, a claim that Mr. Cusack, an experienced negotiator, and his bargaining team deny¹⁵. Ms. Ingram, Ms. Pinarski, Ms. Barrett and Mr. Yeager conceded that Mr. Cusack repeatedly emphasized that it was not that the company *can't*, it *won't* agree to the proposed wage increases¹⁶. Their notes and recollection of when that began vary but the consensus is it was a common refrain. That will be more fully addressed below.

It is uncontroverted that the parties also negotiated on February 1st, March 7th, June 16th, July 18th and August 29th. Mr. Cusack proposed to bargain two days per week until an agreement was reached, but the pace never quickened, the reasons for which will be addressed in a later section¹⁷.

¹⁵ TR766/2-17

¹⁶ TR537/13-16; TR641/11-20; TR456/15-17; TR193/7-17; TR1094/15-21

¹⁷ TR599/18-25 and TR600/1-3

The union concedes that *no counter proposal to the company's merit pay proposal was ever made, and that it added \$1/ hour to the wage demands it had originally made in August 2016.*¹⁸

The company for its part proposed merit pay, or pay for performance, and wage re-openers for 2017 if reimbursement from the state increased. Union counsel recalls Mr. Cusack making a wage proposal in January 2017 that called for a wage re-opener if funding increased.¹⁹

The parties agree that with time, the company offered various dues collection approaches, all short of what the union found acceptable. The parties seem to agree that some notable agreements were reached, extending “just cause” language throughout the contract, longer notice for layoffs, an extra personal day, bulletin boards and additional training provided.

In August, after the company sent a letter to employees' homes (this also appears in GC1-V) offering to resume dues check-off if anyone wished, the union refused to schedule further sessions. On September 7th, the company notified the union²⁰, and their counsel, that they proposed to conduct a *Strusknes* poll on September 21st, it would be conducted according to standard R-case procedures by a retired Superior Court Judge, and they would be afforded an observer. On September 8th, the company sent to the union an “*Excelsior List*” via e-mail consistent with the most recent requirements of “expedited” NLRB elections²¹. On September 21st, the election officer, Retired Superior Court Judge Judge Joseph Scancarella (ret'd), conducted the secret ballot poll, with the results reflecting 61 of 70 eligible voters casting votes against representation. On September 24th, Judge Scancarella informed the union and counsel of

¹⁸ TR597/2-5

¹⁹ TR643/3-5

²⁰ GC52

²¹ GC53

the result, and the procedure for objections, should they wish to file.²² There being no objections from the union within the prescribed time, or thereafter, Mr. Cusack informed the union of the company's withdrawal of recognition on October 5th.²³ No further dates were requested by the union after Mr. Cusack's letter. Judge Scancarella testified about the conduct of the election, as did several of the voters, including those both for, and against, the union by their own testimony.

IV. STATEMENT OF THE CASE

Two things stand out about this case:

- Unlike most of the reported cases involving contested decertification or withdrawal of recognition cases, the case is utterly devoid of any hint of reprisals, threats, or adverse action taken against a soul. There is no assertion of anti-union animus directed toward anyone, any time.
- The margin with which employees rejected representation is more overwhelming than any cases we can find on record. It was not a 51-49 election, or a bare majority of signators on a petition, it was a 61-9 vote, with no room for reasoned doubt as to what the will of the employees is. The issue before us is, *since the Act protects employees and not institutions, are they to be protected against their own clear expression of will?*²⁴

The General Counsel contends that Mr. Setteducati gave more than ministerial assistance to decertification petition by his actions or words in *one* meeting, at *one* group home on October 18, 2016, and that assistance in some way still taints the clear expression of employee will on September 21, 2017, nearly a year afterward, so much that it should be disregarded. *Has the General counsel proved unlawful assistance to the decertification petitioners sufficient to taint a secret ballot election almost a year later under the Board's Master Slack test*²⁵?

²² GC56/TR825, et seq,

²³ GC57

²⁴ See, for example, the discussion in *Lochmere Inc., v NLRB*, 502 US 527, 532 (1992).

²⁵ 271 NLRB 78 (1984)

There are two principal defenses to the General Counsel's contention with regard to the October 18th meeting:

- a. The speech was protected speech under 8(c) as it was a recitation of historical facts and an accurate characterization of the parties' respective bargaining positions at that time (the company had asked for merit pay²⁶ based, and the union had rejected it), and any mischaracterization of the decertification process was inadvertent and inconsequential, simply confusing the certainty of the window closing when bargaining resumed with the possibility that could happen with a contract upon resumption.²⁷
- b. The appropriate standard to evaluate the lingering effect of even unlawful conduct is the Board's *Master Slack* test: the length of time between the event and the withdrawal, the nature of the acts including possible detrimental long-term effects of the acts on the employees; the tendency to cause employees long term disassociation and disaffection for the union; and the effect on employee morale and organizational activities.

The General Counsel's second principal contention is, or was²⁸, that the withdrawal cards were a product of coercion, and their dissemination constituted unlawful interrogation. No evidence was adduced at trial as to any conversations whatsoever about the dues revocation cards involving anyone but staff to one another. The union's attorney conceded on cross examination that the cards could only be revoked twice a year²⁹ *Peoples Gas System*, 275 NLRB 75, governs when contractual "underpinnings" (automatic renewal deadlines) are present. *Given that the terms of the union's own dues check-off cards restricted withdrawal to two brief windows each year, has the General Counsel proved that the letters or memoranda contained threats of reprisal, or promise or benefits?*

²⁶ GC6/GC8

²⁷ "Once negotiations really start...you can't get rid of the union."

²⁸ The Complaint alleges two managers "solicited employees" to sign the withdrawals, CM¶17 and offered no evidence, documentary or testimonial at the hearing, and apart from that the memos in GC1-V are the only record evidence.

²⁹ TR651/12-15 Q: "...they had to be in by December, according to the terms of the card, correct? A" Right, they could revoke membership twice a year."

The most significant event in this case apart from the *Strusknes* poll itself occurred on December 28th. The December 28th memo in response to employee questions about stopping their dues left three days for 85 employees spread over 3 shifts in 14 locations to withdraw before the check-off renewed automatically. About 90% the bargaining unit signed the withdrawals *within one week*, without one shred of documentary or testimonial *hint* of coercion or implied promise. That overwhelming response constituted a “changed condition” of seismic proportions in relative bargaining power upon which the employer is entitled to act at the bargaining table.³⁰ The company’s ability to get the contract it needed happened between December 28th and January 1st.

The General Counsel contends that the employer’s failure to provide financial information contained in Exhibit A of its Complaint was unlawful, since it was relevant to the exclusive agent’s duties. That contention requires the General Counsel to prove that the Company “pled poverty”, but the union’s own testimony is that the company’s counsel repeatedly declared “not we can’t, we won’t.”³¹ Without a plea of poverty, or a “present” inability to pay, there is no obligation to open the books and produce the material sought in Exhibit A. *See, Burruss Transfer* 307 NLRB 31 (1992), finding “best it could do” and need to “remain competitive” does not trigger obligation to disclose.

The Company has the additional defense that the request was not intended to further the union’s bargaining interest, merely to harass, as the union itself noted that it was unaware that the 990’s already produced contained much of the data requested and they failed to even review it over the course of several bargaining sessions. The union’s bare contention that it is “necessary” for it to

³⁰ See, for example, *Challenge Cook Bros* 288 NLRB v 387 (1988); *National Steel* 324 NLRB 155 (1997); *HE Williams*, 199 WL 33453707 (1999)

³¹ TR537/13-16; TR641/11-20; TR456/15-17; TR193/7-17; TR1094/15-21 Annmarie Pinarski reading her notes “It’s not that we can’t pay. It’s that we won’t pay. Okay. It was on March 7th” TR 641/19

fulfill its duty to bargain is belied by the individual facts of this case: It had the information in 3 years of 990's and never looked at it.³²

The General Counsel's assertion of "regressive bargaining" for "withdrawing initial proposals" in ¶26(c – e) and ¶31 misapprehends the law, and is neither accurate nor sufficient to show an unfair labor practice. Testimonial and documentary evidence of those items *ever* being agreed was not produced, and indeed contradicted by the union's agents³³. In the absence of a tentative agreement, either side is entitled to withdraw or amend its proposals, indeed they both took the precaution of preserving that notation when they exchange preliminary offers³⁴. Given the changed conditions of the union's tangible loss of support, the Company would be entitled to change its positions on the basis of changed condition, but even that is not required. In order for the General Counsel to prove an 8(a)(5) violation it must show that the proffered reasons for the change are so illogical and unreasonable as to warrant a conclusion that the change itself evinces an intent *not* to reach agreement. That is the appropriate standard.³⁵

Unilaterally changing terms of the prior agreement to provide the union a list of names and addresses of employees is only a ULP if there *is* a prior agreement, (and even then defensible as a reaction to the changed conditions discussed further below). The union's bargaining agent conceded there was in fact no contractual requirement to produce the names and addressees. Producing 4 consecutive months of reports from December 2016 to March 2017 with 3 different formats does *not* establish a past practice sufficient to create that an ongoing obligation to produce the same report.

³² Detroit Edison Co. v. NLRB, 440 U.S. 301, 314–315 (1979)

³³ GC8: not agreed items include Wages, panel of arbitrators, changes to dues check-off/union security language proposed in GC6.

³⁴ GC4, 6, 8

³⁵ Chicago Local 458-3M v NLRB 206 F3d 22 (DC Cir 1999) for a thorough discussion on regressive bargaining.

Lastly, attacking the *Strusknes* poll as “polling” in ¶21 of the Complaint would require the GC to prove that the observer, Ms. Williams, or the election official, Judge Scancarella could see through a voting booth, a ballot box, or that the ballots were signed. All of which were foreclosed by the un rebutted testimony of those two witnesses, and everyone else who voted, friend and foe alike.

V. LEGAL ARGUMENT

1. **First and foremost, the *Strusknes* poll was conducted in conformity with the standards set by the NLRB, and reflected the will of an overwhelming majority of voters, and employees.**

“Do you wish to be represented for purposes of collective bargaining by CWA Local 1040?”

This was not a squeaker. Judge Scancarella’s tally was 61 NO, 9 YES, with 85 eligible voters.

See, GC 56 for the tally sheet, and related correspondence.

Both observer Lorna Williams and Judge Scancarella testified about the polling place, the polling process, and the outcome. Their testimony was buttressed by the testimony of actual voters³⁶.

There was no evidence, testimonial or documentary, to impugn the confidentiality of the vote, the anonymity nor substantial conformity with the Casehandling manual.

It is worth noting that there was initial testimony from union’s steward, Bryan Baldicanis, that there were no words but “Yes and no” on the ballot, and no voting booth³⁷. Baldicanis initially testified he had to hide the paper with his hands while sitting at the table “a foot” away from the observer. The General Counsel, relying on Baldicanis’s statements could be forgiven for asserting in CM¶21 that Ms. Williams “polled” employees in the voting area... *it just wasn’t true*. Since Baldicanis was the Day 2 leadoff witness, there was no way he could know his colleagues would effectively eviscerate his testimony. Confronted with a photo later

³⁶ See for example, TR 1309/21; TR1326/23; TR: 1337/5-14

³⁷ TR280/2-19

authenticated as the polling area, with its voting booth, Baldicanis claimed he “didn’t know” that the booth was there (TR306/1-8). Even Baldicanis was forced to concede no one knew how he voted. (TR306/14-16)

Complaint ¶21 and any assertion that the poll was procedurally improper was thoroughly debunked at trial.

Now, the issue is, will the Act be used to uphold their will, or frustrate it. The US Supreme Court in *Lochmere, Inc v NLRB*, 502 U.S. 527, 532 (1992) writes “By its plain terms, the NLRA confers rights only to employees, not on unions or other non employee organizations.”

2. If the poll reflects the unquestioned will of the employees, it should be upheld in the absence of a causal connection between the loss of employee support and the complained of action.

The *Master Stack* test has been applied to determine when a remote ULP can serve to overturn an otherwise lawful withdrawal of recognition, not unlike our own. It is instructive here. Master Stack is a sewing machine plant in Tennessee that had a contentious labor history, resulting in a plant closing, reinstatements, and myriad 8(a)(1) and (5) violations. Mostly resolved several years before, there were still issues in contesting the amount of some back pay awards. No longer a 400 person strong plant, there were 161 employees, and 90 of them signed a petition to get rid of the union. The ALJ found that because the earlier ULP was not fully resolved, the current petition and withdrawal were improper. The Board reversed, applying the following test:

- (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.

We have none of the baggage that Master Stack did: *No discharges, nor retaliations, no bargaining orders*, just an allegation that a long since *withdrawn* decertification petition may have been assisted by management. *Master Stack* upheld the will of the employees, as expressed in a *much* more narrow manner (closer to 56/44), and a venue less reliable than a secret ballot election conducted with the NLRB or *Srusknes* protocols and safeguards.

Saint-Gobain Abrasives, 342 NLRB No. 39 (2004) (holding employees' decertification petition should not be dismissed based upon allegations of employer misconduct, unless the union proves that there is a "causal nexus" between the alleged employer misconduct and the employees' disaffection from the union) is another "don't punish the child for the sins of the parent" case, recognizing, like *Lochmere Inc., v NLRB*, 502 US 532, *supra* that the Board's charge is to effectuate the freely expressed will of the employees.

Assume *arguendo*, that Steve's comments to the Rivervale house on October 18th were imperfect, assume *arguendo* they were an implicit promise: NCFL's petitioner withdrew his petition when the allegation was made that Steve had encouraged it in this meeting. That ULP was remedied in early December.

Is there a detrimental or lasting impact on employees? Bryan voted as he wanted, since then he left the company of his own accord, and Saaed got promoted. There is no evidence in the record that *anyone* outside Rivervale, perhaps even outside this meeting had any knowledge of this conversation, even if it was impermissible.

It cannot be said that this conversation – the lone piece of evidence connecting any manager to any aspect of the withdrawn decertification petition – had any “causal connection” to employees’ disaffection from the union. (Saeed and Bryan both supported the union.)

Employees’ disaffection didn’t grow out of the petition, the petition grew out of employee disaffection. The union’s own witnesses testified that Donna Ingram was sent there to fix their disaffection in 2015!³⁸

After the petition was withdrawn – a petition that Andre Marshall testified might have had 60 signatures – withdrawal letters were sent in far greater numbers than the petition. *The employees testified that their dissatisfaction with the union was that they hadn’t seen them, they hadn’t gotten anything, and they didn’t want to pay*³⁹.

To insist that an imperfect conversation manifested anything other than an imperfect understanding of the law is assuming facts not in evidence... and it is the only evidence underlying this whole charge. The fact is the Master Stack considerations just aren’t here in this matter, and the causal connection from *Saint-Gobain* is impossible to establish on the facts here: a disaffected unit looking for any outlet, petition, withdrawal, poll. As Reagan famously asked “if communism is so great, why do they have to build walls to keep people *in*?” The truth is, happy members don’t flee. These weren’t happy members, and you can’t blame Steve Setteducati for that.

³⁸ “I believe I had some work to do.” TR411/1-3; The union by her testimony had no shop stewards and couldn’t get members to come to bargaining. TR433/13-16

³⁹ See, for example, a selection of employee sentiments: TR1339/21-25 (single mom, didn’t want to pay); TR1310/15-25 (didn’t do anything for me, not doing anything); TR/1324/8-15; TR 1346/8-14; TR1351/21, TR 1352/7, 14-20; TR1358/15-24.

3. The Employer did not provide more than ministerial aid to the decertification petitioners, and in any event, the decertification petition was withdrawn 3 weeks prior to the mass withdrawal from the union, which occasioned the changed condition in bargaining.

The General Counsel has rested a lot of the case on Bryan Baldicanis, whose testimony undermined if not eliminated any vestiges of credibility. But analyzing the audio recording he made on October 18th, after inducing Mr. Setteducati to come to the home to speak with him and Saeed Martin alone, and assuming *arguendo* that it does not violate HIPPA, and that it is not unlawful under 2A-156A as Respondent has argued – begs the question “*where is the beef?*”

The General Counsel alleges this conversation solicited and encouraged Saeed and Bryan to decertify, by promising to grant merit wages increases and bonuses. It does neither. Bryan was paid by the union and Saeed by his own testimony supported the union and continued to pay dues until he left the unit for a promotion. While the failure of an effort does not “sterilize” the mistake away, it certainly means there is no causal connection between the incident and the loss of union support, let alone allow for “lasting” disaffection.

When the Act was amended by Taft-Hartley to add Section 8(c) “it’s enactment manifested a ‘congressional intent to encourage free debate on issues dividing labor and management.’” *Chamber of Commerce v Brown* 554 U.S. 60, 67 (Stevens writing for the Court) The Court struck down a California statute which prohibited state funds from being used for “anti-union” efforts, but the broader debate was about the prevailing interest of the Act, expressed by Congress, *not* to suppress speech but to encourage it.

Wage comparisons that contain strong innuendo (i.e., “all of our non-union employees have this 401(k)”) have been held to be implicit promises⁴⁰, while historical facts (such as “you haven’t gotten a raise in 3 years”) have been upheld as lawful speech. Steve never says “my old company was non-union and we had better benefits” or “my non-union staff gets higher raises” though he might well be permitted to. All he says is, in essence, “Gee, I’d rather to do pay for performance, it could be better for you, too, but the union has refused...” Given that would state the parties’ bargaining positions at the time, that would have been lawful. He doesn’t get it exactly on target, but he gets close.

The transcript⁴¹ reveals employees asking Setteducati questions about the decertification process, and pay levels, to wit: SAEED: “What’s the big rush to get rid of the union?” (P2:7). That question precedes *any* discussion of the decertification, (ice breaker or ambush?) though recall Steve testified he was brought there because he was told they had questions about the decertification.⁴²

But what is his first response: “*It’s really up to you guys.*” (Page2:9) “*I can’t promise you anything.*” (P2:15) He goes onto explain that if they file a petition, *they aren’t getting rid of the union, they are bringing it to a vote.* That’s a legal fact. He mistakenly says the petition is barred “once negotiations really start” because as he testifies, he was told that by prior counsel⁴³, who may well have just said “they could sign a contract day 1, and the window closes,” which is true, but imminently confusing to a lay person.

⁴⁰ *In re Sunrise Health*, 334 NLRB 111 (2001).

⁴¹ GC16/P2

⁴² TR1273/23

⁴³ TR1275/18

He explains accurately that if they vote to keep the union, “we have to keep negotiating” but if they are voted out, they can come back in a year. Saeed interjects that the union says the election bar is two years, and Steve corrects it. (P3:13 – 21) Factual discussion of the process? *Legal*. Saeed asks him the famous “so what’s going to be in it for us?” and Steve’s answer is a long one – he explains that with the union contract “it’s a defined wage” (P6:4), which it is, and their proposal at the time was to remain so. He gives a long example of the manager saying he’s a good employee and another employer wants him, and he would like to be able to give that raise to keep the good performer, concluding with “I wouldn’t guarantee we *would*, but I can(sic) say we *could* do it.” (pP:9-18).

Saeed asks him “what would you say our raises would go to...?” and Steve says “*I can’t tell you that. I’m not allowed to. It would be a promise.*” (P8:10 – 13) He reiterates “*You don’t have to. Guys you don’t have to. Wouldn’t want to force – I’m not influencing.*” (P10:12-15).

Steve is a businessman with no labor experience, as he testified. He was trying to get it right. He did say “I’d give merit pay” before he then explained more fully the process as set forth above. If he stopped there, that conversation would be more problematic, *but he didn’t*. Did he mean “I WILL give merit pay” or “I would like to” – the more logical read is most close to the grammatical text, “I’d” not “I’ll.” The context of the conversation – the full discussion of it, with his pronouncements that he cannot *promise*, and it’s up to *them*, combined with the extensive explanations of the union’s contract preference for one wage rate, as opposed to his strong preference for “Merit pay” or pay for performance do mitigate and expand upon the earlier comment. They also track precisely with what he told his bargaining team to do in negotiations.

In terms of assessing the impact of this conversation, *which remember hasn't been alleged to have occurred anywhere else*, it is ephemeral, *it was over that night*. There were two people at this meeting. *Both of them remained in the union*. Both testified they felt no coercion, no threats, Bryan testified he voted for the union, and Saeed was promoted before the election. *It's hard to conceive of a less consequential conversation to an election twelve months later*.

4. The union admits that Mr. Cusack stated time and time again that he was not saying the employer “could not” pay, he was saying they “would not pay” the eventually \$6/ hour pay increase the union demanded.⁴⁴

A non-profit company that relies on a single source of public funds obviously was not going to agree to a \$6/hour increase, and to propose that and then *never move off that position* of intransigence is hardly “bargaining in good faith in an attempt to reach an agreement.” The failure of the union to move off that demand apart from increasing it by \$1/hr in July says more about the union’s intention to get a contract than the company’s.

Mr. Cusack testified unequivocally that after a long career in this field, he’s never pled poverty... it’s like saying “bargaining starts from scratch,” a cliché mistake you never make. Annmarie Pinarski testified while reading a notation from her notes “It’s not that we can’t pay. It’s that we won’t pay. Okay. It was on March 7th.⁴⁵” Donna Ingram, reading her notes, attested “I was paraphrasing what I remember Mr. Cusack saying and he said something like ‘I’m not saying we can’t provide wages, we just won’t pay it.’”

The union’s bargaining position was intransigent, admitting they never moved off a \$6/ hour increase until they *increased* it; never proposing a written “arbitration” article, or for that matter dues checkoff. The information request wasn’t to see the books to help them bargain – they

⁴⁴ TR537/13-16; TR641/11-20; TR456/15-17; TR193/7-17; TR1094/15-21

⁴⁵ TR 641/19; TR 765/19 to TR 766/11.

admitted they had the 990's (3 years) and never looked at them. Under cross examination union counsel, Ms. Pinarski, spoke of how valuable the old audited financials they asked for from 2014 and 2015 would be to see if "maybe the costs have gone up." TR624/14 In fact, the form 990 IS an audited financial – as a cursory glance at it shows. But the union did not glance it⁴⁶:

Q: Ms. Wade, did you ever review the 990? A: Not that I can remember.

Q: ...Do you normally do that, before negotiations or is that something that you'd leave to the bargaining team. A: No.

Q: Do you have the resources on staff that could help the bargaining team, if they wanted help? A: We go to the National Union.

Contrast that with Ms. Barrett, the National Rep⁴⁷:

Q: Do you belie[ve] that Local 1040 has sufficient resources or talent, that they themselves can do an adequate assessment of a form 990... that they don't need the International help in doing that?

A: They would not have done so in this particular case, because we had attorneys come in for bargaining, the attorneys are the lead."

Ms. Pinarski, recall, *knew nothing about them*, but asked for them – her client said she would give it to the National, who said they would leave it to the lawyers. Not to be cynical, but it's hard to show you need audited financials, and utilities, and overall salary and expenses, when *you have them all along and no one looks at them*.

5. To prove an 8(a)(5) violation for a revised or even regressive proposal the General Counsel must show the proffered reasons for the change are so illogical and

⁴⁶ TR1054/8-18

⁴⁷ TR1100/5-12

unreasonable as to warrant a conclusion that the change itself evinces an intent *not* to reach agreement.

First, the record does not support the General Counsel's contention that there the company withdrew its "initial wage proposal" and replaced it with a wage freeze. The bargaining team (Cusack, O'Reilly and Fishman) as well as Setteducati were adamant that the team's marching orders were: *get merit pay*. The initial proposal in August sketched it out that simply. Achieving discretionary performance based pay IS a zero wage increase.

The General Counsel's role isn't to level the playing field. If one side has greater bargaining power, they're free to use it. If changed conditions – a failed strike, or a massive withdrawal of members – create a new opportunity to "flex your economic muscle"⁴⁸ the Board's role is to stand aside and ensure the parties are trying to get an agreement. *See, Barry-Wehmiller Co. 271 NLRB 471, 473 (1984)* evaluating regressive bargaining: "[W]hat is important is whether the [rationale for the offer is] so illogical as to warrant the conclusion that the [party] offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of an agreement."

In our own case, between the September bargaining session and January, the respective power of the parties changed. George Corliss told Setteducati that the union would never agree to merit based pay, and Steve told everyone he needed it to adapt to the changing reimbursement structure.⁴⁹ He changed lawyers to get it: "Q: why [change lawyers]? A: Because George Corliss told me you're never going to get merit pay."

⁴⁸ 296 NLRB 289, 314 (1989)

⁴⁹ TR1266/10-18

In fact, he and his bargaining team confirm that they were using proposed changes to dues check-off to get merit pay⁵⁰. [Steve: “[We] kind of held it back because I was hoping to... get the merit pay, and that was kind of a last chip that I could give in negotiations to... allow them to have the checkoff.”] *Donna Ingram saw it, saying it’s hard to have any power at the bargaining table if you can’t get the members there* (TR431/12-16 and 435/2-9, 13-16). She also seems to have been the only one who knew where the contract was headed “This is what I heard from... negotiations, that New Concepts might change their mind about checkoff if we brought them evidence of member support. Q: So Mr. Cusack said that if you could just generate some support... they would reconsider that dues checkoff again? A: That’s what my remembrance of it is.” TR454/19-25

Any contention that a “regressive” offer is a per se violation is simply false. As the Board and Courts have recognized, it can be a strategy to get a contract, and when it is, there is nothing unlawful about it.⁵¹ The real inquiry is, *if you wanted contract, why would you demand a 60% pay increase on the eve of an industry shake up and never counter?* The union’s story that they weren’t going to bargain against themselves and were just waiting for the company to put some money on the table is a false narrative, obvious for two reasons: 1) the union concedes the last move was made by the company on January 13th “I believe January 13th, when [the company] put a wage proposal across the table, there was a wage freeze and that there could be a wage reopener, as soon as the funding was increased;⁵²” and 2) the union did make a new offer – for \$1/hr more of base pay increase.

6. Several key elements of Complaint were never addressed, never proven, or conclusively disproven.

⁵⁰ TR1273/10-17

⁵¹ Chicago Local 458-3M v NLRB 206 F3d 22 (DC Cir 1999) for a thorough discussion on regressive bargaining.

⁵² Pinarski, TR643/3)

¶17 of the Complaint. The Complaint alleges two managers “solicited employees” to sign the withdrawals, CM¶17 and at trial offered no evidence, documentary or testimonial at the hearing. The cards themselves and the memos in GC1-V are the only record evidence, neither supporting a claim or “solicitation.”

The distribution of non-coercive, informational flyers or letters to employees to inform them of their rights has been upheld repeatedly by the Board and the Courts. The letter from *People’s Gas* to its employees in Orlando in Tampa was almost identical to the one(s) sent here: it informed the employees of an impending window to withdraw, assured them there would be no change to their wages and benefits, and the decision was up them⁵³:

The decision is yours to make. The Company simply' wants to make sure you know about it, and understand your rights and privileges, since , we have been receiving a number of questions on this issue. Whether you resign from the Union or whether you remain a member and continue dues checkoff will not make any difference in your gross wages, benefits, position or treatment by the Company. If you want to discontinue the checkoff of Union dues and resign from - the Union, you should take the following actions... I want you-to understand that the Company is not urging you either -to remain a member of the Union or to resign from the Union, or to discontinue the dues checkoff. As far as the Company is concerned, that is a matter for each employee to decide without pressure from either the Company or the Union...

Washington Gas 275 NLRB 75 (1985)

The Board upheld that, although the company included instructions on how to resign from the union as well. The fact that there was a contractual “underpinning” (the pending deadlines) justified the notice. There, as here, both the employer and the union were the addressees, since of course payroll deduction can *only* be stopped by the employer.

¶14 of the Complaint. The General Counsel alleges that Lorna Williams is 2(13) agent of the employer, and had failed to establish that. In fact it is the un rebutted testimony of Ms. Williams

⁵³ *Peoples Gas 275 NLRB 75 (1985)*

herself⁵⁴, the employee witnesses who identified her as the observer, and even Mr. Baldicanis as “the secretary”. (TR304/1)

¶29 of the Complaint. The General Counsel alleges that (“s)ince on or about October 5, 2017, Respondent has failed and refused to bargain with the Union...”. There was no evidence adduced at trial of any request for bargaining dates or times. While it is true that Mr. Cusack announced the company would withdraw recognition based on the *Strusknes* poll, no attempt or request has been made to do bargain.

¶32 of the Complaint. The General Counsel charges that the ULPs alleged affect interstate commerce, with no record evidence or testimony to support that.

¶P10 of the Complaint. Alleges the Complainant is a labor organization within the meaning on sec. 2(5) and Respondent cannot find anything in the record to that effect.

¶20 of the Complaint. Alleges “Steve Setteducati...informed employees it would be futile for them to select the Union...” and yet there is no testimony or documentary evidence, save the one tape (GC18, and transcript GC19), and that is an expression of protected opinion and historical facts. *See, Holo-Krome Co., 907 F2d 1343 (2d Cir. 1990)* (impermissible to use employer’s lawful speech or opinion to show anti-union animus) and “an employer is entitled to point out legal facts to employees” *Sunrise Health Care, 334 NLRB 111 (2001)*. The remarks that Steve made were factual, legal and opinion, all protected by 8(c). *There is no threat of reprisal, in fact he says he’ll be there for them one way or the other*, and if “you don’t get paid enough for what you do” - a fairly standard salutation and complement becomes construed as a promise of higher pay - it’s noteworthy he made no comparisons to non-union site or staff in a way that you could imply a promise contingent on removing the union. The “you’d have to pay dues” statement is in

⁵⁴ TR680/6

the context of what Mr. Cusack said – you show us you have majority support we will revisit and if they had won, they have majority support.

VI. CONCLUSIONS

If you were evaluating the “good faith” attempts to achieve a contract, albeit one on favorable terms, which side looks more eager? The one that asks for two sessions per week until the deal is done, and is moving on key issues like “just cause” and personal days? Or the one that cancels and refuses to submit a counter. Consider how easy it would have been for the union to propose a two year deal with \$1/hr in return for merit pay next year if the funding supported it, and restart dues check-off, and see if the parties began to move.

Consider, too the last time you saw a union not making any money from a nearly 100 person bargaining unit and not anxious to sign the deal to at least re-start the dues? The problem with conveying to one of the parties in bargaining that the deal could get resolved anywhere BUT at the table, is *it makes deals harder* by taking them away from the market, where there is a natural tendency to want to close, lock in the costs and the revenue stream. The Charging Party, by virtue of its attempts to avoid bargaining at reasonable times in an attempt to get an agreement is foreclosed by the doctrine of laches.

For the foregoing reasons, the Board should find that the General Counsel has failed to carry its burden, and dismiss the charges in their entirety.

In the alternative, as a minority union is impermissible under the Act, the original charge had been agreed settled and ready to post over a year ago, it should now be settled for a posting, as

the original charge is so far removed, and not causally connected to the loss of majority support,
and the balance of the charges dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been e-filed through the Agency's website and served by regular U.S. Mail on this the 1st day of March 2019, on:

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