The Finley Hospital *and* Service Employees International Union, Local 199. Cases 33–CA–014942, 33–CA–015132, 33–CA–015192, and 33–CA–015193

June 3, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On September 28, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 156. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel, acting on behalf of the Board, filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs.[1] We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein to the extent discussed below.[2] Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order as modified and set forth in full below.[3]

Overview

The principal issues presented by this case are whether the Respondent violated Section 8(a)(5) and (1) of the Act by (1) unilaterally discontinuing the annual 3-percent pay raises provided for in the parties' collective-bargaining agreement upon the expiration of the agreement; (2) refusing to provide, or delaying in providing to the Union certain information about its Unit Operations Councils and about nurses who called off from work due to work-related illnesses or exposures; and (3) in connection with the Union's representation of a discharged nurse, failing to bargain a reasonable accommodation of the Union's request for information about coworkers who allegedly witnessed misconduct by the nurse, while lawfully denying the Union's request for information about patients' family members who also allegedly witnessed misconduct.

The judge answered each of these questions in the affirmative. For the reasons discussed below, we agree with the judge that the Respondent violated the Act in all of these respects.

I. THE RESPONDENT'S UNILATERAL DISCONTINUANCE OF ANNUAL PAY RAISES

A. Background

The Respondent operates facilities in three locations in Iowa. On December 22, 2003, the Board certified the Union as the exclusive collective-bargaining representative of the Respondent's full-time and regular part-time registered nurses at all three locations. On June 20, 2005, the parties entered into a 1-year collective-bargaining agreement. Negotiations for a successor agreement commenced on March 28, 2006, but were unsuccessful and the 2005 agreement expired.

Article 20.3 of the 2005 agreement provided:

> 20.3 Base Rate Increases During Term of Agreement. For the duration of this Agreement, the Hospital will

[1] On April 25, 2007, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent, The Finley Hospital, filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The Union, the General Counsel, and the Respondent filed answering briefs. The Respondent filed a reply brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions, unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's dismissal of the allegation that the Respondent unlawfully conditioned reaching agreement in bargaining on the withdrawal of the Union's unfair labor practice charges and grievances.

We find no merit in the Respondent's argument that the Board's Rules violate the Administrative Procedure Act and the due process clause of the Fifth Amendment to the United States Constitution because they allow the General Counsel to request trial information (such as a witness list) from a respondent, but do not impose a corresponding duty on the General Counsel. See *Maywood, Inc.*, 251 NLRB 979 fn. 2 (1980) ("Discovery is not a constitutional right in administrative proceedings.")

[3] We shall modify the judge's recommended Order to more closely conform to the violations found and to the Board's standard remedial language, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). We shall also modify the judge's recommended Order to conform to our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 102 (2014). Finally, we shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

> adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement[,] will be three (3) percent. If a Nurse's base rate is at the top of the range for his/her position, and the Nurse is not on probation, such Nurse will receive a lump sum payment of three (3) percent of his/her current base rate . . . .

During the negotiations for that agreement, the parties did not discuss what would happen to the annual pay raises if the agreement expired without a successor agreement in place.

On June 21, 2006, the day after the 2005 agreement expired, the Respondent informed the unit nurses as follows:

> Article 20.3 of the contract (Wage Increases) expires. Because wage increases must be agreed to by both SEIU and the Hospital, we will be unable to provide increases to nurses whose anniversary date falls after the date of contract expiration (June 20th) until the date a new contract is reached.

The Respondent did not directly inform the Union of the cessation of pay raises until July 17, 2006, when, during a bargaining session, the Respondent announced that there would be no raises until a new agreement was signed. In line with this announcement, the Respondent stopped giving pay raises to nurses whose anniversary dates fell after June 20.

B. The Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing the nurses' annual pay raises. He rejected the Respondent's argument that its action was privileged by article 20.3 of the 2005 agreement, reasoning that the contractual language did not establish a clear and unmistakable waiver of the Union's statutory right to bargain over the posttermination cessation of pay raises. The judge also found that the Respondent violated Section 8(a)(1) when it informed the nurses that it was discontinuing the annual pay raises and that pay raises would not be granted retroactively to June 21, 2006.

C. Discussion

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Perhaps the most fundamental corollary of this rule, established for over 50 years, is that an employer violates Section 8(a)(5) if it "unilateral[ly] change[s] . . . conditions of employment under negotiation . . ., for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The duty to maintain the status quo pending negotiations applies with equal force regardless whether the term or condition of employment at issue was established by the employer alone or jointly by the parties through a collective-bargaining agreement. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988).

In this case, the term and condition of annual pay increases in specified amounts, and the Respondent's duty to continue to pay such increases pending negotiation of an agreement, was established by the parties' collective-bargaining agreement. The issue here is whether the terms of that contract, as agreed to by the Union, also negated the Respondent's *statutory* duty to maintain the status quo by continuing to grant annual pay increases after the agreement expired.

A contractual term of employment must be honored, under Section 8(d) of the Act, unless the union agrees to change it. If the parties agree that a particular contract term will survive the contract's expiration, the employer is required to honor the term until the union consents to a change. Such consent is not required in the absence of a contractual agreement. However, even without a contractual obligation, the employer still has a duty to bargain under Section 8(a)(5). That duty requires that the employer not make changes to existing terms and conditions of employment without satisfying its statutory bargaining obligation. Changes may be made if the employer notifies the union and bargains new terms—or if the parties bargain and reach a lawful impasse. See, e.g., *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036–1038 fn. 6 (2003), review denied 381 F.3d 767 (8th Cir. 2004). When the employer ignores its statutory duty to bargain and makes changes unilaterally, it is bypassing the union and depriving its employees of their right to be represented in bargaining over their terms and conditions of employment.

A union may waive its right to maintenance of the status quo as to a particular term or condition. However such a waiver, like any waiver of a statutory right, must be "clear and unmistakable." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007); see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). "The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that

would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB at 811.

When a collective-bargaining agreement expires, it becomes particularly important to distinguish between the employer's *contractual* obligation (if any) to maintain a particular term and condition postexpiration and the employer's statutory obligation to do so. Certainly, a contractual obligation can exist. As the Supreme Court explained in *Litton*, it may occur, "under normal principles of contract interpretation, [that a] contractual right survives expiration of the remainder of the agreement." 501 U.S. at 206. But even when the contractual right does not survive, the statutory right typically does. Under Section 8(a)(5), "most terms and conditions of employment are not subject to unilateral change. . . . They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." *Litton*, 501 U.S. at 206. In the words of the Court, "the difference is . . . elemental." Id.

It follows that language in a collective-bargaining agreement may intentionally preclude a provision from having any contractual force after expiration of the contract. But given the employer's statutory duty to maintain the status quo postexpiration, such language will not permit a unilateral change of a term established by the same contract unless it also amounts to a clear and unmistakable waiver of the union's separate statutory right to maintenance of the status quo. Application of the more demanding clear and unmistakable waiver standard is appropriate, moreover, because the status quo must be viewed as a collective whole. In the give-and-take of bargaining, a union presumably will make concessions in certain terms and conditions to achieve improvements in others, such as wages.[4] Preserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires, as part of the "status quo," so too the union continues to enjoy its bargained-for improvements, unless the employer establishes that the union has clearly and unmistakably agreed to waive them.

In the case before us, the Respondent relies on article 20.3 of the expired collective-bargaining agreement, titled, "Base Rate Increases During Term of Agreement," which begins with the phrase, "For the duration of this agreement," and specifies the amount of the increases as 3 percent "during the term of this Agreement." The multiple references to the term of the agreement in article 20.3 clearly limit the contractual obligation and preclude the assertion of the contractual right for any period after contract expiration. But these references fail to "unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to [the annual wage increases]." *Provena St. Joseph Medical Center*, 350 NLRB at 811. They do not mention postexpiration employer conduct in any way, much less expressly permit unilateral employer action. Simply put, the limitations contained in article 20.3 cannot be read as a clear and unmistakable waiver of a statutory right elementally different from the contractual right to which the language does refer.

The Board cases concerning postexpiration changes of employment terms established by an expired contract likewise require this result. In *AlliedSignal Aerospace*, 330 NLRB 1216 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001), the employer discontinued paying severance benefits for laid-off employees that were provided for in a collectively bargained agreement that had expired. The duration clause of the agreement provided, "This [agreement] shall remain in effect until [the expiration date], *but not thereafter* unless renewed or extended in writing by the parties." Id. at 1222 (emphasis added). The Board distinguished between the employer's statutory obligation to maintain the status quo and its contractual obligations. While the language of the agreement made clear that the "agreement as a whole may not be automatically renewed or extended unless the parties agree to that in writing," the Board observed, it did *not* establish that "all terms and conditions of employment previously set out by the contract became subject to unilateral action by the [employer] upon contract expiration." Id. at 1216. As the Board put it, "[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding that the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions of employment after contract expiration." Id.

The Board reached the same result in *General Tire & Rubber Co.*, 274 NLRB 591 (1985), enfd. 795 F.2d 585 (6th Cir. 1986), as to a supplemental benefits agreement containing the following language: "Notwithstanding the termination of the Agreement . . ., the benefits described herein shall be provided for ninety (90) days following termination." Id. at 592. Ninety days after the expiration of the agreement, the respondent stopped providing the benefits. The Board found a violation of Section 8(a)(5). The language in the agreement, the Board reasoned, did not address the employer's statutory obligation to pay benefits following the contractual 90-day benefit contin-

[4] See *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978) (recognizing the "the kind of 'horsetrading' or 'give-and-take' that characterizes good-faith bargaining").

uation period, and thus did not amount to a waiver of the union's rights:

> Nowhere in this contract provision is there mention of what is to occur to these supplemental benefits after the 90 days have expired. In these circumstances, we find no clear and unmistakable waiver of the right to bargain over these supplemental benefits after the 90-day period.

274 NLRB at 593.[5]

The contract language in the instant case, like the language in *AlliedSignal* and *General Tire*, limits the effective period of the contractual obligation, but does not address the employer's postexpiration conduct or obligations or authorize unilateral employer action of any kind. Thus, like the employers in *AlliedSignal* and *General Tire*, the Respondent has failed to prove a waiver of its obligation to maintain the status quo established by the expired collective-bargaining agreement.

By contrast, in *Cauthorne Trucking*, 256 NLRB 721 (1981), enf. granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982), the Board found that the union had waived its right to bargain over the cessation of pension contributions. The waiver resulted from the following provision of a pension trust agreement entered into by the union: "[A]t the expiration of any particular collective bargaining agreement . . . any Company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued." 256 NLRB at 722.[6]

Similarly, in *Oak Harbor Freight Lines, Inc.*, 361 NLRB No. 82 (2014), reaffirming 358 NLRB 328 (2012), the unions entered into an agreement containing the following language:

> Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement *until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice or enter into a successor bargaining agreement* which conforms to the trust policy on acceptance of employer contributions, whichever occurs first.

Id., slip op. at 340 (emphasis added in cited decision). Citing *Cauthorne*, the Board ruled that the language constituted a waiver of the union's "right to bargain over the Respondent's cessation of fund payments upon notice after the expiration of the parties' contract" since it "clearly and unambiguously privileges the employer to discontinue trust contributions after expiration of the collective-bargaining agreement and after written notice of its intent to cancel the contribution obligation." Id., slip op. at 328 fn. 2.[7]

The contract provision relied upon by the Respondent in this case, in contrast with those in *Cauthorne* and *Oak Harbor*, does not address any postexpiration conduct or obligations of the employer. It certainly does not "clearly and unambiguously privilege the employer" to take unilateral action of any kind, under any circumstances. To the contrary, like the purported waivers in *AlliedSignal* and *General Tire*, it fails to establish anything resembling a waiver of the Respondent's statutory obligation to maintain the status quo established by the expired collective-bargaining agreement.[8]

[5] In several other cases, the Board has adopted administrative law judges' findings that duration language of this kind did not waive a union's right to demand bargaining over the cutoff of benefits after the expiration of the collective-bargaining agreement. See *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 343 fn. 7, 365–366 (1987) (pension trust language in collective-bargaining agreement did not specifically state that the employer's obligation to contribute to the trust funds ended with the expiration of the agreement); *KBMS*, 278 NLRB 826, 849–850 (1986) (pension trust language stating that contributions shall continue as long as the employer is obligated to do so was at best ambiguous concerning its duty postexpiration); *Wayne's Dairy*, 223 NLRB 260, 264–265 (1976)(terms of collective-bargaining agreement and pension trust agreement "lack[ed] the requisite clarity" to serve as a waiver).

[6] The Board has applied *Cauthorne* narrowly. In *Schmidt-Tiago*, 286 NLRB at 343 fn. 7, which also involved an employer's cessation of pension fund contributions, the Board endorsed the analysis of an administrative law judge, who distinguished *Cauthorne*. At issue in *Schmidt-Tiago* was language in a pension trust document providing that contributions were to be made "in accordance with a Pension Agreement." That language, the judge explained, was distinguishable from the language in *Cauthorne*, because it did "not on its face . . . specifically state that [the employer's] obligation to contribute to the pension trust fund ends with the expiration of the current collective-bargaining contract." 286 NLRB at 366.

[7] The Board's decision in *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (*Hacienda II*), vacated and remanded sub nom. *Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB*, 540 F.3d 1072 (9th Cir. 2008), on remand 355 NLRB 742 (2010) (*Hacienda III*), revd. and remanded 657 F.3d 865 (9th Cir. 2011), does not undercut this analysis. *Hacienda*—in which Board decisions have been rejected three times by the Ninth Circuit—centered on an employer's unilateral cessation of dues checkoff after the parties' collective-bargaining agreements expired. Under current Board law, however, dues checkoff represents an exception to the general rule that an employer may not make unilateral changes in terms and conditions of employment, following expiration of a collective-bargaining agreement. *Bethlehem Steel*, 136 NLRB 1500 (1962).

[8] The Respondent argues that the judge should not have applied a waiver analysis and that it had a "sound arguable basis" in art. 20.3 for discontinuing the pay raises upon the expiration of the 2005 agreement. But under current Board law, the "sound arguable basis" standard invoked by the Respondent applies only where the issue is whether the

Our dissenting colleague notes that the cited cases involved unilateral changes in wages or benefits at a given level, rather than a status quo of annual raises, but this is a distinction without a difference. What matters is that annual raises defined the status quo under well-established law.[9] The dissent fails to appreciate that this case is governed by the familiar "dynamic status quo" doctrine. See Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* Sec. 20.14 (2d ed. 2004). That failure, in turn, leads to the dissent's mistaken claim that our decision here creates a "heretofore unknown obligation" on employers and the even stranger assertion that we are, in effect, imposing *contract* terms on the parties, in violation of *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).[10] This case, of course, involves the application of long-settled rules governing the bargaining *process*. Our colleague's real objection seems to be that Board doctrine, as applied here creates incentives for precision and clarity in defining the parties' respective rights and obligations. But that result obviously furthers the aims of the Act, which is intended to "encourage[e] the practice and procedure of collective bargaining," in the words of Section 1.[11]

We therefore find that the Union did not waive its right to bargain over the discontinuance of the annual wage increase, and that the Respondent's unilateral action violated Section 8(a)(5) and (1).[12] We also adopt the judge's finding that the Respondent independently violated Section 8(a)(1) when it informed employees that it would no longer give annual increases following the expiration of the 2005 agreement. Contrary to the Respondent's argument that a violation of Section 8(a)(1) requires an explicit threat or coercion, the announcement of the unilateral change to the employees itself is unlawful. See *Marion Memorial Hospital*, 335 NLRB 1016, 1019 (2001), enfd. 321 F.3d 1178 (D.C. Cir. 2003).

II. THE RESPONDENT'S FAILURES TO PROVIDE INFORMATION ABOUT ITS UOCS AND ABOUT NURSES' ABSENCES DUE TO WORK-RELATED ILLNESSES

A. Background

Prior to the negotiations for the 2005 agreement, the Respondent started department-level Unit Operations Councils (UOCs) for staff to discuss day-to-day operations, quality, and safety. Minutes of each meeting were kept, and were posted on bulletin boards or made available to nurses in binders in the relevant department. Some union stewards (known as "worksite leaders") also participated in the UOCs. Later, article 28 of the 2005 agreement established a Labor-Management Committee to "discuss the subjects of this Agreement, its administration, health and safety and other items of interest."

By letter dated April 26, 2006, the Union asked the Respondent for a variety of information, including information about the UOCs and about instances in which nurses had called off from work because of work-related illnesses or exposures. The latter request was prompted by an outbreak of mumps in the Dubuque area in early 2006 that sickened several of the Respondent's nurses. In addition to seeking the identity of the affected nurses, the Union asked the Respondent for information about its use of replacements for ill nurses on the shifts they missed.

On May 2, the Respondent refused to provide information about the UOCs (with the exception of one UOC in one department) and calloffs by nurses, asserting that it was not relevant to the parties' negotiations for a successor agreement or to enforcement of the 2005 agreement. In particular, as to the nurses, the Respondent refused to provide its OSHA log for 2006.[13] The Respondent did provide the Union with other information it had requested.

More than 8 months later, on January 12, 2007, the Respondent finally provided its 2006 OSHA log to the Union. In an accompanying letter, the Respondent said that an NLRB attorney had advised it that the Union's April 26 request sought information regarding nurses' absences caused by the mumps outbreak. The Respondent claimed that the "general nature" of the Union's April 26 request had not made that clear.

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employer made a *mid-term* unilateral modification of the collective-bargaining agreement. See *Bath Iron Works*, 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). This case involves a unilateral change made after expiration of the contract.

[9] It is well settled that when periodic wage increases are an established employment term, the employer cannot lawfully discontinue them unilaterally. See *Daily News of Los Angeles*, 315 NLRB 1236, 1239 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997); *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 7–8 (1st Cir. 1981).

[10] Similarly, the Respondent mistakenly contends that the judge "rewrote" the parties' contract.

[11] The dissent objects that, because considerable time sometimes elapses before parties bargain either to agreement or to impasse, employers may be statutorily bound to continue periodic wage increases long after contract expiration. But the same could be said for maintaining other terms and conditions of employment postcontract, which the dissent concedes is an established principle under the Act.

[12] In finding the violation, we do not rely on the judge's reference to pay raises awarded under the Respondent's precontractual practices.

[13] The Respondent maintained OSHA logs that recorded instances in which nurses had called off due to work-related illnesses and injuries. The Respondent had previously provided the Union with such OSHA logs for 2004 and 2005, as well as other illness-related information.

B. The Judge's Decision

The judge found that the Respondent unlawfully failed to provide and/or failed to timely provide the Union with the UOC and calloff information described above. The judge found that the UOC-related information was presumptively relevant because the UOCs affected terms and conditions of employment, e.g., safety, and because the UOCs potentially conflicted with the parties' negotiated Labor-Management Committee. The judge rejected the Respondent's defense that its noncompliance should be excused because the Union's worksite leaders had alternative means of gathering the detailed UOC information via department binders and bulletin boards. The judge found that it would have been a significant burden on worksite leaders to attempt to collect the UOC information from those sources, which also would have required them to visit units where they did not work on their own time. See *River Oak Center for Children, Inc*., 345 NLRB 1335, 1336 fn. 6 (2005), enfd. 273 Fed. Appx. 677 (9th Cir. 2008) (alternative means do not excuse noncompliance); *Kroger Co*., 226 NLRB 512, 513 (1970) (union not required to resort to burdensome alternative methods of acquiring information). Accordingly, because the Respondent furnished only partial information concerning one UOC, the judge found that it violated Section 8(a)(5) and (1).

Similarly, the judge found that the calloff information requested by the Union was presumptively relevant inasmuch as it directly concerned bargaining unit nurses. Although the Respondent had provided some of that information, the judge found that the Respondent unlawfully failed to provide the 2006 OSHA log for 8 months after the Union's request, and never provided information about its replacement of absent nurses. The judge rejected the Respondent's defense that the Union had failed to specify the scope and relevancy of the requested information, reasoning that it was the Respondent's duty to seek clarification of the request, if necessary. See *Mission Foods*, 345 NLRB 788, 789 (2005) (employer cannot simply refuse to comply with an ambiguous or overbroad information request, but must request clarification and comply with the relevant portions). For those reasons, the judge concluded that the Respondent violated Section 8(a)(5) and (1) by failing to provide and/or timely provide the requested calloff information.

C. Discussion

On exceptions, the Respondent challenges the judge's findings with respect to both the UOC documents and the calloff information, largely reasserting the same arguments it made to the judge. We agree with the judge's rejection of those arguments, and we shall not revisit them here.[14] Instead, we briefly address the Respondent's arguments that were either not presented to or not expressly addressed by the judge.

We reject the Respondent's argument that *California Portland Cement Co*., 101 NLRB 1436 (1952), supports its defense that the Union had satisfactory alternative means of gathering the requested UOC information. The information at issue in *California Portland* concerned the employer's distribution of overtime to employees. It is not clear that *California Portland* was analyzed as an "alternative means" case. 101 NLRB at 1440–1441. Rather, it appears that the Board's finding was that the employer had actually granted the union's request by making available its foremen's own records, although the employer also referred the union to bulletin boards. Id. at 1441. In any event, the requested overtime information was substantially more limited and concise than the detailed UOC information requested here. As found by the judge, for the Union to gather the requested UOC information itself would have imposed a burden on its worksite leaders to collect the information by searching through numerous binders and bulletin boards scattered throughout the hospital. Furthermore, requiring an employer to supply requested information from its own records, as the employer in *California Portland Cement* did, assures the union that it has "an accurate and authoritative statement of facts which only the employer is in a position to make." *Kroger*, supra, 226 NLRB at 513.

The Respondent's remaining arguments, which appear to concern both the UOC and the nurse calloff information, lack merit as well. The Respondent argues that the Union requested information merely to harass the Respondent. Board law presumes, however, that a union acts in good faith in requesting information, unless the employer establishes otherwise. See *Mission Foods*, supra, 345 NLRB at 788. Moreover, the good-faith requirement is met if even one reason for the request is justified. See *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988). That is certainly the case here, as the requested information was presumptively relevant to the Union's representational duties, and the Respondent has not presented any evidence of bad faith by the Union.

Finally, the Respondent asserts that the totality of circumstances indicate that it made a good-faith attempt to comply with the Union's extensive requests by providing

[14] In support of the judge's finding that the Respondent unreasonably delayed providing its 2006 OSHA log until January 2007, see also *Woodland Clinic*, 331 NLRB 735, 736 (2000) (7-week delay unreasonable); *Postal Service*, 308 NLRB 547, 551 (1992) (4-week delay unreasonable).

91 out of the 93 total items requested. However, a failure to provide requested information that is presumptively relevant cannot be excused based on the fact that other relevant information was furnished. We therefore reject this argument.

For these reasons, and those given by the judge, we find that the Respondent violated Section 8(a)(5) and (1) when it failed to provide and/or timely provide the complete information requested by the Union in April 2006 regarding the UOCs, the nurse call-offs due to work-related illnesses, and the replacement of absent nurses.[15]

III. THE RESPONDENT'S FAILURES TO REASONABLY ACCOMMODATE THE UNION'S REQUESTS FOR INFORMATION CONCERNING GINA GROSS

A. Background

On June 22, 2005, the Respondent discharged bargaining unit nurse Gina Gross. The Respondent stated in Gross' disciplinary notice that she was discharged for: "Behavior which disrupts a fellow employee(s) performance of their duties and creates dissatisfaction of care for a patient and/or their family members and friends." The notice cited five incidents in which Gross allegedly had engaged in such misconduct. Although the notice did not identify the complainants, it referred to three complaints received from Gross' coworkers, who mostly complained about Gross' conduct toward them, and two received from family members of patients about Gross' conduct toward the patients.

On July 7, the Union requested information to help it prepare a potential grievance of Gross' termination, including the names and contact information of the complaining coworkers and patients' family members. Approximately 5 days later, the Union filed a grievance contending that the Respondent had discharged Gross without "just cause," in violation of the 2005 agreement.[16]

On July 13, the Respondent provided some of the information requested by the Union, but refused to name or provide contact information for either the complaining coworkers or the family members who had complained about Gross, citing confidentiality concerns. The Respondent did not offer any accommodation to address the Union's need for that information. It provided only redacted versions of the coworkers' complaints, along with a statement that, if the grievance went to a hearing, "it would be necessary for us to reveal the names of these persons so they could be questioned and possibly appear as witnesses." The Union filed an unfair labor practice charge in response.

By letter to the Union dated September 27 (by which time Gross' grievance had already been appealed to arbitration), the Respondent reviewed the parties' recent discussions of a possible non-Board settlement of the Union's charge.[17] The letter then declared that the parties were at impasse, and that the Respondent would implement its "final offer" by providing the names of four employees who allegedly had witnessed Gross abusing patients. It did not disclose the names of the patient's family members who had complained, nor did it provide any information about coworkers who had complained about Gross' conduct toward themselves.

The arbitration hearing was held on May 22 and June 12, 2006, before a retired state court judge. At the hearing, the Respondent relied on the complaints made by the coworkers and the family members. The retired judge sustained the Respondent's discharge of Gross, citing a "flurry of complaints about Gross' interpersonal relations from coworkers, as well as patients and their families[,] during the last few weeks prior to her dismissal."

B. The Judge's Decision

The administrative law judge accepted the Respondent's claim that it had legitimate confidentiality concerns over releasing the names and contact information of the complaining coworkers and family members, but explained that the Respondent still bore the burden of offering an accommodation to meet the needs of both parties,

[15] Contrary to the dissent, we do not interpret the Respondent's explicit refusal to provide the calloff information as "seeking clarification of the Union's request." *Dupont Dow Elastomers LLC*, 332 NLRB 1071, 1085 (2000), is inapposite. Unlike in that case, where the employer in good faith misunderstood precisely what information the union was seeking, there was never any doubt as to what information the Union here sought to obtain. The Respondent claimed not to understand the relevance of the information, but as the judge found, the information was presumptively relevant, and the Respondent has not rebutted the presumption.

[16] Art. 5 of the 2005 agreement provided for a five-step grievance procedure, culminating in a hearing before a retired State court judge. The retired judge would then decide whether the Respondent's disciplinary decision or its interpretation of the agreement was arbitrary or discriminatory.

[17] The letter read:

> There have been several discussions . . . regarding the possibility of a non-Board settlement of the above matter.
>
> As we have advised . . ., the Hospital has agreed not to call the patient's family members as witnesses in the arbitration case. We have also advised . . . the Hospital is prepared to disclose the names of the employees who witnessed Gina Gross' abuse of a patient.
>
> We understand that the Union is adamantly insisting that the hospital disclose the names of the patient's family members despite the Hospital's assurances they will not be witnesses.
>
> As it appears that the parties are at an impasse on this proposal, the Hospital is implementing its final offer. The following co-workers witness Gina Gross' abuse of a patient: . . . .

citing *National Steel Corp.*, 335 NLRB 747, 748 (2001), enfd. 324 F.3d 928 (7th Cir. 2003).

With respect to the Union's request for information about coworkers who had complained about Gross' conduct toward themselves, the judge found that the Respondent never made any effort to reasonably accommodate the Union's need for that information. He thus concluded that the Respondent violated Section 8(a)(5) and (1).

By contrast, the judge found that the Respondent had offered a reasonable accommodation of the Union's need for the names and contact information of complaining family members. The judge found that, although the Respondent initially refused to supply any of this information in July, in September it offered not to call the family members as witnesses at the arbitration hearing and to disclose the names of the coworkers who had witnessed Gross' alleged abuse of patients. The judge found this proffered accommodation to be adequate because it was offered as part of a settlement effort, was offered well before the arbitration hearing, and served to avoid burdening the arbitration system.

C. Discussion

We find that the Respondent violated Section 8(a)(5) and (1) by failing to offer reasonable accommodations with respect to both the coworker and family member information requested by the Union.[18] At the outset, we reject the Respondent's argument that the Union prematurely filed its unfair labor practice charge before testing the Respondent's willingness to bargain an accommodation of the Union's requests. On that point, the Respondent's reliance on *Captain's Table*, 289 NLRB 22 (1988), is misplaced. That case involved negotiations for a collective-bargaining agreement where the union filed its charge just after the parties had exchanged their initial proposals, and there was no evidence that the employer had engaged in any relevant unlawful conduct away from the table. In those circumstances, the Board could not find that the employer was unwilling to reach agreement. 289 NLRB at 24.

Here, the Union was in the midst of representing a discharged employee who was seeking a resolution of her grievance. Time was of the essence. It was thus the Respondent's duty, upon asserting its confidentiality concerns, to promptly offer an accommodation. It failed to do so in its July 13 letter, however, denying the Union's requests outright. The Union filed its charge on July 18.[19] Under these circumstances, we reject the Respondent's implicit contention that the filing of the charge somehow precluded the Respondent from timely offering a reasonable accommodation.

That matter aside, we agree with the judge that the Respondent never offered any accommodation regarding the Union's need to identify coworkers who complained about Gross' conduct toward themselves. We thus affirm that aspect of his decision.[20]

On the other hand, we find merit in the General Counsel's exception to the judge's finding that, on September 27, the Respondent adequately accommodated the Union's need for information about family members who had accused Gross of abusing patients.[21] The General Counsel argues that the Respondent's proposed accommodation not to call the family members as witnesses was untimely, coming only after the Union's grievance had advanced through the initial steps of the grievance procedure. Further, the General Counsel argues that the Respondent's offer was inadequate because the Respondent still relied on the family members' complaints to justify Gross' discharge.

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[18] We find no merit in the Respondent's argument that the Board should defer to arbitration the entire issue of whether the Respondent offered a valid accommodation. We adhere to the Board's traditional practice of not deferring cases involving information requests. *Hospital San Cristobal*, 356 NLRB 699, 699 fn. 3 (2011).

[19] The Respondent did not offer any accommodation until September, some 2 months later.

[20] The dissent and the Respondent argue that the Respondent's July 13 offer to identify the coworkers prior to the grievance hearing was an adequate accommodation. There is no merit in that contention. Receiving the names at some unspecified time before the hearing would have occurred far too late to allow the Union to determine whether to pursue a grievance. See *DaimlerChrysler Corp.*, 331 NLRB 1324, 1324–1325 (2000), enfd. 288 F.3d 434 (D.C. Cir. 2002) (requested information could be useful to the union in deciding whether to proceed to arbitration on grievance). That timing also deprived the Union of the opportunity to investigate the grievance and to negotiate with the Respondent based on the results of the investigation. We therefore reject the dissent's suggestion that the Union was obliged to explain why it needed the information sooner; such a transparently inadequate offer is itself unlawful and does not require a response. Cf. *Borgess Medical Center*, 342 NLRB 1105, 1106 fn. 6 (2004) (inadequate offer to accommodate held to be failure to bargain about possible accommodation). *United Parcel Service of America, Inc.*, 362 NLRB 160, 162–163 (2015), *Northern Indiana Public Service Co.*, 347 NLRB 210, 214 (2006), and *Allen Storage & Moving Co.*, 342 NLRB 501, 503 (2004), cited by the dissent, are not to the contrary. The Board majority in those cases seemingly faulted the unions for not responding to the employers' offers to accommodate, but it obviously found those offers to be adequate.

Nor are we persuaded by the fact that the Respondent gave the Union redacted copies of the coworkers' statements relating to alleged patient abuse by Gross. Those statements were not responsive to the Union's request for the names and contact information of the employees (as described in the disciplinary notice) who had complained about Gross' conduct *toward themselves*.

[21] The General Counsel's limited exceptions do not specifically address the judge's findings regarding the Respondent's response to the Union's request as to coworkers who accused Gross of patient abuse.

We agree with the General Counsel that the Respondent's proposed accommodation was untimely, as it was offered almost 3 months after the Union's request for information and only after Gross' discharge grievance had been processed through the parties' prearbitration grievance procedure. See *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) (an employer must timely seek an accommodation of its confidentiality concerns). The Union needed this information much earlier in order to determine whether to proceed with the grievance at all and to represent the grievant in the grievance procedure once it decided to proceed. See *Hawaii Tribune-Herald*, 356 NLRB 661, 683–684 (2011) (finding unreasonable employer's 3-month delay in responding to request for relevant grievance information), enfd. 677 F.3d 1241 (D.C. Cir. 2012); *Beverly California Corp.*, 326 NLRB 153, 157 (1998), enfd. in pertinent part 227 F.3d 817 (7th Cir. 2000) (finding 2-month delay unreasonable). Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to offer a timely accommodation of the Union's request for the names and contact information of patient's family members who had complained about Gross.[22]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Unilaterally discontinuing giving annual pay raises as described in article 20.3 of the expired 2005–2006 collective-bargaining agreement, without first having afforded the Union notice and an opportunity to bargain.

(b) Failing and refusing to provide the Union with information it requested about the Respondent's Unit Operations Councils.

(c) Failing and refusing to provide, or to timely provide, the Union with information it requested about nurses who were out sick due to work-related illness and the replacement of nurses who were out sick due to the mumps.

(d) Failing and refusing to offer, or to timely offer, to bargain an accommodation when it invoked confidentiality as a basis for not providing the Union with the names and contact information of coworkers and patients' family members whose complaints had been a basis for the termination of a nurse.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Telling employees that it would discontinue giving annual pay raises as described in article 20.3 of the expired 2005–2006 collective-bargaining agreement, when the Union had not been afforded notice and an opportunity to bargain.

(b) Telling employees that it would not give annual pay raises retroactively to June 21, 2006, that it unlawfully discontinued on that date.

REMEDY[23]

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing giving annual pay raises as described in article 20.3 of the expired 2005–2006 collective-bargaining agreement, we shall order it to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to rescind the unlawful change and resume giving annual pay raises until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. We shall further order the Respondent to make employees whole for any losses sustained as a result of the unlawful change, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Moreover, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with necessary and relevant information regarding the Respondent's Unit Operations Councils and the replacement of nurses who were out sick due to the mumps, we shall order the Respondent to provide the Union with that information.

Although we find that the Respondent violated the Act by failing to offer, or to timely offer, to bargain an accommodation when it invoked confidentiality as a basis for not providing the Union with requested information

[22] We thus find it unnecessary to pass on the General Counsel's arguments related to the adequacy of the Respondent's proposal.

[23] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's remedy by requiring that backpay shall be paid with interest compounded on a daily basis.

regarding the names of patient's family members and coworkers who had complained about Gina Gross' conduct, we will not order the Respondent to provide the information to the Union at this time. As discussed above, the Union requested the names of the family members and coworkers with respect to a grievance it filed contending that the Respondent had discharged Gross without just cause. That grievance went to a hearing, and the presiding judge (a retired State court judge) issued a decision upholding the discharge on July 26, 2006. Neither the General Counsel nor the Union has asserted that the Union requires this information to pursue the grievance in another forum or for any other matter.[24] We therefore agree with the judge and find that the Union's need for the requested information has ceased and we decline to order the Respondent to produce the information. *Lansing Automakers Federal Credit Union*, 355 NLRB 1359 (2010); *Borgess Medical Center*, supra, 342 NLRB at 1106. Should the Union state a present need for this information, however, we will require the Respondent to either provide the information or bargain with the Union, upon their request, to an accommodation regarding this information.

ORDER

The Respondent, The Finley Hospital, Dubuque, Cascade, and Elklander, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Service Employees International Union, Local 199 (the Union), as the exclusive representative of employees in the following appropriate unit by unilaterally discontinuing giving annual pay raises as described in article 20.3 of the 2005–2006 collective-bargaining agreement:

> All full-time and regular part-time registered nurses, including PRN nurses and charge nurses, employed by the Respondent at its Dubuque, Cascade and Elkader, Iowa facilities; but excluding office clerical employees, service and maintenance employees, other professional employees, technical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Telling employees that it will discontinue benefits contained in the 2005–2006 collective-bargaining agreement, when the Union has not been afforded notice and an opportunity to bargain.

(c) Telling employees that it will not give annual pay raises retroactively to June 21, 2006, that it unlawfully discontinued paying on that date.

(d) Failing and refusing to furnish, or to timely furnish, the Union with requested information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

(e) Failing and refusing to offer, or to timely offer, to bargain an accommodation when it invokes confidentiality as a basis for not providing the Union with requested information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(b) Resume giving unit employees annual pay raises as described in article 20.3 of the 2005–2006 collective-bargaining agreement and maintain that practice in effect until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(c) Make employees whole for any losses sustained as a result of the unlawful change made on June 21, 2006, with interest, in the manner set forth in the remedy section of this decision.

(d) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Furnish the Union with the information it requested about the Unit Operations Councils and about the replacement of nurses who called out sick due to the mumps.

(f) Furnish the Union with information, or offer to bargain an accommodation, regarding the names and contact information of coworkers and patients' family members whose complaints were a basis for the discipline of employee Gina Gross, if the Union articulates a present need for this information.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

[24] In the absence of exceptions we do not address the judge's decision not to order the Respondent to turn over the names of the coworkers, despite his finding that the Respondent had unlawfully refused to supply the names to the Union.

cial security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money to be reimbursed under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Dubuque, Cascade, and Elkader, Iowa, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2005.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER JOHNSON, dissenting in part.

Like Member Hayes in his partial dissent to the now-vacated prior decision in this case, I find that the Respondent (i) lawfully declined to give annual pay increases after the parties' collective-bargaining agreement expired, and (ii) timely provided information requested by the Union about work-related illnesses of nurses, and, (iii) acting pursuant to an undisputed concern for confidentiality, timely met its bargaining obligation by offering an accommodation to the Union's request for the names of the coworkers and patients' family members involved in nurse Gross' discharge. As discussed below, I too would dismiss the allegations related to those issues.

1. The wage increases and the majority's unjustifiable revision of the traditional status quo rule

> "When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.''
>
> The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all."[1]

This case poses the fundamental question: what do words signify? The more specific question presented is whether, under the National Labor Relations Act, a wage increase that occurs each year "[f]or the duration of this [Collective Bargaining] Agreement" actually means that the increase keeps repeating itself after the Agreement expires for as long as it takes the parties to reach either an impasse in bargaining or a new agreement, a process that can sometimes take years. I do not think the Act can be rationally interpreted to require that result, and the majority errs by holding otherwise.

Written language is the core operating system that gives meaning to terms and conditions of employment, collective-bargaining proposals and agreements, and many kinds of statements attributable to employees, employers, and unions. For example, the determinacy of language makes clear to parties to a labor contract what they are agreeing to, and in many cases, how long that agreement lasts. The importance of language having a determinate meaning, indeed, cannot be overstated in labor law, for the written texts there are operational documents that determine the real-world issues of how the workplace runs and how its workers are treated.

It is true that labor contracts are not ordinary contracts under *NLRB v. Katz*, 369 U.S. 736 (1962), in that most terms and conditions of employment persist after the contract expires. *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir.1967) (provisions in collective-bargaining agreement "survive" its termination). But what those contract-based terms and conditions actually happen to be, are creatures of the written contract, and should be determined and delimited by the words used in that contract. And that is where the majority went astray here. The majority holds that wage increase language applying only "for the duration of the contract," in effect guaranteed that the increase would reoccur, perhaps more than once, after the contract's expiration.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Lewis Carroll, *Through the Looking Glass*, Chapter 6.

The relevant facts are as follows. In December 2003, the Union was certified as the bargaining representative for the Respondent's nurses. The parties bargained for a first contract that concluded with the signing of a 1-year collective-bargaining agreement in June 2005. (Art. 33: "The contract will expire one year after the initial effective date of June 20, 2005.")

In article 20.3 of the collective-bargaining agreement, entitled, "Base Rate Increases During Term of Agreement" the parties agreed that:

> *For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date.* Such *pay increases* for Nurses not on probation, *during the term of this Agreement will be three (3) percent.* If a Nurse's base rate is at the top of the range for his/her position, and the Nurse is not on probation, such Nurse will receive a lump sum payment of three (3) percent of his/her current base rate . . . . (Emphasis added.)

In a June 21, 2006 letter, the Respondent advised employees that because the contract, including article 20.3, had expired the day before without a replacement agreement, "we will be unable to provide increases to nurses whose anniversary date falls after the date of contract expiration (June 20th) until a new contract is reached."

My colleagues, like the majority in the vacated decision, find an 8(a)(5) violation because the Respondent failed to give continual 3-percent wage increases after the parties' bargaining agreement expired. They adopt the same fundamental misconception of an employer's statutory obligation to refrain from unilateral changes in the status quo terms and conditions of employment. They do so by framing the issue as one of "waiver." But this case really has nothing to do with interpreting whether article 20.3 of the parties' contract waived the Union's right to bargain about a change in unit employees' wages upon expiration of the contract.[2] The Union always had, and continued to have, the right to bargain about new wage increases once the parties' contract expired. Rather, the proper inquiry is to identify the statutory status quo for wages that the Respondent was obligated to maintain pending bargaining for a successor contract. The status quo is defined by "the contract language itself." *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1567 (10th Cir.1993) (determining status quo is a question of fact and status quo is defined by language of the collective-bargaining agreement). And, that is why the majority's approach unfortunately undermines the very determinacy of language itself. By effectively deleting the time constraint that was an inherent part of the wage increase obligation, the majority makes a time-bound obligation into a perpetual one.

In his partial dissent, Member Hayes started by offering a hypothetical to highlight the problem with the majority's rationale: "Suppose a unit employee is paid $10 an hour when her employer and union representative begin bargaining for a contract. The parties then conclude a 1-year agreement that specifies our employee, and others at the same wage rate, will receive a raise of 30 cents on their anniversary date. The wage provision contains language limiting raises to the duration of the contract, but the language does not also say that raises will not occur after the contract expires. When the contract expires without an immediate successor, our unit employee's hourly wage rate is $10.30. She and her union have received the full benefit of the contractual right they bargained for. The status quo that their employer is statutorily obligated to maintain under [*Katz*] is *that existing* wage rate. There is no statutory right to any additional 30-cent raises; that is a matter for bargaining anew."

As Member Hayes pointed out, this wage increase scenario was not really a hypothetical but only a slight variation on what actually happened here. Yet, my colleagues somehow believe that the Respondent's 1-year commitment in article 20.3 of the parties' initial bargaining agreement to give each nurse a single wage increase has morphed into a statutory obligation to maintain a "status quo" of change. Rather than maintaining wage levels as they were on the final day of the contract, the Respondent is supposed to continue giving employees annual 3-percent wage increases until the parties negotiate a successor agreement or reach impasse. Despite the parties having agreed to a one-time wage increase in the contract, under the majority's skewed thinking, the Respondent must keep repeating it over and over, like Phil Connors (Bill Murray's character) reliving the same February 2 over and over in the classic film "Groundhog Day," only without waking up to Sonny and Cher.

Not only does their opinion contradict precedent governing an employer's postexpiration statutory obligation, but, as mentioned above, the opinion also abnegates language of limitation in article 20.3. The meaning of the phrase "during the term of this Agreement" is clear. The parties agreed to a single wage increase on each nurse's anniversary date occurring during the contract year. Once each nurse's pay has been adjusted, there is neither a contractual *nor* a statutory duty to keep making further postexpiration adjustments. The status of pay is not dynamic. It has moved from one fixed point to another and

[2] Employees have no independent right under the Act to a particular wage rate or pattern of increases.

stays there upon contract expiration. In fact, it would be unlawful for the Respondent to make additional raises unilaterally.

Although my colleagues agree that employees have no contractual right to receive annual wage increases post-expiration, they nevertheless believe that there must be clear and unmistakable proof that the Union waived its right to bargain about the discontinuation of annual wage increases. But their waiver analysis is inapposite here, as is the precedent they rely on, which involves postexpiration unilateral changes from maintenance of wages and/or benefits *at the same level* as on the final day of a contract's term.

Further, the purported "dynamic status quo" cases cannot support requiring the employer to adhere to annual increases based merely on a 1-year contractual commitment. The dynamic status quo line of cases was developed and applied in circumstances where unrepresented employees received wage or benefit increases with such sustained frequency and regularity that the employees regarded them as established terms of employment which an employer was obligated to continue when entering into a new collective-bargaining relationship. In *Daily News of Los Angeles*,[3] for example, the Board and the court found that, during bargaining for an initial labor contract, the employer could not unilaterally discontinue a longstanding past practice of regular wage increases established by the employer prior to the union's certification. Similarly inapposite is *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 7–8 (1st Cir. 1981) (during initial contract bargaining, employer obligated to maintain dynamic status quo granting previously announced wage increases under its longstanding practice). Here, in contrast, the status quo obligation the majority seeks to perpetuate is based solely on a negotiated wage increase for the nurses that the parties agreed would be granted for the *1 year of the contract term*.[4]

Indeed, to the extent that a waiver issue is present in this case, my colleagues focus on the wrong party. Their analysis effectively waives the Respondent's right to bargain about these kinds of ongoing, incrementalist changes in the status quo. Until the parties reach a new agreement or impasse, the Respondent will have to give annual wage increases never contemplated when the parties concluded their last negotiations. Only clear and unmistakable contract language manifesting the parties' agreement to extend this particular term of employment beyond the contract termination date could justify such a result. The contract at issue here does the precisely the opposite, expressly confirming the time-based limitation of the agreed-upon wage increase to dates occurring between the contract's effective date and its expiration date.

Here, I am unsure whether my colleagues have fully conceived the ramifications of their opinion. For instance, what if the contract had provided for a concessionary percentage decrease in wages, as could be the case in recent times, depending on the industry? Would the signatory employer be free (in fact, obligated) to continue annual decreases postexpiration, pending the results of new bargaining? It would seem so. What if a single contract raised employees' health care premiums by 2 percent? Would that premium raise then keep repeating itself until agreement or impasse? It would seem so. Bizarrely, the extrapolated "trajectory" of any incrementalist or decrementalist term would control over the *actual language* used in the contract. This is an impermissible result, not least because negotiating parties will now have to take into account the speculative post-expiration "trajectories" of contract increases or decreases in the absence of an immediate successor agreement. And, future Boards making *status quo* determinations will be much more prone to subjective arbitrariness in divining and applying the "true trajectory" of any collective bargaining agreement, as opposed to applying the actual language of the contract. Cf. *M & G Polymers USA v. Tackett*, 135 S.Ct. 926, 936 (2015) (instructing that, under "principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties," courts must respect ordinary meaning of durational clauses in parties' agreements).

My colleagues treat this matter as a routine application of *Katz* principles. As shown above, it is far from that. It is a startling and troubling imposition on employers of a heretofore unknown obligation to continue giving nondiscretionary wage and benefit increases postexpiration at the rate given in the final year of a collective-bargaining agreement.[5] And, of course, this new rule

[3] 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

[4] I appreciate my colleagues' perspective and also their implicit suggestion that employers involved in negotiations use greater "precision and clarity" in their contract drafting to avoid the result that the majority effects here. With due respect to my colleagues, however, the employer actually inserted the time-bound expiration phrase "during *the term of this Agreement" into the midst of the very wage increase provision at issue in this case. I do not see how—without divorcing our statute from both the ordinary meaning of language and the actual practice of workaday collective bargaining in this nation—the employer could have been clearer or more precise.*

[5] Although this case only involves wage increases, there is no indication in the opinion that the same flawed reasoning would not similarly be used to require continuation of other monetary benefit increases. Indeed, before the prior *Finley* decision was vacated, a panel majority, relying on the reasoning in 359 NLRB 156 adopted a judge's finding that a respondent violated Sec. 8(a)(5) by discontinuing a lump-sum

will disadvantage unions and employees as well, by holding them captive to any negative changes to terms and conditions of employment, regardless of how the contract language circumscribed the duration of the change.

Overall, the terms and conditions of employment in a labor contract will no longer be time-bound, regardless of contrary language of the labor contract. Instead, any changes will keep replicating themselves, sometimes long after the contract itself expires, until agreement or impasse occurs.[6] And, neither agreement nor impasse may be readily forthcoming from the party receiving this kind of windfall—a windfall that the Board has created with the decision today.

After this case in particular, employers must now bargain with unions for what they can only hope will be ironclad language expressly providing that no increases will be paid beyond a contract term. Of course, unions now will have no incentive to agree to ironclad language or to do so promptly. Given how the majority ignores the clear limiting language here, employers have no certainty that any language will be a barrier to having to continue wage increases until they reach agreement on a successor contract or impasse. Even if there is ironclad language, unions have been given added bargaining leverage to extract a price from employers for their agreement to it.

To say the least, after this specific case result, the majority has now given unions a powerful new economic weapon to use during such negotiations. And therein lies the rub. The principles governing this issue are set forth in *H. K. Porter*,[7] not *Katz*. In *H. K Porter*, the Supreme Court stated that "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . [T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." Id. at 108. My colleagues' imposition of a specific obligation here for employers to give nonnegotiated, perpetual wage increases after a labor contract expires directly contravenes that fundamental premise. Moreover, regardless of whether either a union or an employer is benefitted in future cases, the rule impermissibly replaces a status quo that has previously been based on *something that parties actually agreed to*, with something that they *never* did. Accordingly, unlike my colleagues, I believe the Act and precedent compel a finding that the Respondent acted lawfully when it ceased changing unit employees' wages upon expiration of the parties' contract, and when it explained to those employees that it would be unable to give them further increases until the parties reached a new agreement.

There is one final point. An agency that progressively divorces all ordinary meaning from language opens the door to a "decisionmaking" process that is inherently subjective, contingent upon who is the decisionmaker rather than the intent of the parties or a clearly-defined objective standard. The meaning of words under the Act we administer cannot turn on "which is to be the master." When they do, they will provide no real guidance to the constituency subject to our rulings and be due no deference from a reviewing court. I regret that my colleagues do not appreciate this significant shortcoming in their analysis.

2. Information re nurses' work-related illnesses; the duty to provide information and bargain is not a one way street

In January 2006, the Respondent provided the Union with the OSHA 300 logs of work-related injuries and illnesses for 2004 and 2005 in response to the Union's specific request for that information. On April 26, the Union sent a letter to the Respondent requesting seven items of information "in preparation for our next collective bargaining session." One of the requested items

longevity bonus after expiration of the contract under which it was payable to eligible employees "[e]very December 1st and June 1st of each year of this Agreement." *Southwest Ambulance*, 360 NLRB 835 (2014). Member Miscimarra dissented there "[b]ecause the contract language expressly limit[ed] Respondent's longevity pay obligation to specified dates during 'each year of this Agreement,' [and thus finding] that the Board cannot reasonably conclude the Respondent implemented a 'change' by giving effect to this language and limiting its longevity payments to the agreement's term." Id. at 835 fn. 1. In my view, he was correct.

[6] Because the Board considers multiple factors in determining if a valid impasse exists, *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (setting forth a number of factors for determining whether impasse has been reached), it is often not easy to know whether a valid impasse has been reached even after years of negotiations. "'Impasse' is an imprecise term of art: "The definition of an 'impasse' is understandable enough...but its application can be difficult. . . . The Board and courts [consider many factors including] such matters as the number of meetings . . . the length of those meetings and the ... time . . . between the start of negotiations and their breaking off. There is no magic number of meetings, hours or weeks which will reliably determine when an impasse has occurred." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 5 (1988) (citation omitted); *Exposition Cotton Mills Co.*, 76 NLRB 1289 (1948) (lawfully implemented terms after 2 years of good-faith negotiations); *Galaxy Towers Condominium Assn.*, 361 NLRB No. 36 (2014) (parties bargained for 5 years but panel majority upheld the judge's finding no valid impasse because of a failure to furnish some information and apparent demand for bargaining over a permissive subjects).

[7] *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

was a list of "[e]ach nurse who has called out sick due to a work related illness or exposure, the date of the call out, the unit, the reason stated, and whether or not the nurse was replaced." On May 2, the Respondent responded that "we do not see [the list of call outs by sick nurses] as relevant to any issue that is being negotiated for the new contract or relevant to the enforcement of the current collective bargaining agreement and will not be providing any information responsive to these requests."

The Union filed its charge alleging an unlawful refusal to provide the requested information on May 9. It never bothered to explain to the Respondent that its information request concerned the recent outbreak of mumps in the area. In January 2007, when the Board's attorney clarified the Union's request, the Respondent sent the 2006 OSHA 300 log to the Union. The OSHA log included all of the requested information, except whether a nurse who called off sick was replaced by another nurse.

Although the information about unit nurses calling off may be presumptively relevant, the Union's reason for the request was not apparent. The Respondent had just a few months earlier provided the OSHA logs of injuries and illnesses for the last 2 years. The April 26 request did not mention the mumps epidemic or specify any timeframe. Although the April request stated that it was to prepare for the next bargaining session, the information was not related to any subject the parties had been discussing. Given the lack of specificity in the April request, the OSHA logs previously supplied arguably sufficed as a response.

In any event, unlike my colleagues and the judge, I view the Respondent's May 2 letter as seeking clarification of the Union's request rather than a permanent denial of the information. There is no evidence that the Respondent was simply stonewalling the Union's numerous and extensive information requests. Between January 6, 2006 and May 2, 2006, the Union sent 10 separate information requests *covering 93 separate items of information to the Respondent*; the Respondent provided information in response to *91 of the 93 items requested* by the Union. In the May 2 letter, the Respondent told the Union that it could not see any relevance to information about nurses calling off for illness or injury. Having already provided illness or injury information for nurses when earlier requested by the Union, the Respondent was clearly not making a blanket refusal to provide such information. It was simply asking why the Union needed this additional information now, when its relevance to any bargaining or contract administration issue was not apparent.

Of course, the Union could have easily explained why it wanted this information. That would be the kind of exchange appropriate to establishing and maintaining a good-faith bargaining relationship. That would also be the kind of exchange the Act should expect after the Respondent complied outright with 91 of 93 information requests. Instead, the Union chose to file a charge a week later and admittedly made no effort whatsoever to clarify its request during the ensuing 8 months. Apparently, both the Union and the majority share the view that an employer has no right to make a good-faith inquiry about a union's need for presumptively relevant information prior to providing that information

Like Member Hayes, I strongly disagree. In the circumstances of this case, I would not hold the Respondent responsible for the delay in providing the information. *Dupont Dow Elastomers, LLC*, 332 NLRB 1071, 1085 (2000) (finding no violation where delay was result of a "good faith" misunderstanding and union failed to supply "needed clarification" for employer to provide requested information). The duty to provide information, like the duty to bargain, is a two-way street, and thus good faith runs both ways. A good-faith interpretation of, and interaction with, the Respondent's response, rather than the tactical filing of an unfair labor practice charge, was what good faith required of the Union at that point. For the same reason, I also would not find that the Respondent failed to provide all the requested information because the Union *never* renewed its request for that additional information.

3. Request for names of coworkers and patient family members; the duty to bargain is also not a one way street[8]

On June 22, 2005, the Respondent discharged nurse Gina Gross. Her termination notice stated that the basis for the discharge was

> Behavior which disrupts a fellow employee(s) performance of their duties and creates dissatisfaction of care for a patient and/or their family members and friends.

The Union requested information on July 7 related to Gross' discharge. The Respondent responded by letter on July 13 that it would need until July 20 to gather the requested information and that it would be supplying all of it except the names of the coworkers and patients' family members who complained about Gross' behavior. The Respondent declined to provide this information

[8] Although I agree deferral is inappropriate here, I have previously stated that in my view 8(a)(5) allegations about a failure to provide requested information should be deferrable where the parties' bargaining agreement was comprehensive of procedures for handling of information requests related to grievances. *Lenox Hill Hospital*, 362 NLRB 106, 106 fn. 2 (2015).

because of confidentiality concerns. However, its letter to the Union further stated that if the matter went to arbitration "it would be necessary for us to *reveal the names of these persons so they could be questioned and possibly appear as witnesses.* However, *at this point* we will not provide their names." (Emphasis added.)

The Union filed an unfair labor practice charge on July 18. The Respondent supplied most of the requested information on July 19. On August 1, it provided the Union with a copy of the Respondent's investigation file, which included redacted hospital reports of the patient's family complaints and coworker complaint forms. In a September 27, the Respondent gave effect to a prior offer in Board settlement discussions by providing the names of employee witnesses and declaring that it would not call patients' family members as witnesses. The arbitration hearing was not held until almost 10 months later, on May 22 and June 12, 2006.

No one disputes the judge's finding that the Respondent had a valid confidentiality interest in withholding the names of the coworkers and patients' family members. Though the Respondent raised legitimate confidentiality concerns, it was obligated to seek an accommodation of the Union's need for the information. *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999). I find that it did so.

As for the requested names of coworkers, the majority and the judge find that the Respondent failed to offer any accommodation concerning the names of the coworkers. I disagree, particularly in the circumstances here. The Union filed the charge just 5 days after the Respondent raised its confidentiality concerns and before it had received any of the information the Respondent promptly provided. The redacted complaints in the Respondent's investigation file gave the Union *direct access to the coworkers' actual statements.* Cf. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107–1108 (1991) (union not entitled to confidential informants' exact statements, but employer must provide summaries of statements). The Respondent's July 13 response further offered to accommodate the Union's request for the names of the coworkers by indicating that it would honor the coworkers' request for anonymity "at this time," but that the Respondent would "reveal" their names if the matter was set for arbitration "so they could be questioned and possibly appear as witnesses."

The Board has recognized that "[t]he appropriate accommodation necessarily depends on the particular circumstances of each case." *Pennsylvania Power & Light Co.*, 301 NLRB at 1105. Given the detailed information the Union already had to evaluate and process the grievance, including the coworkers' actual statements to the Respondent, the temporary withholding of the coworker's names with an explanation as to when they would be provided was an offer of a reasonable accommodation balancing the Respondent's legitimate confidentiality interests against the Union's interests in having this information when representing Gross. The majority states that the Respondent's offer to disclose the coworkers' names before the arbitration was not an adequate accommodation and comes "far too late." But the Respondent's July 13 letter plainly anticipates that the disclosure would be in advance of the arbitration. In fact, the names were disclosed in the Respondent's September 27, 2005 letter, *roughly 8 months before the arbitration began*. Moreover, this was an offer of accommodation by the Respondent. The Union never responded to that offer.

At the very least, the Union was obliged to state in response why it needed the information sooner. That is the good-faith bargaining process that Board precedent requires. See *Metropolitan Edison Co.*, 330 NLRB at 109. Bargaining, as I have noted earlier, is a two-way street. There is no evidence that the Union proposed any alternative short of immediate full disclosure of the coworkers' names or ever sought to discuss the Respondent's offered accommodation. [9] *United Parcel Service of America, Inc.*, 362 NLRB 160, 162–163 (2015). *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1143–1144 (6th Cir. 1993) (finding when hospital raised confidentiality concerns "it became incumbent" on union to show its need for information outweighed maintaining confidentiality of records). See also *Northern Indiana Public Service Co*., 347 NLRB 210 (2006) (employer offered accommodation but union never offered counterproposal for another accommodation); *Allen Storage & Moving Co.*, 342 NLRB 50, 503 (2004) (employer fulfilled obligation to bargain about accommodation by offering to allow the union to review financial statements which union rejected "without discussion or explanation"). In these circumstances, I find that the Respondent made a reasonable offer of accommodation. My colleagues' contrary finding simply privileges unions not to bargain at all, but rest confident in the knowledge, that regardless of what position they take (or even if they fail

[9] This case is unlike *Borgess Medical Center*, 342 NLRB 1105 (2004), cited by the majority. There the Board found a violation where the employer established a legitimate confidentiality interest but the union immediately explained why the employer's offered accommodation would not work. Id. at 1106. Here, the Union's immediate response was to file a charge. Moreover, in *Borgess*, the offered accommodation would not supply the union with any information needed to assess the employee's grievance. In contrast, the Respondent here provided detailed information, including actual employee statements, which the Union could use to assess the grievance while only temporarily withholding the employees' names.

to respond), the Board will override any claims of confidentiality. This departs from precedent, and is especially unwarranted in the facts of this case.

Contrary to my colleagues, I would also affirm the judge's finding that the Respondent timely sought to accommodate the Union's request for the identity of the complaining patient family members. In the same September 27 letter identifying employee witnesses, the Respondent offered not to call family members as witnesses. Again, this offer was made long before the actual arbitration date. I agree with the judge, and Member Hayes, that this was a reasonable and timely offer of accommodation. It necessarily came after the Union's hasty filing of an unfair labor practice charge before it had received any of the information it requested. Merely because the offer was made as part of settlement discussions with the Board, does not make it unreasonable or untimely. As noted, Board precedent contemplates that the parties will bargain about the appropriate accommodation but there is no set timeframe for such bargaining. See, e.g., *GTE California, Inc.*, 324 NLRB 424 (1997) (parties bargained for over a year about accommodation).

In sum, I would find that the Respondent met its good-faith obligation to seek a reasonable accommodation of conflicting confidentiality and representational interests with respect to the Union's request for the names of coworkers and patients' family members. The majority's contrary finding discourages the resolution of such matters through the collective-bargaining process envisioned by the Act, and encourages precipitate and unnecessary resort by this Union and others to unfair labor practice litigation as a disruptive and divisive

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Service Employees International Union, Local 199 (the Union), as the exclusive representative of our employees in the following appropriate unit by unilaterally discontinuing giving annual pay raises as described in article 20.3 of the expired 2005–2006 collective-bargaining agreement:

> All full-time and regular part-time registered nurses, including PRN nurses and charge nurses, employed by us at our Dubuque, Cascade and Elkader, Iowa facilities; but excluding office clerical employees, service and maintenance employees, other professional employees, technical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT tell you that we will discontinue benefits contained in the 2005–2006 collective-bargaining agreement, when we have not given the Union notice and an opportunity to bargain.

WE WILL NOT tell you that you will not receive pay raises retroactively to June 21, 2006, which we unlawfully discontinued on that date.

WE WILL NOT fail and refuse to provide, or to timely provide, the Union with requested information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT fail and refuse to offer, or to timely offer, to bargain an accommodation when we invoke confidentiality as a basis for not providing the Union with requested information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with the Union as your exclusive bargaining representative.

WE WILL resume giving annual pay raises as described in article 20.3 of the 2005–2006 collective-bargaining agreement, as it was in effect on June 20, 2006, and WE WILL maintain that practice in effect until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make you whole, with interest, for any losses sustained as a result of the unlawful cessation of annual pay raises.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL furnish the Union with the information it requested about the Unit Operations Councils and about the replacement of nurses who called out sick.

WE WILL furnish the Union, or bargain an accommodation with it, regarding the names and contact information of coworkers and patients' family members whose complaints have been a basis for the discipline of an employee, if the Union articulates a present need for this information.

THE FINLEY HOSPITAL

The Board's decision can be found at – www.nlrb.gov/case/33–CA-014942 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Debra L. Stefanik and *Deborah Fisher, Esqs.*, for the General Counsel.

Douglas A. Darch, Esq. (Seyfarth Shaw, LLP), and *Kami M. Lang, Esq. (Iowa Health Systems),* for the Respondent.

Matthew Glasson, Esq. (Glasson, Sole, McManus & Pearson, PC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The complaints stem from unfair labor practice (ULP) charges that Service Employees International Union, Local 199 (the Union) filed against The Finley Hospital (Respondent or the Hospital), alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).[1]

Pursuant to notice, I conducted a trial in Galena, Illinois, on March 6 and 7, 2007, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel and Respondent filed helpful posthearing briefs that I have duly considered.

[1] At my request, the General Council prepared a stipulation of complaint allegations integrating the various complaints, GC Exh. 2.

Issues

I. Did Respondent, in violation of Section 8(a)(5) and (1) of the Act, make a unilateral change in working conditions without having afforded the Union notice and an opportunity to bargain when, upon expiration of the 2005–2006 collective-bargaining agreement, it ceased giving nurses 3-percent raises on their anniversary dates as provided in said agreement? Or, as Respondent contends, did the contractual language privilege Respondent to discontinue raises when the agreement expired?

Related to this, did Respondent violate Section 8(a)(1) by telling nurses that they would no longer get 3-percent raises upon expiration of the agreement? Did Respondent further violate Section 8(a)(1) by telling nurses that, after expiration of the agreement, no subsequently negotiated raises would be made retroactive?

2. Did Respondent, in violation of Section 8(a)(5) and (1), condition reaching agreement on the terms of a successor contract on the Union's withdrawal of ULP charges and grievances? Or, as Respondent defends, did it lawfully submit a package proposal that included a permissive subject of bargaining?

3. Did Respondent, in violation of Section 8(a)(5) and (1), fail and refuse to provide the Union with relevant and necessary information it requested concerning the Hospital's unit operations councils (UOCs)? Or, as Respondent argues, was the Hospital's obligation excused because the information was available to the Union through other means, including union steward participation in the councils, as well as binders and bulletin boards maintained in various nursing departments?

4. Did Respondent, in violation of Section 8(a)(5) and (1), fail and refuse to provide the Union with relevant and necessary information it requested concerning nurses who called out sick during a mumps outbreak in 2006, and who replaced them? Or, as Respondent contends, was the information in fact provided?

5. Did Respondent, in violation of Section 8(a)(5) and (1), fail and refuse to bargain an accommodation when it asserted confidentiality in refusing to disclose the names and contact information of patients' family members and of coworkers who had complained about Charge Nurse Gina Gross, in response to the Union's request for such in connection with Gross' termination grievance? Or, as Respondent defends, was it released from any such obligation because the information was known or available to the Union through other means; or, alternatively, should the matter have been deferred to arbitration?

During the course of these proceedings, Respondent raised certain arguments that I will not address in my decision. First, Respondent has condemned as unconstitutional and violative of due process the Board's policies that do not require the General Counsel to disclose to a respondent prior to trial evidence in the Government's possession. This is not a matter over which I have jurisdiction. Second, Respondent has asserted that the Union engaged in certain bad-faith conduct, including making its requests for the UOCs and sick-out records for improper purposes. However, Respondent never filed any ULP charges against the Union, and my attempting to adjudicate any such unlitigated contentions here would be wholly inappropriate.

Finally, I reject Respondent's contention that the undisputed fact that it did furnish the Union with a myriad of documents in response to various information requests serves as a valid de-

fense to its failure to provide the information at issue before me. Respondent has correctly stated the law that, in determining whether an employer must furnish requested information, all of the circumstances must be considered. However, the test is not a quantitative one of how many information requests were fulfilled vis-à-vis how many were not, but whether Respondent failed and refused to furnish information that was relevant and necessary for the Union to represent the employees who have chosen it to represent them. For example, if 20 unit employees were discharged, and pursuant to a union's information request, an employer provided full and complete information as to 19 of them but not the 20th, the failure and refusal to provide information pertaining to the 20th employee would nevertheless violate the Act. The ratio could be 50 to 1, or 100 to 1, but the 1 employee would still be potentially adversely affected. In sum, any failures of Respondent to provide relevant and necessary information were not cured by its compliance with the law as to other requests.

Witnesses and Credibility

Witness titles are given as of the time period relevant to this proceeding.

The General Counsel's witnesses included Anne Gentil-Archer and Bradley Van Waus, both full-time union organizers and representatives; and Linda Mefeld, a part-time registered nurse (RN) at the hospital, who is also union chapter president and a part-time paid union representative.

Respondent's witnesses included Lynn McDermott, director of nursing of skilled and acute rehabilitation units; Kathy Ripple, vice president of nursing; Karla Waldbillig, human resources director; and Sabra Rosener, attorney for Iowa Health Systems (IHS), a multiemployer association with which the Hospital is affiliated.

Most salient facts are undisputed, and there were few conflicts in witness testimony. Therefore, my conclusions in this case do not depend on credibility resolution.

Facts

Based on the entire record, including the pleadings, testimony of witnesses, and my observations of their demeanor, documents, and stipulations of the parties, I find the facts as follows.

Respondent, a corporation, with offices and places of business in Dubuque, Cascade, and Elkader, Iowa, engages in the operation of an acute-care hospital. Jurisdiction has been admitted, and I so find. Respondent is a senior affiliate of IHS, a multihospital organization headquartered in Des Moines, Iowa, which provides various services to its members, including assistance in negotiating labor agreements.

On December 22, 2003, the Union was certified as the exclusive collective-bargaining representative of Respondent's full-time and regular part-time nurses, including PRN nurses and charge nurses, employed at the three locations above. The main hospital facility is in Dubuque. The unit has approximately 300 employees.

Following lengthy negotiations, the parties on June 20, 2005, reached agreement on a collective-bargaining agreement, effective from that date through June 20, 2006.[2] Negotiations on a successor contract began on March 28, 2006, but no new agreement was reached, and the 2005–2006 agreement expired by its terms as of June 20, 2006. Negotiations continued thereafter, but there is still no new contract. Management's negotiators in 2006 included Chief Spokesperson Sarah Votroubek and Rosener from IHS, Ripple, and Waldbillig. The Union's negotiators included Chief Spokesperson Matthew Glasson, Merfeld, and Van Waus, as well as a bargaining team of 8–11 nurses.

Discontinuance of Pay Raises after Expiration of 2005–2006 Agreement

Article 20.3 of the agreement pertained to "Base Rate Increases During Term of Agreement." It stated, in relevant part:

> For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement will be three (3) percent. If a Nurse's base rate is at the top of the range for his/her position, and the Nurse is not on probation, such Nurse will receive a lump sum payment of three (3) percent of his/her current base rate . . . .

The parties stipulated to Respondent's practice of paying nurses raises during the calendar years between January 1, 1996, and June 20, 2005, as follows.[3] Nurses were given annual 3-percent pay increases, unless they were at or near the top of their scale. Those at the top of the scale received a lump-sum payment of 2, 3, or 4 percent of their salaries, depending on their years of service. Some nurses who were at near the top of their range received a combination of a percent increase in their wage and a lump sum payment, totaling 3 percent. Raises could be withheld for poor performance.

The date of receiving the raise was usually the employee's performance review date, which in many (but not all) instances was the employee's anniversary date or date of hire. For some nurses, the difference between anniversary and review dates was as much as 11 months because of leave from work that did not earn seniority. Further, some employees received increases in 6-month increments.

At negotiations that culminated in the 2005–2006 agreement, the parties had no discussion about what would happen to the pay raises if there was no new agreement at the time the contract expired.

By letter dated June 21, 2006, John Knox, chair of the Hospital's board of directors, advised employees that because the contract had expired on June 20, without a new agreement replacing it, article 20.3 expired, and "we will be unable to provide increases to nurses whose anniversary date falls after the date of contract expiration (June 20th) until a new contract is reached."[4] The Union received a copy of this letter from employees but never directly from Respondent.

At a negotiations session held on July 17, 2006, Ripple stated there would be no further raises until a new contract was signed and that the Hospital would not accept the Union's proposal for retroactive pay to June 21, 2006. Management reiter-

[2] GC Exh. 4.

[3] See Jt. Exh. 1, modified by oral stipulations during the hearing.

[4] GC Exh. 14.

ated the position that pay raises would not be made retroactive at October 2006 "Open Forum" meetings.[5] Such meetings are regularly conducted with all staff, not only nurses, on a voluntary basis and concern various issues of interest to employees.

Respondent, in fact, discontinued giving such pay raises for nurses whose anniversary dates fell after June 20, 2006. At no time prior did Respondent give the Union notice of the decision to stop paying raises or afford it an opportunity to bargain thereover.

Conditioning Proposals on Withdrawal of ULP Charges and Grievances

Management made a "final" contract proposal on June 20, 2006.[6] However, on June 29, at the first bargaining session after the expiration of the 2005–2006 contract, Respondent's negotiators presented the Union with a contract proposal entitled "Finley's Proposal to Union in an Attempt to Avoid a Strike—Proposal Contingent Upon John Knox's Discussion with the Finley Board of Directors."[7]

Rosener stated that the proposal went beyond the scope of the authority of management's negotiators and had to be approved by the board, a procedure that would take a day or two. She asked the Union to delay the strike/ratification vote (on Respondent's June 20 proposal) that was scheduled for the following day. Glasson replied that this was not an offer that could be taken to the membership and that the Union would proceed with the scheduled vote.

The next day, the membership voted to reject the June 20 management offer and instead to strike. By letter dated July 3, Rosener advised Glasson that, in essence, the Finley executive committee had discussed and approved the June 29 management proposal.[8]

She went to make other proposals "in an attempt to avoid a strike." Thus, Respondent offered to remove, at the Union's request, language in its modified proposal giving all nurses, whether dues paying or not, the right to vote to vote on whether to ratify or reject the Hospital's contract proposals. Respondent would also agree to remove language in its modified contract proposal entitling the hospital to reimbursement from the Union for costs paid to a nurse-contracting agency after notice of a strike had been given by the Union and the strike was called off.

Further, the Hospital would agree to include article 29A drug testing in the modified contract proposal only with the condition that the Union agree to withdraw a ULP charge relating to drug testing. In addition, the Hospital would remove language it had added to article 33 whistleblower that committed the Union not to intimidate nurses, only if the Union withdrew several ULP charges and a grievance related to the conduct of nurses engaged in union activity.

Finally, she stated that the modified contract proposal was offered "with the condition" that the Union withdraw two ULP charges (including Case 33–CA–015132) and four grievances related to the terms or negotiation of contract language. This was the first time that Respondent had conditioned its proposals on withdrawal of ULP charges or grievances. Nothing in the July 3 letter indicated that its terms constituted a final offer, or that its rejection by the union membership would result in an impasse.

A strike took place from July 6–8. The parties met again for negotiations on July 17. Waldbillig's testimony was that at such meeting, Glasson stated that the Union would not be opposed to including withdrawal of ULP charges and grievances in connection with settlement. Van Waus, on the other hand, testified that Glasson told the hospital negotiators that the Union would not accept a contract contingent upon removal of ULP charges and grievances.

Rosener corroborated Waldbillig's testimony to the extent that she testified that following her July 3 letter, Glasson indicated a willingness to discuss withdrawal of ULP charges as part of negotiations. She further testified that the Union did not later expressly state that it was unwilling to do so but shortly afterward filed ULP charges on the matter.

Waldbillig's notes of the July 17 session state: "Including ULP's and grievances in settling, the union is not opposed and may be useful per Matt. ULP's regarding bargaining would be mute [sic]. Others the union may not withdraw. May not want to withdraw all grievances either. For example on call and call back grievance and disciplinary matters."[9] These notes and Rosener's and Waldbillig's testimony were not necessarily inconsistent with Van Waus' testimony. Neither Rosener nor Waldbillig testified that Glasson said that the Union would entertain withdrawing *all* charges and grievances. Based on testimony and Waldbillig's notes, I find that Glasson stated at the meeting that the Union was open to discussing withdrawal of certain ULP charges and grievances but not others.

Following the Union's filing of ULP charges on the basis of the July 3 letter, Respondent did not renew its demand that the Union withdraw any ULP charges or grievances as a quid pro quo for an agreement. Such demand was not contained in management's next proposal, presented on August 17.

Information Requests—Unit Operations Councils (UOCs) and Work-Related Illness

Prior to negotiation of the 2005–2006 agreement, Respondent had UOCs in place, and the Union has never played any role in their operations. The Hospital's larger units have UOCs, but some of the smaller ones use their staff meetings to serve UOC functions. According to Ripple, the UOCs are designed to get staff together and to focus on issues in a unit, with focus on day-to-day operations, quality, and safety. Each UOC has a recorder, who either types up the minutes her or himself or gives them to the ward secretary for typing. The minutes are then either posted on the unit bulletin board or placed in binders kept at the unit that are accessible to all employees.[10] The parties stipulated that some worksite leaders (stewards) have been members of UOCs on some units; that Respondent's Exhibit 19

[5] See GC Exh. 15, a summary published by Respondent.

[6] All dates in this section occurred in 2006.

[7] GC Exh. 17.

[8] GC Exh. 18. The executive committee consisted of some of the members of the board of directors.

[9] GC Exh. 22 at 1.

[10] Illustrations of the bulletin boards and binders in various units are contained in R. Exh. 18.

minutes of the Peri-op unit UOCs December 12, 2005 meeting, represents an example of the format in which minutes are normally taken; and that RN Vonda Wall, who recorded the minutes contained in Respondent's Exhibit 19, was a worksite leader at the time.

There are about 20 worksite leaders, with not all units having one. Ripple testified that the hospital affords worksite leaders exactly the same access to information contained on bulletin boards and in binders as any other employees; no more, no less. She conceded that worksite leaders normally would not go to areas where they do not work. Nothing in the record suggests that Respondent ever offered to allow worksite leaders to look for information on the UOCs on their worktime or authorized them to go to units other than where they worked for that purpose.

Article 3 of the 2005–2006 agreement created a joint labor-management collaborative nursing council, "to promote the professional practice of nursing care" at the Hospital. Comprised of 13 members (6 staff nurses appointed by the Union, 6 management representatives, and the vice president of patient care services), it was to meet at least every other month.

In 2006, an outbreak of mumps occurred in the Dubuque area, and certain nurses at the Hospital contracted the disease.

By letter dated April 26, 2006, to Waldbillig, Van Waus requested various kinds of information "In preparation for our next collective bargaining session."[11] Included were the following:

(1) A list of the members of each units operational[sic] council, a description of the function of the councils, a list of the issues discussed by each council and the resolutions of the council, all minutes of each units operational council meetings since June 20, 2005, and the methodology used in selecting members of each units council.
(2) List each nurse who has called out sick due to a work related illness or exposure, the date of the call out, the unit, the reason stated, and whether or not the nurse was replaced.

Van Waus testified that he requested the information about the UOCs because he had received information from unit employees that the UOCs were discussing staffing issues that could replace nurses with technical employees, and changing hours of work, including the possibility of implementing rotating shifts. His concern was that this could undermine the status of the Union as the exclusive-bargaining representative, as well as infringe on the functions of the contractually-established collaborative nursing council. He further testified that he wished the information about nurses who had called out sick due to a work-related illness or exposure, because nurses had told him that the Hospital had replaced nurses who were out with the mumps with nonnurses. They further reported to him that the Hospital had not been paying workers' compensation correctly under state law but had forced them to use their paid time off under the contract before such compensation benefits kicked in. At no time did Van Waus explain, orally or in writing, why he wanted information about the UOCs, and at no time did Respondent request such an explanation.

Waldbillig replied by letter dated May 2,[12] stating that with regard to the above-two items, as well as two other requests not germane here, "[W]e do not see these issues as relevant to any issue that is being negotiated for a new contract or relevant to enforcement of the current collective bargaining agreement and will not be providing any information response to these requests." In addition, she accused Van Waus of attempting to harass her with voluminous information requests for information not relevant to the representation of bargaining unit employees, and threatened that if he continued to so, the hospital would file ULP charges against the Union. As noted earlier, Respondent never in fact filed any.

Neither Waldbillig nor anyone else from management ever told Van Waus where he could find minutes of the UOCs, which Respondent never provided to the Union. As a union representative, he was limited to the cafeteria, as any member of the public, and he did not have access to areas in the units where patient information was maintained.

By letter dated January 12, 2007, Waldbillg advised Van Waus that Respondent had learned from the Regional Office that his April 26 information request had sought information about nurses who were absent from work due to contracting the mumps, which had not been clear from his request.[13] She enclosed copies of OSHA form 300 logs for the year 2006, which listed nurses who had called off work due to workplace illness or injury and described the reasons, including "mumps disease."[14]

At no time did the hospital furnish Van Waus with information regarding the positions of those who filled in for nurses who called out ill because of the mumps.

Information Request Pertaining to Gina Gross' Termination

At the outset, I note that the issue here is a limited one: as clarified by the General Counsel at hearing, it is solely whether Respondent violated the Act by failing and refusing to bargain an accommodation with the Union when it invoked the confidentiality defense as a ground for not disclosing the names and contact information of patients' family members and coworkers who had complained about Gross.

Charge Nurse Gross was terminated on June 22, 2005, for "Behavior which disrupts a fellow employee(s) performance of

[11] GC Exh. 11. All dates hereinafter in this section occurred in 2006, unless otherwise indicated.

[12] GC Exh. 12.

[13] GC Exh. 13.

[14] Respondent had provided the OSHA logs for 2004 and 2005, pursuant to par. 8(e) of the Union's January 6, 2006 information request (R. Exh. 1-A at 2), seeking reports and logs on work-related accidents and illnesses for the last 2 years. Further, in response to par. 7(b) of that request, asking for copies of patient care policies affecting nurses for each department, Respondent had included certain information concerning the three medical unit's UOC. See R. Exh. 12 at 4–5. Waldbillig testified this information would have applied to other units with UOCs, but this was never related to the Union.

their duties and creates dissatisfaction of care for a patient and/or their family members and friends."[15]

The termination notice she was given that day listed six dates of occurrences: April 4, May 28, June 1, 7, 11, and 14. It went on to provide details of five incidents, without specifying the names of the complainants or the dates. The first two started with "From a patient's family:" and the remaining three began with "Co-worker."

Present at the termination interview, in addition to Gross, were Gross' supervisor, Lynn McDermott, Waldbillig, and union worksite leader (steward) Vonda Wall.

The parties stipulated that Gross testified at the step 5 grievance hearing (described subsequently) that at the time of her termination, she was aware of the identity of one of the patients' family members because she knew her outside of work and was acquainted with her. I also credit Waldbillig's testimony that at the termination interview, Gross stated that she was aware of the identify of one of the three coworkers whose complaint was described.

The parties further stipulated that at the step 5 hearing, Gross testified as follows. She was made aware of the two patients' family members' complaints listed in her termination notice shortly after they were received by the Hospital; she was aware of the identity of the patients at those times; following her discharge, she was provided a copy of the investigation file from the Union (which the Union received in early August) and was able to determine their identities based in part upon those same complaints; and she did not at any time tell the Union whom she thought they were because she did not want to violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[16]

By letter to Waldbillig dated July 7, Gentil-Archer requested various types of information in order to prepare for a grievance on the termination.[17] Pertinent here, the request included the names and contact information of all patients' family members and of all coworkers cited in the disciplinary notice. Gentil-Archer testified that she wanted this information because the Union wished to conduct first-hand interviews with family members and coworkers to make certain that what was stated in the termination notice was accurate.

The Union filed a grievance as per article 5 of the contract, which Gross signed on July 12, contending that the termination violated articles 6.1 and 6.2 of the agreement.[18] The former provided that discipline shall be for "just cause," defined as "a reason that is not arbitrary or discriminatory."

By letter dated July 13, Waldbillg responded to the July 7 information request.[19] She agreed to provide certain information that had been requested: sanitized information on nurses who had been terminated over the past 3 years and the reasons therefore, sanitized copies of disciplinary notices that had been given to nurses over the past 3 years for disruptive behavior or similar conduct, Gross' personnel file, and the dates and places of the occurrences cited in the termination notice. However, she stated that the hospital would not provide the names of patients or their family members "as we view that information as confidential;" further, the names of coworkers would not be provided because they had specifically requested to remain anonymous. Waldbillig pointed out that if the matter went to step 4 of the grievance procedure, it might be necessary for the hospital to reveal their names. After receipt of this letter, Gentil-Archer called Waldbillig and reiterated her request for patients' family members' names.

Either with this letter or thereafter, Respondent, by both fax and letter, provided Gentil-Archer with Gross' investigation file, which included redacted hospital reports of patients' family members' complaints (not written by the family members themselves) and coworker complaint forms. With cover letter dated July 19, Waldbillig furnished the information she had agreed to provide in her July 13 letter, with the possible exception of Gross' personnel file, which Waldbillig said she understood had already been obtained.[20] In any event, it is undisputed that the personnel file was provided to the Union.

Before the step 3 grievance meeting on August 8, the Union received from the Iowa Work Force Development (IWFD), a State agency, a copy of what the hospital had submitted to it in connection with Gross' unemployment compensation claim.[21] Included therein was the following:

A memorandum dated May 4 by McDermott, detailing complaints against Gross by a patient's wife that day (p. 70).

A customer satisfaction form filled out by McDermott, detailing complaints against Gross by a patient's daughter and son, received on April 4 (p. 71).

A memorandum dated May 5 by McDermott, describing a meeting she had with Gross that day, apparently about the above April 4 complaint (p. 72).

A customer satisfaction form filled out by Ripple, detailing complaints against Gross from a patient's wife and son, received on June14 (p. 73).

A customer satisfaction form filled out by McDermott, detailing complaints against Gross from a patient's son, received on June 13 (p. 74).

A memorandum dated May 30 by McDermott, describing her meeting with Gross about an incident with a coworker the previous weekend (p. 76).

In each of the three customer satisfaction forms, a phone number was shown in the box next to the box for the person(s) making the report, who were not named. Gentile-Archer testified that because she did not know whose phone numbers were listed, she did not dial them. Rather, she called Waldbillig. Referring to her request for the names of the patients' family members and of coworkers, she mentioned that some of the

[15] See GC Exh. 5, notice of termination. All dates hereinafter in this section occurred in 2005, unless otherwise indicated.

[16] In general, with certain exceptions not germane here, the statute prohibits disclosure of the names of patients who register complaints about their health care treatment.

[17] GC Exh. 6.

[18] GC Exh. 7.

[19] GC Exh. 8.

[20] R. Exh. 3. The parties stipulated this document did not name any coworkers.

[21] R. Exh. 4. The fax cover page reflects that the hospital faxed the documents to the agency on August 1. Respondent did not directly furnish them to the Union.

information had not been redacted. Waldbillig responded that she had not noticed this.

Waldbillig testified that the phone numbers were provided to IWFD with no intention that they be disclosed to the Union. However, she also testified that when an employer sends information to that agency, such information is forwarded to the other party. In any event, based on Respondent's consistent position throughout, that those phone numbers were not meant to appear and that Respondent's disclosure of the identity of the patients' family members would have violated HIPAA, I find that it did not intentionally provide such information to the Union.

According to Waldbillig, at the step 3 grievance hearing on August 8, Gentile-Archer said that she was going to call the phone numbers listed on the investigative reports of patient complaints and conduct her own investigation. In contrast, the parties stipulated, in lieu of calling Gentile-Archer back on rebuttal, that she would testify that at no time did she tell Respondent she was going to call the phone numbers of patients' family members that had been disclosed to the Union. Waldbillig's notes of the meeting do not support a conclusion that Gentile-Archer made such a statement. Thus, they say that Gentile-Archer "wants copies of the information with names included. She wants to complete her own investigation. She has filed an unfair labor practice on this."[22] They reflect nothing about her stating that she would make any telephone calls. In any event, for reasons to be discussed, my conclusions do not depend on which version is credited.

Because the grievance was unresolved at steps 2 through 4, it was scheduled for a 5th and final step hearing before a retired state court judge who, according to article 5.10, would render a decision limited to whether or not the Hospital's interpretation of the agreement and its disciplinary decision were "arbitrary or discriminatory." The judge would either uphold the termination or order Gross reinstated. Although this is technically not arbitration per se, the parties have referred to it as such, and the difference is immaterial for purposes of my decision.

By letter dated September 27 to Gentil-Archer, Rosener referred to several discussions through the Regional Office regarding possible non-Board settlement.[23] She stated that the hospital had agreed not to call the patients' family members as witnesses in the arbitration case and was prepared to disclose the names of employees who had witnessed Gross' abuse of a patient. However, inasmuch as the Union was insisting that the hospital disclose the names of patients' family members, the parties were at an impasse, and the hospital was therefore implementing its final offer by providing the names of coworkers "who witnessed Gina Gross' abuse of a patient." She later named four individuals, again describing them as coworkers who witnessed patient abuse. Rosener mentioned nothing in the letter about the coworkers who complained about Gross' conduct vis-à-vis themselves and, in the absence of record evidence, I will not find that they were the same coworkers who witnessed Gross abusing patients.

Of the four named coworkers, the Union had contact information for only one (who was in the bargaining unit). Another had left the hospital, and the remaining two were nursing assistants who were not in the unit. In its defense, the Hospital contends that in each unit, a scheduling book is maintained for the employees assigned to the floor. It includes employees' contact information (home telephone numbers) and is accessible to all employees.

The Union never agreed to withdraw its request for patients' family members' names and contact information if Respondent agreed not to call them at the step 5 hearing. According to Gentil-Archer, even had Gross been able to determine what patients were involved, the Union would have violated HIPAA by asking her for the names of their family members.

The step 5 hearing was held on May 22 and June 12, 2006, before Judge L. D. Lybbert. Because of a miscommunication, the first day's proceeding was not transcribed. The parties stipulated that at the hearing, Respondent continued to rely on complaints by patients' family members and coworkers in support of its decision to terminate Gross. In his decision, issued on July 26, 2006, Judge Lybbert upheld the termination as not arbitrary or discriminatory.[24] Whether or not the patients' family members testified, he clearly considered most, if not all, of the incidents referenced in the termination letter. Thus, he noted, on page 2:

> McDermott received a flurry of complaints about Gross's interpersonal relationships from co-workers, as well as patients and their families during the last few weeks prior to her dismissal. One patient and his family were so upset with Gross's behavior and attitude that they transferred the patient to another hospital and threatened to sue her and the Hospital.

Analysis and Conclusions

Discontinuance of Pay Raises after Expiration of 2005–2006 Agreement

As a general rule, an employer may not make unilateral changes when the parties are engaged in negotiations for a new agreement and there has been no overall impasse, absent a showing that a union has engaged in delay tactics, or that the employer has economic exigencies. *Pleasantview Nursing Home*, 335 NLRB 961, 962 (2001); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Respondent has not alleged the parties bargained to impasse; indeed, negotiations continued after the instant charges were filed. Nor has Respondent alleged economic exigencies or that the Union engaged in delaying tactics.

Rather, Respondent has relied on the contention that it was privileged to stop giving pay raises upon expiration of the contract because of its sound arguable interpretation of the language of article 20.3 ("For the duration of this Agreement"). Respondent further argues that this language constituted a waiver by the Union.

Addressing first the waiver argument, an employer may lawfully make changes at the expiration of a contract if a union has waived the right to bargain over them. The employer contend-

[22] GC Exh. 21 at 0023.

[23] GC Exh. 9.

[24] GC Exh. 10.

ing this bears the high burden of demonstrating that the union has clearly and unequivocally relinquished such right. *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), enfd. 475 F.3d 14 (1st Cir. 2007); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993) ("A union must clearly intend, express, and manifest a conscious relinquishment"); *TCI of New York*, 301 NLRB 822, 824 (1991).

Respondent has failed to meet that burden. Contrary to Respondent, I do not conclude that the Union's agreement to the language "For the duration of this Agreement" ipso facto amounted to any kind of waiver of the Union's rights to later bargain over changes to the policy on raises. *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), cited by Respondent, is distinguishable. There, the provision specifically stated that pension obligations would terminate at contract expiration unless they were continued in a new agreement. Moreover, nothing in the negotiations leading to the 2005–2006 agreement supports the waiver argument. Thus, no discussions took place during those negotiations about what would happen to raises when the contract expired, if no successor agreement had been negotiated.

I also reject Respondent's contention that its arguable construction of contractual language gave it the right to stop providing pay raises. In situations such as this, where the collective-bargaining agreement has expired, and there has been no clear waiver by the Union, any matters of private contractual interpretation between the parties should be superseded by the statutory protection of employees' Section 7 rights, as held by the Board in *AlliedSignal Aerospace*, 330 NLRB 1216 (2000), enf. denied sub nom. *Honeywell International, Inc. v. NLRB*, 253 F.3d 119 (D.C. Cir. 2001), governs.[25] There, the Board determined that an employer's cessation of paying severance benefits after the expiration of the contract constituted a unilateral change in violation of Section 8(a)(5) and (1) of the Act. As the Board stated (at 1216):

> Whatever the scope of the Respondent's obligation as a matter of contract, there is no basis for finding that the Union waived its right to continuance of the status quo as to terms and conditions of employment after contract expiration. Indeed, there is absolutely no evidence that the Respondent and the Union, as negotiating partners [when the contract was negotiated] even considered the question of the Respondent's *statutory* obligation to maintain existing severance benefits after expiration of the agreement . . . . [Italics in original.]

Cf. *TransMontaigne, Inc.*, 337 NLRB 262 (2001) (successor employer's obligation to recognize union statutory, not contractual, in nature).

Accepting Respondent's position would have the immediate natural effect of causing unit employees to believe that they have been effectively punished for supporting the Union, since they have been deprived of the raises they received not only during the term of the contract but for many years before then. This, in turn, would result in discouraging them from engaging in union support or activity, an outcome inconsistent with the purposes of the Act. As the Board aptly articulated in *Intermountain Rural Electric Assn.*, supra at 789, regarding an employer's making changes in pay calculations that adversely affected employees:

> [T]hese were . . . areas in which the entire bargaining unit was affected adversely in the most fundamental way—their paychecks. These actions would likely place the Union at a serious disadvantage in terms of maintaining the support and trust of the employees. This would serve to undercut the Union's authority at the bargaining table. (Partially quoted in *Dynatron/Bondo Corp.*, 333 NLRB 750, 753 at fn. 8 (2001).

I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing raises without first having afforded the Union notice and an opportunity to bargain. Ergo, I further conclude that Respondent violated Section 8(a)(1) by announcing to employees that they would no longer get raises upon expiration of the agreement and by stating that it would not give the raises—that it unlawfully discontinued paying on June 21, 2006,—retroactively to June 21, 2006.

Conditioning Reaching Agreement in Bargaining on Withdrawal of ULP Charges and Grievances

A party may bargain to impasse over a mandatory subject of bargaining, concerning "wages, hours, and other terms and conditions of employment," but not over a nonmandatory (or permissive) one. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Success Village Apartments, Inc.*, 347 NLRB 1065, 1070 (2006); *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999). Withdrawal of ULP charges is considered a nonmandatory subject of bargaining. *Hilton's Environmental, Inc.*, 320 NLRB 437, 455 (1995); *Magic Chef, Inc.*, 288 NLRB 2, 15 (1988); *Laredo Packing Co.*, 254 NLRB 1, 30 (1981). The same holds true for the withdrawal of pending grievances. *Good GMC, Inc.*, 267 NLRB 583 (1983).

As a corollary, a party may not insist on a nonmandatory subject of bargaining as a condition precedent to entering into any collective-bargaining agreement, because this amounts to a refusal to bargain about the subjects that are within the scope of mandatory bargaining. *Borg-Warner Corp.*, supra at 349; *Detroit Newspaper Agency*, supra at 800; *Union Carbide Corp.*, 165 NLRB 254 (1967), enfd. sub nom. *Oil Workers Local 3-89 v. NLRB*, 405 F.2d 1111 (D.C. Cir. 1968). Distinguishable are situations where a party merely presents, and even repeats, a demand for a nonmandatory subject, without positing it as an ultimatum. *Detroit Newspaper Agency*, ibid. See also *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985). An employer may do so until a union unequivocally rejects acceptance of inclusion of such in an agreement.

The alleged violations relate to statements in Rosener's letter of July 3, 2006, conditioning modified proposals on certain matters on the Union's withdrawal of related ULP's and grievances, and stating in regard to Respondent's June 29 proposal, that "Finley offers the modified contract proposal with the con-

[25] The Board has not reversed its position since enforcement was denied, and I am unaware of any contrary Sixth Circuit Court of Appeals decisions.

dition that the Union will withdraw [listed ULP charges and grievances]."

Nothing in the letter expressly stated or otherwise indicated it was a final offer. Significantly, the June 29 proposal superseded a prior hospital offer that had been termed "final." In these circumstances, the Union could not reasonably have inferred that the July 3 proposal was the Hospital's last offer, the Union's rejection of which would result in impasse. Indeed, after the Union rejected the July 3 proposal, stating that it would not agree to withdraw ULP charges and grievances, the parties met again for negotiations, and Respondent dropped its demand that the Union withdraw them. In view of all of these factors, I cannot conclude that Respondent insisted that the Union withdraw ULP charges and grievances as a quid pro quo for reaching *any* agreement, either as to particular provisions or on a contract as a whole, or that Respondent indicated that impasse would result if the Union would not agree thereto.

In sum, Respondent lawfully presented a demand for a nonmandatory subject but did not put it forward as an ultimatum that would result in the success or failure of negotiations on a new contract. See *Detroit Newspaper Agency*, supra at 800. Accordingly, I recommend that this allegation be dismissed.

Information Concerning the Unit Operations Councils (UOCs) and Nurses' Sick-Out Records

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Although an employer need not automatically comply with a union's information request, with its duty to provide such turning on the circumstances of the particular case, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979), requested information that relates directly to the terms and conditions of represented employees is presumptively relevant. *Beverly Health & Rehabilitation Services*, 328 NLRB 885, 888 (1999); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). The Board applies a liberal, discovery-type standard in determining what requests for information must be honored. *Raley's Supermarket*, 349 NLRB 26, 29 (2007); *Postal Service*, 337 NLRB 820, 822 (2002); *Brazos Electric Power Co-op*, 241 NLRB 1016, 1018 (1979). Thus, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

I conclude that information pertaining to the UOCs was presumptively relevant, inasmuch as the UOCs are designed to bring staff together and have as their focus day-to-day operations, quality, and safety—matters that directly concern nurses' working conditions. Moreover, the existence of the joint labor-management council established by the collective-bargaining agreement raised the possibility of overlap or conflict in functions between it and the UOCs. Similarly, information relating to the health and safety of nurses was also presumptively relevant.

Although Van Waus did not articulate reasons why he wanted information about the UOCs or the sick-out records, the Union was not required to make a specific showing of relevance unless Respondent had rebutted the presumption of such. See *Southern California Gas Co.*, 346 NLRB 449 (2006); *Mathews Readymix, Inc.*, 324 NLRB 1005, 1009 (1997), enfd. in relevant part 165 F.3d 74 (D.C. Cir. 1999); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Further, to the extent that Respondent felt that the requests were ambiguous or overbroad, it had the obligation to request clarification and/or comply with them to the extent that they encompassed necessary and relevant information. See *Mission Foods*, 345 NLRB 788, 789–790 (2005); *National Steel Corp.*, 335 NLRB 747, 748 (2001); *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

Respondent asserts that it had no obligation to provide the Union with information concerning the UOCs, including minutes of their meetings, because some worksite leaders have been members of some UOCs, and the information was otherwise available to the Union through its worksite leaders. This argument does not pass muster, because the existence of alternative means for a union to obtain requested information normally fails as a justification for an employer's refusal to furnish it. See *River Oak Center for Children, Inc.*, 345 NLRB 1335, 1336 (2005); *King Soopers, Inc.*, 344 NLRB 842, 843 (2005); *Kroger Co.*, 226 NLRB 512, 513 (1976). The Sixth Circuit Court of Appeals has expressly approved of this proposition. See *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986). As the Board articulated in *Kroger Co.* (supra at 513):

> Absent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of investigation. The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form. The union is entitled to an accurate and authoritative statement of facts which only the employer is in a position to make. [Footnotes omitted.]

In this regard, Respondent's theory would place an untenable burden on worksite leaders who, in the absence of a contrary suggestion by Respondent, would be required to try to amass the information on their own time by looking through binders and on bulletin board postings, in some cases, in units where they do not work. Respondent cannot shake off its statutory responsibility in such a manner.

Other than furnishing partial information on one unit, Respondent did not provide the information requested about the UOCs, and its failure and refusal to do so violated Section 8(a)(5) and (1) of the Act.

As to the information requests concerning work-related illness, Respondent had already provided the Union with the 2004 and 2005 OSHA logs in response to another information request, and it was not required to reprovide them. See *Wackenhut Corp.*, 345 NLRB 850 (2005); *King Soopers, Inc.*, supra at 846 fn. 6.

The 2006 OSHA logs were furnished in January 2007, after discussions with the Regional Office as to why the Union wanted them (in connection with nurses absent from work due to contracting the mumps). However, as noted earlier, it was

incumbent upon Respondent to seek further clarification from the Union at the time the April 2006 information request was made, if it had questions about the relevancy or scope of the request. Respondent failed to do so. An employer has a duty to furnish information in a timely fashion. *Beverly California Corp.*, 326 NLRB 153, 157 (1998); I*nterstate Food Processing*, 283 NLRB 303, 306 (1987). Belated compliance does not cure an unlawful refusal. *Iron Workers Local 86*, 308 NLRB 173 at fn. 2 (1992); *Interstate Food Processing*, supra. Accordingly, the 2006 OSHA logs were untimely provided. Respondent has never provided the Union with the information it sought regarding what employees replaced nurses who were off work due to the mumps, as the request was later narrowed.

In sum, I conclude that by not providing the 2006 OSHA logs in a timely fashion and by not providing information about who replaced nurses off from work due to the mumps in 2006, Respondent violated Section 8(a)(5) and (1) of the Act.

Refusal to Disclose Names and Contact Information of Patients' Family Members and Coworkers who Complained about Gross

When a party refuses to supply requested information on the grounds of confidentiality, it then bears the burden of coming forward with an offer of accommodation that will meet the needs of both parties. *National Steel Corp*., supra at 748; *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004); *Pennsylvania Power*, 301 NLRB at 1105–1106. The burden was thus on Respondent, not the Union, to suggest alternatives. It is irrelevant that Gross and the Union might have been able to ascertain the identities of the complainants and find ways to contact them, since Respondent's invocation of confidentiality as a basis for not supplying such information is not at issue. I also reject Respondent's argument that deferral to arbitration was the appropriate method to determine the accommodation, because the Board has a longstanding policy of refusing to defer information disputes. *Team Clean, Inc.*, 348 NLRB 1231 at fn. 1 (2005); *Shaw's Supermarkets*, 339 NLRB 871 (2003).

Respondent responded to the July 7, 2005 request that included the above information by letter of July 13, 2005, stating that it was confidential and would not be furnished. Respondent made no efforts to offer an accommodation prior to the Union's filing of a charge on the matter on July 28, 2005. The next question is whether Respondent's later actions amounted to attempts at accommodation, even though not so entitled. As to the information that Respondent provided to the IWFD, this was not directly provided to the Union, and it is undisputed that any unredacted phone numbers were not meant for the Union.

Accordingly, I do not conclude that this constituted any kind of effort at accommodation.

The key issue is whether any proposals Respondent made in postcharge settlement discussions referenced in Rosener's September 27, 2005 letter should be deemed offers of accommodation. The letter reflects that Respondent had made proposals, including not calling patients' family members as witnesses at the step 5 hearing, and disclosing the names of employees who had witnessed Gross' abuse of patients, but that the Union had insisted on disclosure of the patients' family members' names. Rosener stated that because there was an impasse, Respondent was implementing its final offer, and she went on to list those employees' names. As noted previously, there is nothing to indicate these discussions included the matter of coworkers who had complained about Gross' conduct vis-à-vis themselves.

As discussed above, information must be furnished in a timely fashion, with late compliance failing to negate an earlier unlawful refusal. When it comes to bargaining an accommodation, the situation is different to the extent that a union will not be receiving information in the form in which it was requested. There is no assurance that an employer's offers to provide alternatives will be accepted or that the parties will reach agreement on the scope of information to be furnished, since the law does not require an employer to successfully bargain an accommodation with a union, only to make bona fide efforts to achieve such.

Three considerations, taken together, cause me to conclude that Respondent's postcharge offers of accommodation satisfied its obligations under the Act. First, they stemmed from settlement efforts. The Regional Office appropriately attempted to facilitate pretrial resolution of the charge by discussions with the parties, during which Respondent made certain proposals. Inasmuch as Respondent apparently made good-faith efforts to reach settlement, it is entitled to some benefit from that. I cite the Board's longstanding policy of encouraging settlement of labor disputes. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 253–254 (1944); *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 785 (2006).

Second, Respondent offered proposals as an accommodation well in advance of the scheduled arbitration hearing. Thus, the proposals were made prior to September 27, 2005, approximately 8 months before the first day of the step 5 hearing on May 22, 2006. I cannot see how the Union was prejudiced by not having received the proposals earlier, especially when no agreement was reached on an accommodation.

Third, although though the proposals were received after the charge was filed and months after the original request for them was made, the Board encourages resolution of disputes "short of arbitration hearings, briefs, and decisions so that the arbitration system is not 'woefully overburden.'" *Pennsylvania Power Co.*, supra at 1104–1105; quoted in *Raley's Supermarket*, 349 NLRB 27. Postcharge conduct that serves that end should be fostered.

In view of all these considerations combined, I conclude that Respondent satisfied its obligations under the Act with regard to bargaining an accommodation on patients' family members' names and contact information, and recommend dismissal of that aspect of the complaint.

In contrast, Respondent never provided the Union with the names and contact information of the coworkers who complained about Gross' conduct vis-à-vis themselves, and the record does not reflect any efforts by Respondent to bargain an accommodation as to them.

Respondent merely provided redacted coworker complaint forms. Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) with regard to this aspect of the Union's information request, by not suggesting alternatives that would have accommodated both the undisputed confidentiality con-

cerns of coworkers, and the needs of the Union to represent Gross in her termination grievance.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Unilaterally discontinued paying raises after June 20, 2006, without first having afforded the Union notice and an opportunity to bargain.

(b) Failed and refused to provide the Union with information the Union had requested about Respondent's unit operations councils.

(c) Failed and refused to timely provide, or to provide at all, to the Union, information the Union had requested about nurses who were out sick with the mumps.

(d) Failed and refused to offer to bargain an accommodation when it invoked confidentiality as a basis for not providing the Union with the names and contact information of coworkers whose complaints had been a basis for the termination of a nurse and for a union grievance on the termination.

4. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section (1) of the Act:

(a) Told employees that Respondent would discontinue paying raises after June 20, 2006, when the Union had not been afforded notice and an opportunity to bargain.

(b) Told employees that Respondent would not give pay raises—that it unlawfully discontinued paying on June 21, 2006—retroactively to June 21, 2006.

REMEDY

Because Respondent has engaged in unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent unilaterally withheld pay raises after June 20, 2006, Respondent shall also be ordered to rescind this unlawful change and to pay to all bargaining unit employees the pay raises which would have been payable beginning June 21, 2006, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), until such time as the parties negotiate a new pay provision or reach a bona fide impasse. I will further order that Respondent restore the status quo ante with respect to raises.

Inasmuch as Gross' grievance has been finally decided, Respondent's refusal and failure to bargain an accommodation regarding the names and contact information of coworkers who complained against her is moot as a practical matter. I therefore deem it unnecessary to order as an affirmative action that Respondent bargain such an accommodation. See *Borgess Medical Center*, supra at 1106.

[Recommended Order omitted from publication.]