NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Altura Communication Solutions, LLC *and* International Brotherhood of Electrical Workers, Local 21. Case 13–CA–174605

May 21, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 27, 2017, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions, and the Respondent filed an answering brief to the Charging Party's cross-exceptions. The Respondent filed reply briefs to the General Counsel's and Charging Party's answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as further discussed below and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent installs and services telephone equipment. Like the judge, we recognize that its 2015 negotiations for a successor collective-bargaining agreement took place against the backdrop of significant changes in the telecommunications industry in recent years, including a movement away from the kinds of telephone systems the Respondent has historically installed and repaired. We also recognize that these changes resulted in declining revenues and a brush with bankruptcy for the Respondent.

As we recently explained in *Phillips 66*, 369 NLRB No. 13, slip op. at 4 (2020):

> The essence of bad-faith bargaining is a purpose to frustrate the possibility of arriving at any agreement, and the Board looks to the totality of an employer's conduct to determine whether the employer has bargained in bad faith. See, e.g., *West Coast Casket Co., Inc.*, 192 NLRB 624, 636 (1971), enfd. in relevant part 469 F.2d 871 (9th Cir. 1972). Section 8(d) of the Act provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Accordingly, even "adamant" insistence on a bargaining position "is not of itself a refusal to bargain in good faith." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

See also *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 367 NLRB No. 103, slip op. at 6 (2019) (quoting Sec. 8(d)'s description of what the Act does and does not require), affd. sub nom. *IATSE, Local 15 v. NLRB*, ___ F.3d ___, 2020 WL 2053090 (9th Cir. April 29, 2020). Thus, employers and unions are entitled to bargain hard for a contract each side perceives as desirable, and nothing in the Act precludes an employer from bargaining aggressively for cost-cutting measures. "A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, supra (quoted in *Audio Visual Services Group*, supra, slip op. at 6). Moreover, "it is not the Board's role to sit in judgment of the substantive terms of bargaining." *Rescar, Inc.*, 274 NLRB 1, 2 (1985). It is our role, however, "to oversee the process to ascertain that the parties are making a sincere effort to reach agreement." Id. Accordingly, "[w]hile the Board will not decide whether an employer's proposals were acceptable or unacceptable, it will examine those proposals and 'consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.'" *Audio Visual Services Group*, supra, slip op. at 6 (quoting *Reichhold Chemicals*, 288 NLRB 69, 69 (1988), enfd. in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991)).

Recently, we reiterated the well-established principle that in some cases, the content of specific proposals "may become relevant in determining whether a party was

[1] 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.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), and to conform to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified. We decline the Charging Party's request for additional remedies.

making a sincere effort to reach an agreement." *Phillips 66*, supra, slip op. at 4 fn. 9. As explained below and in the judge's decision, this is such a case, and the Respondent did not make the requisite effort. Relying, as the judge did, on the combination of facts present in this case,[3] we affirm the judge's finding that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.[4]

Facts

In the attached decision, the judge describes the parties' negotiation history in great detail. It is, however, sufficient for our purposes to summarize the provisions included in the Respondent's final offer to the Union, as follows.

- A sweeping management-rights clause under which the Respondent would retain the right ("limited only by the specific and express terms" of the agreement) "to unilaterally make and implement decisions with respect to the operation and management of its business and employees in all respects, including, but not limited to, all rights and authority possessed or exercised by the Company prior to the certification of the Union as the exclusive collective bargaining representative" of the unit employees. Among these retained rights would be the right "to determine whether services or goods are to be provided or produced by employees covered by this Agreement or by other non-bargaining unit employees (including supervisors and temporaries) and non-employees (including contractors)." And "the exercise" of management's rights would be excluded from the grievance procedure except where "specifically and clearly limited by the [agreement's] express terms."
- A broadly worded "zipper" clause under which the Union would "unqualifiedly waive[] the right . . . to bargain collectively with respect to any subject or matter whether or not . . . covered by" the agreement.
- Work-jurisdiction provisions placing no restrictions on the Respondent's use of non-bargaining-unit employees to perform work that had been exclusively or regularly performed by the bargaining unit, which, if implemented, effectively would have given the Respondent the unfettered ability to eliminate the bargaining unit at will.
- A broad no-strike clause that included prohibitions on "handbilling" and "protest[s] regardless of the reason."[5]
- A narrow arbitration clause providing that the arbitrator's authority would be "expressly limited to a decision upon the question of alleged violation of a specific provision of th[e a]greement, rather than indirect or implied intent thereof."
- Layoff provisions eliminating seniority as a consideration unless the Respondent, in its sole discretion,

[3] We emphasize that certain of the Respondent's individual proposals might not be unlawful under other circumstances. See, e.g., *NLRB v. American National Insurance Co.*, 343 U.S. 395, 407–409 (1952) (holding that proposal of, and bargaining for, broad management-rights provision is not per se violation of duty to bargain in good faith); *Litton Systems*, 300 NLRB 324, 326–330 (1990) (same, regarding zipper clause, dues checkoff, and unit-placement decisions); *Rescar, Inc.*, 274 NLRB at 2 (same, regarding broad management-rights and no-strike clauses and limited grievance and arbitration provision).

[4] We agree with the judge that the parties did not reach a good-faith bargaining impasse, but we find it unnecessary to decide whether a valid impasse would have existed in the absence of the Respondent's overall bad-faith bargaining. In addition, unlike the judge, we do not rely on the Respondent's unilateral implementation of certain terms and conditions as an indicium of bad faith. In this regard, the decisions relied upon by the judge involved unilateral changes implemented while bargaining was ongoing, rather than, as here, after the employer had claimed, erroneously, to have reached impasse. See *Omaha World-Herald*, 357 NLRB 1870, 1885 (2011); *Whitesell Corp.*, 357 NLRB 1119 (2011); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996), enfd. 140 F.3d 169 (2d Cir. 1998).

We also do not rely on the judge's finding that the factor of bargaining history weighed against a finding of good-faith impasse under *Taft Broadcasting*, 163 NLRB 475 (1967), review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In *Taft*, the Board listed five non-exhaustive factors to consider in determining whether a good-faith impasse exists: (1) the parties' bargaining history; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issue or issues as to which there is disagreement: and (5) the contemporaneous understanding of the parties as to the state of negotiations. Id. at 478. In his analysis, the judge appears to have conflated the first and third factors. Nevertheless, we affirm the judge's conclusion that the parties never reached a valid impasse, as the second, third, and fifth *Taft* factors weigh against a finding of impasse and outweigh factors one and four, which tilt the other way. See *American Security Programs, Inc.*, 368 NLRB No. 151, slip op. at 13 (2019) ("One or two factors . . . may be sufficient to demonstrate the absence of impasse.").

Among the terms and conditions it implemented upon reaching the claimed impasse, the Respondent offered buyouts to six employees, five of whom accepted. Because the claimed impasse was invalid and unlawful, the judge properly ordered the Respondent to offer the five reinstatement and to make them whole. Since these five did accept buyouts, we leave to compliance the determination of the amount of the setoff, if any, necessary to prevent a windfall.

[5] We do not rely on the judge's findings regarding the Respondent's initial no-strike proposal as evidence of bad faith.

determined employees to be equal in all other relevant respects and making severance benefits contingent on the recipient signing a waiver of claims that would be binding on the Union.

- A provision stating that nothing in the agreement should "be construed as a guarantee of hours of work per shift, per day or per week."
- Healthcare provisions permitting the Respondent to eliminate coverage at will (provided it did so for non-bargaining-unit employees as well) and excluding coverage disputes from the grievance procedure.
- Proposals transferring "all . . . Company-provided benefits and other terms and conditions of employment" not specifically addressed in the agreement—except for the amount "(i.e., days or hours)" of certain kinds of paid time off [6]—to an employee handbook outside the agreement and entirely within the Respondent's unilateral control.
- Proposals granting the Respondent the ability to establish and change "all policies, rules, regulations, and performance standards" on 10 days' notice (provided that such changes were reasonable and consistent with the agreement's express terms).
- A two-tier wage proposal that gave the Respondent complete discretion to set rates of pay above specified minimums[7] and to raise individual employees' wages, and substantial discretion to reduce wages, during the term of the agreement.

Discussion

Section 8(d) of the Act defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Sixty years ago, the Supreme Court held that the statutory duty to "meet . . . and confer in good faith" is not fulfilled by "purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it.'" *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). Rather, "[c]ollective bargaining . . . presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." Id. Thus, "the touchstone of bad-faith bargaining is a purpose to frustrate the very possibility of reaching an agreement." *Phillips 66*, 369 NLRB No. 13, slip op. at 6.

In assessing whether a party has failed or refused to bargain in good faith, the Board considers the totality of the circumstances. *Audio Visual Services Group*, 367 NLRB No. 103, slip op. at 6; *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 8 (2018); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003). Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, it will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Audio Visual Services Group*, supra, slip op. at 6; *Reichhold Chemicals*, supra (same); see also *Phillips 66*, 369 NLRB No. 13, slip op. at 4 fn. 9 (same); *Kitsap*, 366 NLRB No. 98, slip op. at 8 (same).

Clauses vesting in management rights of unilateral action are a staple of collective-bargaining agreements, and the Supreme Court long ago held that bargaining for a provision granting the employer unilateral control over certain terms and conditions of employment is not, "per se, an unfair labor practice." *NLRB v. American National Insurance Co.*, 343 U.S. at 409 ("Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board.").[8] However, the Board, with court approval, has consistently found that an employer's proposals evidence bad-faith bargaining when they would confer on the employer "unilateral control

[6] Specifically, holidays, vacation days, funeral leave, jury leave, and sick leave.

[7] The Respondent's proposal established two job classifications—Levels A and AA—and set minimum wage rates for each classification.

[8] In *American National Insurance Co.*, the Supreme Court held that the Board must evaluate the employer's overall conduct, including its proposals, taken as a whole, "by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether." 343 U.S. at 408–409. Our decision today respects the Court's holding.

over virtually all significant terms and conditions of employment." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 487; see *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 877 (11th Cir. 1984), enfg. 265 NLRB 850 (1982); *Eastern Maine Medical Center*, 253 NLRB 224, 246 (1980), enfd. 658 F.2d 1 (1st Cir. 1981); *NLRB v. Johnson Mfg. of Lubbock*, 458 F.2d 453, 455 (5th Cir. 1972); see also *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992) (proposal to incorporate into the parties' labor contract an employee handbook, which "would operate, at best, . . . as a perpetual reopener clause," evidenced bad faith) (internal quotation marks omitted), enfd. 987 F.2d 1376 (8th Cir. 1993).

This latter principle follows from the longstanding recognition that the object of collective bargaining under the Act is "an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract." *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523 (1941). Section 1 of the Act makes clear that the national labor policy established by Congress includes protecting the right of workers to designate representatives of their own choosing "for the purpose of negotiating the terms and conditions of their employment," and the Supreme Court has held that Congress intended collective bargaining to be "a process that look[s] to the *ordering* of the parties' industrial relationship through the formation of a contract." *NLRB v. Insurance Agents' Union*, 361 U.S. at 485 (emphasis added). Proposals that would instead authorize an employer to make unilateral changes to a broad range of significant terms and conditions of employment, or that would amount to a "perpetual reopener clause" as to those terms during the life of the contract, are thus "at odds with the basic concept of a collective-bargaining agreement." *Radisson Plaza Minneapolis*, 307 NLRB at 95.[9] Such proposals are evidence that an employer has failed to bargain with the required desire to enter into a collective-bargaining contract, the Board has explained, because "unions are statutorily guaranteed the right to bargain over any change in any term or condition of employment, [and therefore] could do just as well with no contract at all." Id.[10]

Accordingly, an inference of bad faith is appropriate "when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 487–488. "Put somewhat differently, an inference of bad-faith bargaining is warranted when an employer's proposals 'would strip the union of any effective method of representing its members . . . further excluding it from any participation in decisions affecting important conditions of employment . . . thus exposing the company's bad faith.'" *Kitsap*, 366 NLRB No. 98, slip op. at 8–9 (brackets omitted) (quoting *A-1 King Size Sandwiches*, 265 NLRB at 859).

We recognize, of course, that neither the Board nor the courts may compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements. NLRA Section 8(d); *American National Insurance Co.*, 343 U.S. at 403–404. Our examination of the Respondent's proposals is undertaken to determine, not their merits, but "whether in combination and by the manner proposed they evidence an intent not to reach agreement." *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

With these considerations in mind, we find that the Respondent's proposals, when considered in combination, evinced a failure to bargain in good faith.

First, although the Respondent's wage proposals included minimum wage amounts for Level A and AA workers, they would have granted the Respondent complete discretion to raise individual employees' wages above these minimums without bargaining or even notice

---

[9] As the Board has stated in the context of explaining its contract-bar doctrine,

> real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems . . . . [A] contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.

Appalachian Shale Products Co., 121 NLRB 1160, 1163 (1958).

[10] To be clear, the mere insistence on a management-rights clause as part of an employer's overall bargaining position does not compel a finding of bad-faith bargaining. Indeed, a union might be willing to accept even "comprehensive restrictions on the employees' statutory rights if the employer were offering something significant in return." *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991). Neither is it unlawful for an employer to advance a proposal granting it unilateral discretion over merit-based wage increases. *McClatchy Newspapers, Inc.,* 321 NLRB 1386 (1996) (explaining that employer could not, however, unilaterally implement such proposals when parties were at impasse), enfd. 131 F.3d 1026 (D.C. Cir. 1997). But where an employer seeks "unilateral control over virtually all significant terms and conditions of employment," the Board will infer a desire to frustrate the very possibility of reaching an agreement. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 487.

to the Union.[11] In fact, the Respondent planned to pay more than 85 percent of the unit above the Level A minimum wage. The Respondent also would have substantial discretion to reduce individual employees' wages, insofar as its proposal would allow it to move employees between levels. Accordingly, under the proposal, wage reductions could be affected by moving employees from the higher Level AA classification to the lower Level A.

Second, the Respondent's proposals would have granted it complete discretion over hours of work. The Respondent proposed that nothing in the agreement should "be construed as a guarantee of hours of work per shift, per day or per week." This proposal also would have increased its unilateral control over employees' pay: by seeking complete discretion over hours, the Respondent also sought complete discretion over total compensation.

Third, by means of its health-insurance proposal and its proposal to transfer most benefits to the employee handbook, the Respondent sought the ability to unilaterally alter or eliminate many significant benefits—including life insurance, long- and short-term disability benefits, expense reimbursements, and paid military leave—provided that such changes also applied to non-unit employees.[12] Although the Respondent would not be able to unilaterally alter the amounts (i.e., days and hours) of paid time off for holidays, vacation days, funeral leave, jury leave, and sick leave, its proposal would have given it the ability to unilaterally alter the policies governing paid time off through its exclusive control over the terms and conditions contained in the employee handbook. In *Radisson Plaza Minneapolis*, the Board found that a proposal to incorporate in the parties' contract a handbook that "would operate, at best, . . . as a 'perpetual reopener clause'" was "at odds with the basic concept of a collective-bargaining agreement." 307 NLRB at 95. The Respondent's proposals would go even further because the Respondent would be able to unilaterally change the extra-contractual handbook at any time.[13] Moreover, since the handbook would be outside of the contract, claims of violations of the handbook apparently would be excluded from the grievance procedure.

Finally, we infer bad faith from the combination of the Respondent's proposals for a remarkably broad management-rights clause, a no-strike clause that would have precluded even handbilling and "protest[s] regardless of the reason," and a grievance procedure that would exclude from its scope the Respondent's exercise of the extraordinarily broad discretion provided it under many of its proposals. Under the proposed management-rights clause, the Respondent would retain "all rights and authority possessed or exercised by" it before the Union was certified as the unit employees' bargaining representative, "limited only by the specific and express terms" of the agreement. The breadth of this proposed clause is all the more striking when one considers that the Respondent's proposals for those "specific and express terms" included few such limits. As set forth above, those proposals would permit the Respondent, among other things, (i) to unilaterally increase individual employees' wages, (ii) to unilaterally move employees from a higher to a lower wage tier, (iii) to unilaterally reduce employees' hours, (iv) to unilaterally alter or eliminate most benefits, and (v) to unilaterally eliminate the bargaining unit entirely. At the same time, the proposed management-rights clause also provided that the rights established therein "[could not] be the subject of the grievance and/or arbitration procedures," and the proposed no-strike clause would have precluded any and all protests, "regardless of the reason." Thus, employees and the Union would be left with no avenue to challenge any of the Respondent's decisions with regard to the nearly exhaustive rights reserved to the Respondent under the management-rights clause, even if the Respondent decided to eliminate the bargaining unit entirely.[14] The Board has consistently found such proposals to be an indicator of bad faith. See, e.g., *Kitsap*, 366 NLRB No. 98,

---

[11] Cf. *Kitsap*, 366 NLRB No. 98, slip op. at 9 (wage proposal under which union "would be entitled only to *receive notice* of any wage rate changes, not to bargain" suggested bad faith (emphasis in original)).

[12] Cf. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 488 (proposal permitting employer to make unilateral changes to "important employee benefits such as vacation days, holidays, medical insurance, leave time, and life, disability, and on-the-job accident insurance" suggested bad faith). We note that bargaining proposals seeking contract provisions that link unit employees' benefits to those of non-unit employees do not by themselves suggest bad-faith bargaining. Here, however, the Respondent's proposal went well beyond such linkage.

[13] Cf. *Radisson Plaza Minneapolis*, 307 NLRB at 95 fn. 8 (finding that proposal incorporating handbook "was indicative of bad faith even assuming that the [r]espondent was merely demanding a regime of continual bargaining, at its option" rather than the ability to unilaterally revise the handbook without bargaining).

[14] See *San Isabel Electric Services, Inc.*, 225 NLRB 1073, 1079 fn. 7 (1976) (citing cases establishing that the Board has "consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure").

slip op. at 4 fn. 11, 9; *Regency Service Carts*, 345 NLRB 671, 675, 722 (2005).

Considered in their entirety, the Respondent's proposals would have required the Union "to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 489; see also *Regency Service Carts*, 345 NLRB at 672–676 (proposed management-rights clause that left employer with "unilateral control [] over virtually all significant terms and conditions of employment," together with insistence on a grievance and arbitration clause that excluded from arbitral review the employer's exercise of discretion under its proposed management-rights clause, indicative of bad faith); *A-1 King Size Sandwiches*, 265 NLRB at 858–859 (employer bargained in bad faith where it insisted on retaining the unilateral right to set wage rates and "total control over virtually every significant aspect of the employment relationship," including discipline and discharge, work rules and regulations, subcontracting, and transferring unit work).

As the Supreme Court recognized long ago, "there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' Union*, 361 U.S. at 486. Therefore, although the Board may not decide whether particular contract proposals are acceptable or unacceptable, *Reichhold Chemicals*, 288 NLRB at 69, it must sometimes consider a party's proposals, along with all other relevant evidence, if the duty to bargain is to have any meaning at all. Indeed, "[s]ometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. The fact that it may be difficult to distinguish bad faith bargaining from hard bargaining cannot excuse our obligation to do so." *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609–610 (7th Cir. 1979) (citations omitted).

For all the reasons discussed above, as well as the additional indicia of bad faith found by the judge (as limited herein),[15] we conclude that the Respondent crossed the line that separates lawful hard bargaining and unlawful bad-faith bargaining. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by engaging in overall bad-faith bargaining.[16]

ORDER

The Respondent, Altura Communication Solutions, LLC, Fullerton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local 21 (Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by implementing portions of its final contract offer without first bargaining to a good-faith impasse.

(c) 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time field service technicians based at reporting locations throughout the United States (except New York City), but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on January 1, 2016.

(c) Within 14 days from the date of this Order, offer David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark,

[15] See fns. 4 and 5, supra.

[16] To remedy this violation, the judge issued an affirmative bargaining order. Although the Respondent excepts to the judge's finding that it unlawfully failed and refused to bargain in good faith in violation of Sec. 8(a)(5), it does not argue that the judge's recommended affirmative bargaining order is improper even assuming the Board affirms the judge's Sec. 8(a)(5) violation finding. We therefore find it unnecessary to provide a specific justification for that remedy. See *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119, slip op. at 1 fn. 2 (2019) (collecting cases).

and Paul Curran full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran whole for any loss of earnings and other benefits suffered as a result of their unlawful buyouts, in the manner set forth in the remedy section of the judge's decision.

(e) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes in terms and conditions of employment on January 1, 2016, in the manner set forth in the remedy section of the judge's decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(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, social 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 backpay due under the terms of this Order.

(h) Post at its facilities nationwide copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 13, 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. The Respondent shall take reasonable steps 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 October 21, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the 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.

Dated, Washington, D.C. May 21, 2020

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

[17] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If any facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

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 in good faith with the International Brotherhood of Electrical Workers, Local 21 (Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT unilaterally change your terms and conditions of employment by implementing portions of our final contract offer without first bargaining to a good-faith impasse.

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, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time field service technicians based at reporting locations throughout the United States (except New York City), but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL, on the Union's request, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on January 1, 2016.

WE WILL, within 14 days from the date of the Board's Order, offer David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran whole for any loss of earnings and other benefits resulting from their unlawful buyouts, less any net interim earnings, plus interest, and WE WILL also make these individuals whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful changes to your terms and conditions of employment on January 1, 2016.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

ALTURA COMMUNICATION SOLUTIONS, LLC

The Board's decision can be found at www.nlrb.gov/case/13-CA-174605 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Christina B. Hill, Esq., for the General Counsel.
Anthony B. Byergo, Esq. and *Matthew J. Kelley, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),* of Seattle, Washington, and of Indianapolis, Indiana, for the Respondent.
Barry M. Bennett, Esq. and *George A. Luscombe, III, Esq. (Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich),* of Chicago, Illinois, for the Charging Party

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employer that came to collective bargaining determined to restructure the collective-bargaining agreement, terms and conditions of employment, and relationship, with its long-time union-represented employees. Its stated goal was to obtain virtually unlimited discretion or "flexibility" in determining a wide range of terms and condition of employment, including whether to use bargaining unit employees at all. In pursuit of this goal it proposed and insisted upon, not only proposals that gave it highly discretionary prerogatives during the contract's term, but as to many mandatory subjects of bargaining demanded that they be relegated to and governed by the unilaterally drafted and maintained employee handbook, generally applicable to

nonrepresented employees.

With a few changes, the employer insisted on its positions and when, after three meeting sessions in eight weeks (a total of approximately eight days of meetings), while clearly drawing the union toward its positions, the employer grew frustrated with its inability to obtain the union's agreement and began arguing that the parties were at impasse. After being cajoled into a further bargaining session with mediator—at which both parties made movement—it ceased meeting with the union and evaded, dismissed, and set preconditions for the union's efforts to restart negotiations, even when the union repeatedly offered significant proposals with increasing movement toward the employer's positions. After repeatedly rejecting every union effort to bargain, the employer announced implementation of selected parts of its proposal.

As discussed herein, the combination of the extensive discretion in a wide range of terms and conditions, unyieldingly insisted upon, the repeated and premature declarations of impasse that were used to justify the employer's abandonment of meaningful bargaining, the imposition of preconditions to renewed bargaining, and the refusal to continue a reasonable face-to-face meeting schedule to bargain, provide convincing evidence of an overall failure to bargain in good faith under the National Labor Relations Act (Act).

Moreover, the employer's unilateral implementation of portions of its bargaining proposal provides further evidence of unlawful bad faith and is independently unlawful as well. Contrary to the claim of the employer, there was not a valid lawful impasse when it implemented. Indeed, even assuming, wrongly in my view, that the employer did bargain in good faith to a valid bargaining impasse at some point in the months before implementation, the Union's efforts to reignite bargaining—the record shows that along with providing significant additional bargaining proposals moving toward the employer's position it was nearly begging for the restarting of negotiations in an effort to bring the employer back to the bargaining process—clearly broke any impasse that could have existed before implementation was announced. In sum, this is an employer that lost sight of its obligations under the Act to collectively-bargain in good faith. As discussed herein, I find that by its overall conduct the employer refused to bargain collectively and in good faith, and in addition, unlawfully and unilaterally changed its employees' terms and conditions of employment.

STATEMENT OF THE CASE

On April 21, 2016, Local 21 of the International Brotherhood of Electrical Workers (Union or Charging Party) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by Altura Communication Solutions, LLC (Altura or Employer or Company or Respondent), docketed by Region 13 of the National Labor Relations Board (Board) as Case 13–CA–174605. A copy of the charge was served on the Employer April 22, 2016. A first amended charge was filed by the Union in this case on September 20, 2016, and served on the Employer the same day.

Based on an investigation into these charges, on November 30, 2016, the Board's General Counsel, by the Acting Regional Director for Region 13 of the Board, issued a complaint and notice of hearing alleging that the Employer had violated the Act. On December 12, 2016, the Employer filed an answer denying all alleged violations of the Act.

A trial in this case was conducted March 20–23, 2017, in Chicago, Illinois. Counsel for the General Counsel, the Charging Party Union, and the Respondent Employer, filed posttrial briefs in support of their positions by May 18, 2017.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, the Respondent admits, and I find that at all material times, the Employer was a corporation with an office and place of business in Downers Grove, Illinois, and that it has been engaged in the business of selling, installing, and servicing communication platforms throughout the United States, including the onsite installation and servicing of telephony equipment. During the past calendar year, a representative period, the Company performed services valued in excess of $50,000 in States other than the State of Illinois. At all material times, the Company has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

General background

Altura installs and repairs customer provided telephonic systems and equipment for commercial and institutional enterprises located throughout the United States. Altura is a successor company to Fujitsu Business Communications, which many years ago bought the private branch exchange (PBX) manufacturing business of GTE Business Systems. Fujitsu manufactured, installed, and maintained PBX equipment for large institutions such as universities, hospitals, and state and local government buildings, and relied at the time on TDM switching technologies. As the technology changed in the late 1990s, Fujitsu decided to close in 2001. Altura was formed in about 2004 out of a "partnering" of Fujitsu with Avaya, the successor to AT&T's PBX operations, and together they developed software to integrate the Fujitsu systems into an alternative communications technology. This was a successful business—the new technology made the Fujitsu installed systems viable—and the business did well until approximately 2010, when, according to Altura President and CEO Robert Blazek, the shift to cell phone and PC applications and away from traditional phone systems began "to hit all the traditional Voice Over IP manufacturers hard." As a result, Altura has endured declining revenues for the last five or six years, a "brush with bankruptcy in 2013," and difficult financial circumstances generally.

Altura maintains a current work force of approximately 150, including management. Approximately 40–50 employees are Union-represented. The Union represents a bargaining unit of Altura's field technicians who work around the country, usually reporting to customer sites to perform their work. These

employees are spread around the country in approximately 28 "seniority areas." There are eight physical offices across the country. Some employees are dispatched as needed to different customers within their area, while others are essentially dedicated to and continuously report to a particular client or customer. These technician employees have been represented by the Union for at least 30 years, going back to the GTE-era, and once included a group of "logistics coordinators" who managed warehouse delivery. According to Blazek, by 2012, the warehouses were gone, and those employees are no longer part of the bargaining unit. In addition to the bargaining unit employees, Altura employs approximately ten project managers, ten professional engineers, and ten network operation engineers, whose work sometimes overlaps with bargaining unit work based on the needs of customers, the availability of bargaining unit employees to perform the work, and general expedience.

Consistent with the decline in revenues, as well as technological changes, employment at Altura (including nonbargaining unit) has declined from over 300 in 2001, to approximately 150 today. Bargaining unit employees have seen even steeper relative declines: in 2001 there were approximately 120 employees working in the bargaining unit. Union Vice President and Assistant Business Manager Bill Henne, who headed up the Union's 2015 negotiating team, testified that at the start of the 2015 negotiations there were roughly 50 bargaining unit employees, while Blazek testified that there were 39 at the time of the hearing, i.e., in March 2017. (The "Seniority Area Update" provided by the Employer lists 52 bargaining-unit employees as of July 1, 2015.)

The decline reflected the changes in the industry. The "legacy technologies" TDM work long performed by the unit technicians was being increasingly replaced by "advance technologies." Blazek described Altura's work as having moved from "traditional telephone work to being much more data and data [di]agnostic and also much more programing and software knowledge. The level of hardware has dropped dramatically over time. It's becoming much more of a software-based industry and the corresponding skills [required] are changing to represent a software-based solutions center." According to Blazek, "traditional telephony work has declined to the point where in some of the reporting centers I really don't have any of it." As a result in the change of the nature and complexity of the work, Blazek described a situation where some of the union-represented technicians had "embraced these new technologies" and had learned how to work on the new technologies while others had "stayed more in the TDM space," for which there was less work available. Blazek explained that, given that there were only two or three employees in a "seniority center" area, it was increasingly difficult to support the customers in that area, "especially when I have differences in the skills and abilities of most people in those areas." In response, Blazek described an extensive training program for technicians that, "for the most part we've been successful" with, but he described the balancing of work among variously-skilled employees in the unit as "some of the biggest challenge we've had with the Union and our conversations over the last nine, ten years."

2015 bargaining background

The last collective-bargaining agreement between the parties was effective August 1, 2012, and scheduled to expire July 31, 2015 (the 2012 Agreement).

As referenced, Altura's President and CEO is Robert Blazek. Blazek has been Altura's President and CEO since the Company was formed in 2001, and he held positions with Altura's predecessors for approximately 16 years before that. Blazek was the Employer's chief negotiator in the 2015 collective-bargaining negotiations that are the focus of this case. Also on the negotiating team for the Employer was Greg Feller, Altura's HR director, and Tim Henion, the vice-president of sales and operations. Attorney Anthony Byergo also participated in one bargaining session in 2015. For the Union, Vice-President and Assistant Business Manager Henne was the principal bargainer. He was assisted by Business Representative Mike Grindle, and at times by President and Business Manager Paul Wright, and also by Chief Steward Paul Waters and Shop Steward Jeff Stewart.

With the expiration date in sight, on April 30, 2015, Human Resources Director Feller and Union Representative Henne agreed for the parties to meet June 4 in the Chicago area, June 23–24 in Phoenix, and July 28–29 in Phoenix.

The Union's offices are in Downers Grove, Illinois, outside of Chicago. Blazek's office is in Phoenix. Altura's headquarters is in Fullerton, California. Blazek testified that in past negotiations, as here, the parties would "as a general rule" alternate negotiating sites between the central part of the country and the west coast. Henne agreed that in past negotiations the parties had alternated "between Phoenix, Arizona, a different Company location at the time and Downers Grove, Illinois, either between our office or the Company's location in a town north of Downers Grove, Illinois."

Blazek testified that going into negotiations for 2015, one of the Employer's chief goals was "flexibility" in its terms and conditions of employment. Blazek testified that "I absolutely needed future flexibility." As an example of the flexibility he sought, Blazek described wanting the ability to only have wage increases given in the Employer's discretion, so that they could be awarded to the "higher skilled technicians" who were billed to customers at a higher rate, rather than having an across-the-board wage increases that "would lock me in." In the area of subcontracting, Blazek described "want[ing] flexibility" from "the inability to lay somebody off," whenever the Employer preferred to have nonunit employees or supervisors perform the work. This theme of "flexibility," i.e., employer discretion, was central to the Employer's vision for these negotiations. As to healthcare, "Our intention was not to stop providing healthcare or, you know, reduce people's hours. That's not the intent at all. It's to have the flexibility" to do so should the Employer believe it necessary for the good of the business. Thus, while Blazek testified that there were no plans to eliminate healthcare for employees, he wanted to come out of bargaining with a contract where "we could" eliminate it if the Employer desired to do so. Blazek described wanting a system that made pay and layoffs a matter of management discretion not "[b]ecause we didn't like somebody and we were going to pick on them," but rather, "We were looking for flexibility all around." Essentially, the Employer sought and talked openly of wanting to have the same

"flexibility" with the union-represented workforce that it enjoyed with the nonrepresented workforce. The goal, according to Blazek, was "to have the flexibility and the same flexibility on both sides, Union and non-Union." He testified, "we were trying to . . . treat all our employees equally." The nonunion employees' terms and conditions were governed by an Employer-drafted handbook that could be changed at any time by the Employer and Blazek described that a goal of these negotiations was for the Company to seek the same "[f]lexibility and simplicity" in its dealings with union-represented employees. "As the Company has shrunk, it makes more sense to try to offer the same benefits and the same structure for all the people. Blazek testified that having "two policies, two practices [one for unit and one for nonunit employees] . . . for a small finance team that's problematic and difficult to manage." In terms of this "simplification," Blazek explained that the "contract itself had more pages than employees" and covered items in detail that "made it harder for our back office people to manage." Historically, the unit employees' benefits have been distinct from the nonunit, but Blazek testified that "through the life of Altura and successor agreements, we've been working to bring those two together," making changes toward that end in each successive negotiation.

Notably, although the Employer's financial circumstances were an animating concern in the negotiations, and were substantiated with information provided to the Union, the record is also clear that the Employer affirmatively eschewed any claim of an inability to pay for Union negotiating demands at any time in the negotiations.

June 4 bargaining in Downers Grove, Illinois; the Employer's first proposal

The parties met to bargain as planned on June 4. Altura's bargaining team was composed of Blazek, whose office is in Phoenix; Feller, whose office is in the Employer's headquarters in Fullerton, California; and Tim Henion, whose office is in Michigan. Blazek testified that "ultimately" he was the chief spokesperson, but Henion and Feller also spoke for the Employer in their areas of expertise.

The Union's bargaining committee was headed by Henne. Also in attendance was Michael Grindle, a union business representative, Jeff Stewart, chief steward, and Paul Waters, shop steward.

The June 4 meeting took place at the Union's offices in Downers Grove, Illinois, outside of Chicago. The meeting began with Blazek making an opening statement referencing the vast changes in the industry, and the changes to the Employer's and its partner Avaya's businesses. Blazek told the group that based on the changes in the business,

> the contract we have doesn't make sense and its gotta change, its 80 pages, I'm gonna continue to reduce my management, we need to start fresh and that's what we are gonna propose to you folks. Avaya's revenue has declined 30%, 4.5 billion revenue, 6 billion in debt coming due, hard pressed to refinance. If they have to okay it, if they can't refinance, none of its good. All of that leads to we are in a trouble as a business, employees are in trouble too, we are in this together.[1]

Blazek went on to answer questions posed by Henne, and to discuss in more detail the financial situation of the Employer including the losses in recent years and a change in ownership that left the Employer owned by a "small private equity partner, silver oak. Myself, Tim, couple other managers all have a piece."

After this discussion, the Employer provided the Union with its initial bargaining proposal, with Blazek stating:

> so back to opening comments, look at the agreement we've got, still has GTE references, 80 page agreement for my size company didn't make sense, we wrote this for simplification, flexibility to meet customer needs, strongly feel current agreement limits us.

Blazek told the Union, that he was "not sure how you wanna go through this, this is dramatically different from what we have today, we did use the existing agreement as the basis, a lot of this [is] skinnying this language down." Henne noted immediately that the Employer had "increased management rights." Blazek responded, "absolutely need to manage the business." The parties broke to allow the Union to read through the proposal.

The Employer's 2015 proposal was, by any measure, a drastic revision of the structure, premises, and substance of the previous contract in numerous ways adverse to the protections enjoyed by employees under the existing labor agreement. Blazek agreed that the changes sought by the Employer "went beyond the sort of changes . . . requested in prior contracts." The Union did not learn of the Employer's plan to propose such significant changes to the collective-bargaining relationship until this June 4 meeting. Below I summarize some (but not all) of the chief proposed changes.

Articles 1 & 2, including broad zipper clause, management rights, and ability of the Employer to have bargaining unit work performed by nonunit individuals (supervisors, nonunit employees, subcontracting)

The management rights clause (which was two sentences in the 2012 Agreement (see, 2012 Agreement, art. 1)), was vastly expanded in the 2015 proposal (art. 2) to a page and a half, in favor of the Employer's rights. The proposal is sweeping in its scope, providing the Employer with unfettered discretion over nearly every function of administration in the facility, "includ[ing], but . . . not limited to, the following":

> To plan, direct, control and determine all operations; to determine the Company's objectives and policies, and to determine

[1] I note that in addition to oral testimony at the hearing, in reconstructing events at the bargaining table I have relied upon the contemporaneous and extensive bargaining notes taken by Union Representative Grindle and offered into evidence (some by the General Counsel and others by the Respondent). In addition, notes from one day of the bargaining taken by Shop Steward Waters were also introduced into evidence. I accept these notes as evidence—albeit not necessarily exclusive or conclusive evidence—of what was stated at the bargaining table and of what transpired in bargaining. *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963). All bargaining notes were offered into evidence without objection.

> and set all standards of service; to determine what services and products, if any, shall be provided, produced, serviced or distributed, and to determine what services and duties are performed and provided by employees and where they shall be performed, produced, serviced or distributed; to supervise and direct employees and their activities as related to the conduct of Company business or affairs; to establish the qualifications and conditions for employment and to select and employ employees; to schedule and assign work (including overtime work) and to establish, schedule and change the hours of work (including overtime); to assign or to transfer employees within the Company; to establish and enforce work and productivity standards and, from time to time, to change those standards; to lay off or relieve employees due to lack of work or funds or for other reasons; to determine the methods, means, organization and number of personnel by which its operations and services shall be conducted or provided; to make and enforce reasonable rules and regulations regarding the conduct of employees; to promote and transfer employees; to discipline, demote, suspend and discharge employees for cause (probationary employees without cause); to change, relocate, modify or eliminate existing programs, services, methods, equipment or facilities or close its business or any part thereof; to determine whether services or goods are to be provided or produced by employees covered by this Agreement or by other non-bargaining unit employees (including supervisors and temporaries) and non-employees (including contractors) not covered by this Agreement; to hire all employees and, subject to provisions of law, to determine their qualifications, and the conditions for their continued employment, or their dismissal or demotion, and to evaluate, promote and transfer all such employees; to determine the duties, responsibilities, and assignment of employees, both in the bargaining unit and outside the bargaining unit. The foregoing enumeration of management's rights shall not be deemed all-inclusive so as to exclude other rights of management not specifically delineated in this Section.

The provision goes on to state that the Employer's "powers . . . shall be limited only by the specific and express terms of this Agreement," and that "the Company has the right to manage its business and direct its employees as in its judgment it deems is proper, unless restricted by the express language of this Agreement," and that "the exercise of such right or action taken by the Company which is not specifically and clearly limited by the express terms of this Agreement, cannot be the subject of the grievance and/or arbitration procedures under this Agreement."

The Employer's proposal transferred what had been a subcontracting clause of the 2012 Agreement (see art. 3 of 2012 Agreement) to the expanded management rights article (art. 2) and specifically to section 2.3. This subsection of the Employer's proposal provided that the Employer could freely assign bargaining unit work to anyone including nonemployees:

> Managers, supervisors, other non-unit employees (including, but not limited to contingent workers), and other non-employees shall be permitted to perform any work (including work otherwise performed by employees in the bargaining unit) for the operation of the Company's business.[2]

Blazek readily agreed that under this proposal there would be no limit on the Employer's ability to have nonbargaining unit people do work that had been done by the bargaining unit in the past.

The new proposed zipper clause replaced the one-sentence version that was in article 2 of the 2012 Agreement and was now expanded and placed as section 4 to a new article 1 "Scope and Purpose of Agreement." Proposed section 1.4 stated:

> The Union and the Company [agree] that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at between the parties after due exercise of that right and opportunity are set forth in the Agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered by this Agreement. No agreement, alteration, understanding, variation, waiver, or modification of any of the terms or conditions or covenants contained herein shall be binding upon the parties hereto unless made and executed in writing between the parties and made part of this Agreement. This Agreement supersedes all previous agreements, including all verbal or written supplemental agreements and all past agreements or practices.

These proposals, coupled with the deletion of the restriction in the 2012 Agreement (art. 3) on contracting out bargaining unit work "if it will directly cause the layoffs of regular employees," would, if adopted, provide the Employer with unlimited discretion in determining whether bargaining unit work was ever performed by the bargaining unit, or whether it was to be contracted out, performed by nonunit employees, or performed by managers or supervisors.

Article 4: No strike-no lockout provision

The No Strike clause proposed by the Employer was much expanded from the 2012 Agreement's clause on the subject. It greatly expanded the scope of prohibited activity for employees, including prohibiting handbilling or "protest regardless of the reason for doing so" and authorized "immediate discharge or other discipline, at the discretion of the Company" as the penalty for an employee engaged in an activity prohibited by the clause, with limits to the basis on which the penalty could be challenged through the grievance-arbitration procedure.

As originally proposed, in the event of a violation of the No-Strike clause, the provision stated that there would be no

[2] I note that throughout negotiations the parties referred to this as a proposed subcontracting clause. However, the clause, on its face, is much broader than just subcontracting.

"negotiation or discussion on the subject matter(s) allegedly causing the violation until after the violation has ceased." In other words, as initially proposed, the proposed contract provided for a waiver of the duty to bargain over the underlying employment dispute for the duration of a no-strike violation.

The provision's prohibition on lockouts is conditioned on employee and union compliance with the No-Strike provision. Finally, proposed section 4.5 states that "[e]ach Union officer, and each employee who holds a position of officer or steward of the Union, occupies a position of special trust and responsibility in maintaining and bringing about compliance with the provisions of this Article," and requires the Union and its officers and stewards to take certain steps directed toward ensuring employee and union compliance with this provision.[3]

Article 5: Grievance and arbitration procedure; article 6 non-discrimination

The proposed grievance and arbitration procedure contained many changes. It introduced a section, 5.2, titled "informal resolution," in which employees were "encouraged" to resolve their grievances "through informal discussions with their supervisors." Under this proposed procedure, the union steward, only "[w]hen specifically requested by an employee[,] . . . may accompany the employee (at a mutually agreed time) to assist in the informal resolution of the grievance." This originally-proposed section further provides that "[s]uch informal discussions are not to be construed as part of the grievance procedure."[4]

It added numerous procedural requirements—including a strict time limit for default, applicable only to the Union, and precise requirements for what must be stated in the grievance.[5]

In the Employer's original proposal, the arbitrator's power is

[3] The full clause as originally proposed, is set forth here:

ARTICLE 4
NO STRIKE - NO LOCKOUT

Section 4.1. No Strike. The grievance and arbitration procedure set forth in Article 5 are the exclusive means of resolving any claimed violation of this Agreement, whether or not a grievance has been filed. Accordingly, there shall not be (nor shall the Union, its agents, officers, stewards, representatives, or employees encourage, instigate, promote, sponsor, engage in or sanction) any strike (including sympathy strike), picketing, boycott, handbilling, sitdown, stay-in, slowdown, concerted stoppage of work, concerted refusal to perform overtime, concerted, abnormal and unapproved "work to the rule" situation, mass resignations, mass absenteeism, or any other intentional curtailment, restriction, interruption or interference with operations or work, or protest regardless of the reason for so doing.

Section 4.2. Penalty. Any employee engaging in activity prohibited by Section 4.1 or who instigates or gives leadership to such activity, shall be subject to immediate discharge or other discipline, at the discretion of the Company. In the event of discipline or discharge, the only matters which may be made the subject of a grievance is whether or not the employees actually engaged in such prohibited conduct and whether the penalty given to all employees in this instance was consistent. The failure to confer a penalty in any instance is not a waiver of such right in any other instance nor shall it constitute a precedent of any kind.

Section 4.3. No Negotiations. In the event of a violation of Section 4.1 by employees or the Union, there shall be no negotiation or discussion on the subject matter(s) allegedly causing the violation until after the violation has ceased.

Section 4.4. No Lockout. During the term of this Agreement, the Company will not institute a lockout over a dispute with the Union so long as there is good faith compliance by the Union with this Article, unless the Company cannot efficiently operate in whole or in part due to a breach of Section 4.1.

Section 4.5. Union Official Responsibility. Each Union officer, and each employee who holds a position of officer or steward of the Union, occupies a position of special trust and responsibility in maintaining and bringing about compliance with the provisions of this Article. Accordingly, the Union agrees to notify all Union officers and stewards of their obligation and responsibility for maintaining compliance with this Article, including their responsibility to abide by the provisions of this Article by remaining at work (that is, those who are employees of the Company) during any interruption as outlined above. In addition, in the event of a violation of Section 4.1, the Union agrees to inform its members of their obligations under this Agreement and to encourage and direct them to return to work by all means available under its constitution, by -laws, and/or otherwise.

[4] The text of 5.2 stated:

Section 5.2. Informal Resolution. Employees are encouraged to resolve through informal discussions with their supervisors any grievances as defined herein. When specifically requested by an employee, a Union steward may accompany the employee (at a mutually agreed time) to assist in the informal resolution of the grievance. Such informal discussions are not to be construed as a part of the grievance procedure.

[5] Sec. 5.3 and 5.7 of the grievance-arbitration procedure state:

Within ten (10) working days after any action of the Company giving rise to a grievance as defined in Section 5.1, the Union must submit such grievance in writing to the Human Resources Director. Such written grievance must include a short statement of the facts (including affected employee(s), dates, locations, and short summary of claim) and a statement of specific provisions of this Agreement allegedly violated. Failure to submit a grievance within ten (10) working days after the action of the Company giving rise to the grievance will result in the Company's action being considered final and the grievance will not be eligible for further consideration under this grievance procedure.

Within ten (10) working days of the submission of a written grievance, a meeting (in person or by phone or video-conference) will be held between the HR Director, the Union's representative, the aggrieved employee(s), and any other necessary attendees. The parties shall make reasonable attempts to resolve the grievance during the meeting. However, upon conclusion of the meeting, the Company will be allowed ten (10) working days to provide an official written response to the grievance. If the Company does not provide a written response within such time, the grievance shall be deemed denied by the Company and the Union may proceed as set forth in Section 5.4.

. . . .

Section 5.7. Time Limits. All of the time limits specified in the grievance and /or arbitration procedure shall be jurisdictional and shall be the conditions . precedent upon which the grievance shall be processed further. If any and /or all the time limits are not complied with, the Company may rightfully and lawfully refuse to process the grievance further, and the grievance shall be considered null and void and end then and there, without either the Union or any allegedly aggrieved team member being entitled to process the matter further to arbitration or

limited in numerous ways including mandating "that the arbitrator shall have no power or authority to alter or change any discipline and/or discharge imposed by the Company unless such discipline is clearly arbitrary."[6]

Finally, the Employer's June 4 proposal removed the language from the 2012 Agreement stating that "the decision of the arbitrator will be final and binding upon the parties," with no such requirement or agreement to abide by the arbitration award provided for in the proposed language.

Related to this were the changes originally proposed in article 6 Non-Discrimination. This Employer proposal permitted employees to bring a claim for discrimination, retaliation, harassment or other "equal opportunity" claims to arbitration only if the employee waived his or her right to "pursue any monetary, equitable, or other relief (including attorney's fees and costs) through the filing of any charge of discrimination, lawsuit, or other legal action of any sort outside the grievance and arbitration procedures."

Wages (schedule A attached to Employer's proposal):

The Employer added a newly created "Wage Philosophy" section that articulated the view that more highly skilled employees were more valuable and more in demand, and thus:

> Wage rates for the higher skilled technicians who are in higher demand should not be limited by the wage rates of the lower skilled technicians who are in lower demand. Additionally, differentials in pay are sometimes warranted by market economics and differences in performance.

In furtherance of this, the Employer proposed a new two-tier wage system under which the unit employees (technicians) would be divided among lower-paid Level A and higher-paid Level AA technicians. The Employer proposed a new lower minimum rate for the Level A technicians of $25.66 per hour, while Level AA technicians would remain (at least) at the previous agreement's minimum rate for experienced technicians of $34.35 per hour. The proposal provided for no general across-the-board or any other scheduled raises. However, as in the 2012 Agreement, the Employer could provide discretionary wage increases as it saw fit for employees.

The proposal provides that Level A will be the classification the Employer assigns to "those who have mastered only legacy voice, messaging, and similar technologies, and are not deemed qualified to perform work and/or do not perform work at least one half of their work time in installations, repairs, or MAC orders with higher level technologies without assistance." Level AA was to be the classification given technicians who had mastered higher-skilled technologies and are "deemed qualified to perform [such] work and do perform work at least one half of their work time." Although not stated until the July 30 session, Henion later told the union negotiators that Level A versus AA assignment would be based on "skills and ability, their attitude, their work ethic, any number of things could cause them to become a . . . level A." Blazek pointed out (in a discussion on July 30) that Level A employees would not automatically move to Level AA by obtaining the proper certifications because "we have employees that have bad attitudes, don't want to do that work, they aren't gonna get a raise." R Exh. 5 at 18; see also R Exh. 18 at 2-3. Blazek agreed in his testimony that which employees became a Level AA and whether employees relegated to Level A received a pay reduction remained "at all times" in the discretion of the Employer to determine.

Article 8: Continuous service and seniority

Article 8 of the Employer's proposal changed the basis for determining layoffs (sec. 8.4). The current contract made seniority the basis for layoffs (unless an employee did not have the minimum skills and abilities necessary for the job). The Employer's proposal provided for layoffs to be based on "the judgment of management as to which skills, certifications, experience, and abilities are necessary to perform existing and expected future client work." Seniority came into play "[o]nly if management, in its sole discretion, deems two or more employees to be equal in skills, certifications, experience, and abilities to perform existing and expected future client work." Unlike under the current 2012 contract, where failure to provide training opportunities to an employee would allow the employee to avoid layoff for lack of skills and abilities, the Employer's proposal stated that "[a] lack of training may not be used by an employee or the Union as an excuse for not having skills, certifications, experience or abilities."

In section 8.5 (Severance) the Employer proposed a significant change to severance. The 2012 Agreement provided for employee severance in the event of layoff in the amount of one week per year of service. The Employer's 2015 proposal limited this severance to a maximum of 26 weeks. See, section 8.5. In other words, under the Employer's proposal, for employees with 26 or more years of service, the severance was capped at 26 weeks' pay. Given the extensive seniority of the bargaining unit—approximately 30 of the 52 unit employees listed in the July 1, 2015 Seniority Update had seniority dates of more than 26 years, and 19 had seniority dates of more than 37 years—this

otherwise. However, by mutual agreement of both the Company and the Union, the parties may agree to modify or extend any of the jurisdictional time limitations specified above in any particular case.

[6] Sec. 5.6, as originally proposed, states:

> Section 5.6. Authority of and Limitations on the Arbitrator. The subject matter to be arbitrated shall be limited solely to the interpretation or application of the provisions of this Agreement. The arbitrator shall have no authority to amend, add to, subtract from, or delete any of the language of any provisions of this Agreement, or to establish or change wages, the wage structure, the job classifications, work methods or the benefits in this Agreement. The arbitrator's authority shall be expressly limited to a decision upon the question of alleged violation of a specific provision of this Agreement, rather than indirect or implied intent thereof, and a decision upon any grievance subject to arbitration hereunder shall be in accordance with the terms of this Agreement. The arbitrator shall have no authority or jurisdiction except that given specifically in this Article, unless special authority and jurisdiction shall be mutually submitted in a written submission Agreement. Furthermore, the arbitrator shall have no power or authority to alter or change any discipline and /or discharge imposed by the Company unless such discipline is clearly arbitrary.

was a significant loss to employees, particularly given the prospects for layoffs that Blazek discussed, and the Employer's unwillingness to allow seniority to be a factor in layoff decisions. The Company negotiators told the Union negotiators that 26 weeks maximum severance "was much more to market" and that more severance "was not reasonable . . . in today's marketplace."

In addition, the Employer's proposal spelled out conditions on the release that employees must sign in order to receive severance, including that the employee's waiver binds the Union and that any breach of the release results in repayment of all amounts by the employee and the payment to the Company of reasonable attorneys' fees incurred by the Company.

Article 9: Tools

This provision of the proposal removed from the 2012 Agreement's provision on tools the prohibition on the Employer requiring employees to transport tools and equipment in their private vehicles and providing for some payment for mileage for employees who voluntarily transported tools and equipment in their private vehicles

Article 10: Hours of work

The Union felt that there was a longstanding past practice of the Employer providing employees with 40-hour work weeks. While the Employer did not concede that there was such a practice, the Employer's 2015 proposal, in article 10 (Hours of Work and Overtime), section 1 (Application of this art.), added language explicitly disavowing the point, stating that "nothing in this Agreement shall be construed as a guarantee of hours of work per shift, per day or per week." Coupled with the expansive zipper clause in section 1.4 of the Employer's 2015 proposal, the Union viewed the Employer's 2015 proposal in section 10.1 as an elimination of any practice of a guaranteed workweek—or the ability to bargain about it during the term of the contract.

In addition, section 10.1 stated that:

> Nothing in this Article nor Agreement shall be construed to create job or work jurisdiction or ownership in any particular group or classification of employees (inside or outside the bargaining unit) nor to prevent the assignment of employees to other work on regular or overtime hours or to cause the inefficient or ineffective use of manpower.

Thus, section 10.1 reinforced the elimination of the concept of bargaining unit work permitted by section 2.3 of the management rights section (see above).

The Employer's proposal in article 10, also limited (in 10.3) the circumstances in which overtime pay would be paid, specifically, among other situations, the overtime provisions no longer provided for overtime (as a sixth day of the week) for absences for an excused illness or for union business by union business representatives and stewards. See 2012 Agreement, schedule A, section 5D(IV), compared to Employer's 2015 proposal, section 10.3(c). In article 10, the Employer also altered the stand-by procedures. The Employer omitted standby premium rates from their proposal on June 4, but in discussion conceded that "there will be an amount there for that," suggesting that it would be put in future proposals.

Article 11: Healthcare

The 2012 Agreement (sec. 9 of schedule A) provided that unit employees would be offered the same healthcare plan rates offered by the Employer to all nonbargaining unit employees. In the 2012 Agreement, the Employer reserved the right to change providers or administrators, and thus, the coverage details. However, in the 2012 Agreement it committed that notwithstanding any changes "the Company will continue to provide comparable comprehensive coverage."

The Employer's 2015 proposal removed the promise to maintain "comparable comprehensive coverage" and expanded the reservation of Company rights to provide that:

> The Company reserves the right to change insurance policies, plans, carriers, administrators, providers, benefits, coverages, deductibles, or co-payments or to self-insure as it deems appropriate, provided such changes apply in the same manner to nonbargaining unit employees.

Thus, the Employer's proposal reserved to itself the right at any time during the term of the labor agreement to diminish, change, or even eliminate healthcare coverage and costs borne by the employees, as long as such changes apply also to nonunit employees. At the meeting Blazek confirmed this, telling the Union: "yeah, there's no obligation to provide healthcare, other than what's in Obamacare, we have legal, there's nothing in the agreement to do that. I don't know why we need that in an agreement, we need to be competitive."

In addition, the Employer's 2015 proposal moved to remove the Employer as a guarantor of any benefits—even for the Employer provided healthcare coverage. The proposal (sec. 11.4) provided that "[t]he failure of any insurance carrier(s) or plan administrator(s) to provide any benefit for which it has contracted or is obligated shall result in no liability to the Company, nor shall such failure be considered a breach by the Company of any obligation undertaken under this or any other Agreement." Finally, the Employer's 2015 proposal excluded health insurance disputes from the grievance and arbitration procedure and mandated that any such disputes be resolved "in accordance with the terms and conditions set forth in said policies or plans."

Article 13: Exclusion of multiple benefits from collective-bargaining agreement and the provision (of some of them) through the nonbargained Employer handbook

A highly significant change in both the proposed substance and form of employees' terms and conditions of employment is found in the Employer's 2015 proposal to eliminate multiple benefits and procedures found in the 2012 Agreement and have employees obtain benefits from the nonbargained, unilaterally-created, and unilaterally-maintained employee handbook. Under the Employer's proposal, the handbook would become the new source of terms and conditions for all benefits not provided for in the collective-bargaining agreement. As Feller told the Union, "basically all other company benefits [are to be the] same as nonunion, no reason to treat employees differently, we've been doing that on all our other benefits."

The 2012 Agreement provided for a wide array of bargained-for employee benefits. The Employer's proposal eliminated many of these benefits from the proposed labor agreement and

stated that "Company-provided employee benefits and other terms and conditions of employment" not referenced in the new agreement would be provided, if at all, pursuant to the non-negotiated Employer handbook applicable to nonunit employees. Article 13 of the Employer's proposal stated:

> To the extent not specifically governed by or referenced in this Agreement, all other Company-provided employee benefits and other terms and conditions of employment shall be as provided in the Altura Communication Solutions Handbook (effective June 1, 2009), including but not limited to holidays, vacations, funeral leave, jury leave, sick leave, Family and Medical Leave Act leave (and similar state and local benefits), and short term disability (STD) and long term disability (LTD) benefits. The extent, allowances, and terms of such benefits may be changed for employees covered by this Agreement, provided the same changes apply to other non-bargaining unit covered by the general terms of the Handbook. Employees covered by this Agreement, however, shall not be entitled to profit sharing or other discretionary bonuses in light of the negotiated wages and benefits otherwise provided in this Agreement.

Thus, pursuant to this provision, multiple benefits previously collectively bargained and in the current contract were removed from the proposed collective-bargaining agreement. Initially, these included, holidays, vacations, funeral leave, jury leave, sick leave, Family and Medical Leave Act leave, disability benefits (STD and LTD), grooming and work attire (renamed personal appearance), drug and alcohol policy and accident policy, and cell phone policy reimbursement. These were all benefits and subjects traditionally covered in the parties' collective-bargaining agreement, and under the Employer's proposal they were moved to the Altura handbook.

Other benefits in the 2012 Agreement were eliminated in the Employer's proposal and only indirectly or vaguely touched on by the handbook. These include article 19 of the 2012 Agreement (Disciplinary Action) which required that discipline be initiated within ten days of the incident for which the employee was being disciplined. This is omitted from the Employer's proposal and the handbook contains no comparable language. The 2012 Agreement contains (Attachment G) a Fleet Vehicle & Driving Safety Policy with rules on investigating and reporting accidents, and provisions setting forth a progressive discipline policy and penalties for driving violations and accidents. This is eliminated from the Employer' 2015 proposal and the handbook has no such policy but rather, according to Blazek, under the handbook, the discipline is at the sole discretion of the Company.

The handbook states that it "is not a contact, express or implied," and "is not intended to and does not create any rights, contractual or otherwise, between [the Company] and any of its employees and should not be understood as constituting a Company representation or commitment to any employee that the policies will be followed in every case." The handbook states that the Company "reserves the right to deviate or depart from, make exceptions to interpret, modify, and apply any of its policies and policy provisions (including those in this handbook) as it sees fit based on particular facts or changing conditions or as it otherwise determines for any reason or for no reason at all in its sole judgment." The handbook states that it "can be changed by Altura unilaterally at any time." Blazek stated that "the intent is everything [in the handbook] appl[ies] to everyone, except if there is something specific in the contract that supersedes it." Henne raised a concern about the items in the handbook changing during the term of the contract: "Contracts are signed for a certain time, trying to understand that, can I make an assumption that that would stay the same, outside of what you said Bob about legal things[?]" Blazek said, there are "no plans to change it, but if you ask if there are guarantees that no change, then no. If something changed business wise, then I would want to be able to change the handbook."

The full implications of article 13's default to the handbook as the source for terms and conditions of employment are not fully determinable. article 13 states that the "terms and conditions of employment shall be as provided in the Altura . . . Handbook . . . including but not limited to" the array of described benefits. Thus, the scope of the handbook is not described and, during the term of the contract, its coverage is potentially "limitless" given Altura's unilateral discretion to change the handbook. Thus, pursuant to article 13, other than terms and conditions of employment "specifically governed or referenced in this Agreement," the unilaterally-developed and controlled handbook is the source of authority, and that document can be changed at will. Thus, the terms and conditions of employment are a sprawling and essentially undefinable entity. Indeed, asked (in relation to the "included-but-not-limited-to" language of article 13 what *other* benefits not listed in article 13 fall under its handbook-default rule, Blazek's response was candid and revealing: "Oh, goodness, I don't know."

Article 13: Elimination of unit employees' entitlement to profit-sharing

As part of article 13, the Employer proposal eliminated any right of employees to receive profit sharing, even if paid to nonunit employees.

The 2012 Agreement (schedule A sec. 15) provided that "[b]argaining unit members shall be included in the same Altura Profit Sharing Program as nonunion employees for the Plan years 2012, 2013, and 2014." The contract also stated that profit sharing bonuses are paid at the discretion of management.

Article 13 of the Employer's 2015 proposal excluded unit employees from profit sharing or other discretionary bonuses that the Employer might choose to pay to all other employees. article 13 stated this as an exception to the general rule that unit employees would receive what nonunit employees received based on the employee handbook:

> Employees covered by this Agreement, however, shall not be entitled to profit sharing or other discretionary bonuses in light of the negotiated wages and benefits otherwise provided in this Agreement.

Article 14: Elimination of collectively-bargained training and performance standards

Article 25 of the 2012 Agreement provided for extensive rules on training and performance standards. These were not in the Employer's 2015 proposal. Instead, article 14 of the Employer's proposal, titled "Policies, Rules, Regulations and Performance Standards," provided, in relevant part, that

> All employees must comply with all policies, rules, and regulations, and meet performance standards, issued by the Company. The Company reserves the right to change all policies, rule, regulations, and performance standards, provided such does not violate an express term of this Agreement.

Section 12.3: Elimination of the Employer match for 401(k) contributions and Employer discretion to amend pension plan unlimited by any collectively-bargained agreement.

With the exception of a pension plan frozen for purposes of accruals and service in 2003, Altura's retirement to unit employees was provided through a Company 401(k) plan. As with the 401(k) provision in the 2012 Agreement, the 2015 401(k) proposal provided that "Altura shall have the sole discretion to administer and amend the Plan." However, under the 2012 Agreement, the Employer contributed 50 cents for each $1 of employee contribution, up 6 percent. This employer match was eliminated from the Employer's 2015 proposal.

Blazek told the negotiators that the match was being eliminated to balance out the 3 percent contribution to the IBEW's National Electrical Benefit Fund, to which the Employer made (and would continue to make under the Employer proposal) contributions on behalf of union member employees. Blazek told the Union that this amounted to a "dual contribution for Union personnel versus non-Union, the dual contribution being the Company 401(k) match as well as our 3 percent contribution into the NEBF pension fund."

Article 3: Union representation

This provision was substantially rewritten from the 2012 Agreement. As originally proposed by the Employer, it eliminated union security and converted the unit to open shop, without regard to whether such is required by the law of the state in which the employee works.

The provision also contained numerous requirements that the Union identify union representatives to the Employer as a condition for the Employer having an obligation to deal with them.[7]

In addition, section 3.4 (later updated to 3.5), limited union activity, including that non-employee union representatives. This section provided that nonemployee union representatives would have access to Company facilities

> to meet with a Union steward on his or her non-work time and in non-work areas, or to carry out such activities as are specifically provided for in this Agreement only after advising the Company by telephone or in writing of the matter requiring his attention and after scheduling a mutually agreeable time and location so as not to interfere with the business of the Company or its clients.

Section 15.1: Safety

The 2012 Agreement provided for the Employer to make safety provisions, and provided a procedure for the Employer and employees and Union to follow when an employee notified the Employer of a safety hazard. The Employer's 2015 proposal removed the procedure and stated:

> The Company will continue to make reasonable provisions for the safety of employees during their hours of employment at the Company. The employees will abide by the health and safety rules, and promptly inform their supervisor of any perceived health or safety risk. All health and safety equipment shall be provided by the Company. The Company may implement, in its sole discretion, safety incentive or bonus programs which will be subject to change, modification, or revocation at any time.

Schedule A section 5: Elimination of per diem and replacement with reimbursement for actual expenses

The Employer's proposal eliminated per diem travel reimbursement, and proposed that:

> Expense, mileage and travel reimbursement will be handled in the same manner for bargaining unit employee as it is for non-bargaining unit employees under the Company's policies governing such, and subject to such changes as may be made in the future. All per diems are eliminated.

The Employer's June 4 bargaining proposal was studied by the Union during a break in negotiations. After the break, the parties reconvened. Henne told the Employer, "well it is very apparent you are looking for some drastic changes in your contract with this local. I don't know with the extreme changes you've come with to determine how to even give you a counter." After a couple of questions, Henne asked the Employer to "walk us through" the proposal. The parties spent the day doing that. In his testimony, Blazek agreed that the parties took quite a long time to go through the Employer's proposal because of the major changes the Employer was seeking. The parties broke with the anticipation that arrangement would be made for a conference call between the parties the following Thursday June 11.

June 11 conference call

The conference call discussed at the June 4 meeting took place on June 11. Henne, Waters, and Grindle participated for the Union. The Employer was represented by Blazek, Feller, and Henion.

Just prior to the call, Henne sent the Employer a letter seeking a redlined version of the Employer's proposals that would show the proposed changes compared to the existing contract. Henne told the Company that "[t]he proposal you provided the Union has so many changes that, as a practical matter, it is impossible to determine exactly what contract changes you are seeking. It is unreasonable to demand that the Union respond to a proposal that does not show what it seeks to change, and what it is

[7] Sec. 3.3. of this proposal stated:

> Notification of Union Representatives. The Union will maintain (and keep current) with the Company a complete written list of its officers, business agent(s), stewards and staff representatives (including addresses and telephone numbers) who will deal with the Company. The Company shall be free to refuse to deal with any purported Union representative for whom the Company has not a received written notification from the Union President or Secretary confirming such individual's status as an official Union representative authorized to deal with the Company.

retaining, from the expired contract."

Feller told Henne in response that because of the extensive restructuring of the agreement, a redline version comparing the new proposal with the current contract would not be helpful. Henne suggested another conference call again before the meetings in Arizona (scheduled for June 23–25), but Blazek declined, responding, "my idea is to [g]et you the red line document, because honestly what we've presented is where we need to go so we don't need to set up a standing call at this moment."

Henne told Blazek, "the sooner you can get me that document, the sooner I can give you some verbal feedback as to where we want to go with this and where we can't go with some of the things." The redline document was not provided.

June 23–25 bargaining in Phoenix

The parties met again on June 23, in Phoenix, Arizona. The Union representatives were Henne, Grindle, and Stewart. The Employer representatives were Blazek, Feller, and Henion.

The Employer provided requested financial information, pursuant to a nondisclosure agreement.

Henne testified that "[d]ue to the fact that we hadn't received a redline version from the Company, we went through the contract line by line trying to understand the Company's intent of all the changes to the current contract."

Many issues were discussed that day. In particular, the discussion of the Employer's proposal for discretion to layoff and to reclassify employees was pointed. The Employer negotiators argued that they wanted discretion to determine who kept their jobs, and at what level pay, based on management's perception of skills and ability, and motivation, not seniority. Henion agreed that under the Employer's proposal, the Company had wide discretion on who to terminate. Henion made clear that this determination could involve more than whether an employee had the necessary certifications for the work. Henion told the Union, "You can have all the skills and not do the work." He said, "not everybody is productive." Henion told the Union that even if an employee had the skills and abilities, their wage and job classification level could be reduced due to work performance and attitude. Feller gave the example of an employee who had multiple certifications but never got the work done and someone else had to be sent to perform the work. Henne responded saying, "so in other words if you didn't like an employee you could just get rid of em." The Company made clear that their discretion was tied to their perception of employees' attitude toward work, not just their certifications, or their formal skills and abilities. Henion said that just because someone passes a certification or other test, "I don't know that that helps my situation, because he doesn't want to do new work." Henion pointed out that under the current contract, if he terminated the employee, "you're gonna grieve that, and what's it gonna cost to do that." Blazek summed up: "so what we're proposing is not I don't like you, in the event there's no work in that area, it's based on skills first, experience, certs, and abilities. 4 criteria, determined by management. I need to run the business based on the market. And yes a self-motivat[ion] is a better employee." As he put it later in the day, the proposal gave management discretion to consider "capabilities and motivation." Henion explained that employees could be shifted under the new two-tier technician scale between Level A and AA based on Company discretion at any time. The Employer negotiators expressed concern that some employees were unable and/or unwilling to learn new updated skills. If the traditional work these employees performed continued to decline, there would be no work for them and, without regard to seniority, they should be the first laid off. Henne understood from the discussion that under the Company's proposal employees could be reduced from AA to A for "[a]lmost any reason." Management's discretion was "unlimited."

There was discussion about many other aspects of the Employer's proposal. Henne pointed out that some policies under the current contract that the Employer proposed (in art.13) to have covered by the handbook, were not mentioned in the handbook. Feller agreed that some items—such as a cell phone reimbursement that the Employer paid for all employees, and was amenable to paying—were not in the handbook. But the Company wanted the flexibility to make changes without constraint. As Henion put it, "what we're saying is we don't want the policy in there. Almost everyone in the company has some sort of reimbursement. If we get to a place where we don't reimburse and he [Blazek] cuts it out for everyone, we don't want it in the book." Blazek added that cellphone reimbursement rates "are gonna go down, that's why I don't want to put it in there." When Henne suggested that having cell phone reimbursement language in the handbook would help the Company, Henion responded, "I don't need it."

The Union presented its proposal the morning of June 24. The Union's proposal was based on the current contract and struck through provisions it was proposing to delete and bolded and underlined new proposals. The Union proposed a three-year contact, no general wage increase but proposed keeping the minimum wage rate at the $34.35 for all long-term employees with management, at its discretion, being able to give additional increases to individual employees. There were some changes to premium pay for employees designated to be working as foremen or sub-foremen, and standby premiums, and a change in funeral leave pay. The Union proposed an increase in cell phone subsidy for employees who agreed to access Company applications for business purposes through their personal cell phone. Most significantly in light of the Employer's proposal, the Union proposed deleting and "refer[ing] to Employee Handbook," some of the benefits that were in the 2012 Agreement regarding FMLA Leave, profit-sharing, customer referral program, paycheck distribution, and Fleet Vehicle and Driving Policy (involving policy on accidents and discipline for accidents), drug and alcohol policy, grooming and work attire. However, the Union wanted to be provided 30 days' notice of any change in the handbook. The Union offered an expanded (but not the extent of the Employer's proposal) version of the management rights clause but deleted the zipper clause thus retaining rights to bargain during the term of the contract. The Union proposed to adopt significant portions of the Employer proposed grievance-arbitration procedure, streamlining the procedure, but maintained the language that arbitration was "final and binding."

In response, the Employer suggested, in essence, that the Union's proposal was too similar to the previous contract. Blazek said the Company would look at the Union's proposal but "for the most part we have to make some changes." Blazek told the

Union, "somehow we gotta get to where the employees are all treated equally," by which he meant unit and nonunit employees.

The parties continued their discussions on June 24 and June 25. At some point the Employer suggested that it was looking to demote roughly 14 of the technicians to Level A under their new proposal. However, the Employer did not say at this time how many of those 14 would have their pay reduced or who the individuals would be.

July 21–22 bargaining in Phoenix

At the end of the June 25 meeting, Henne asked for additional dates to meet in July. Through subsequent email exchanges (between June 26 and July 1) the parties agreed to meet July 21 and July 22. As referenced above, typically the parties rotated meeting rotations East (near Chicago) and West. However, the previously-scheduled sessions were already set up, and the Union agreed to go back to Phoenix for this add-on session.

On July 2, Feller emailed to Henne a "seniority listing" that identified which employees the Employer wanted to make A employees and which would be AA, along with associated rates of pay. The document showed 16 employees moved to A, with the remainder listed as AA. Seven of those designated as Level A were to have their pay grade reduced to $25.66 per hour. The remaining nine Level A employees remained at $34.35 per hour (minimum).

Prior to the July 21 meeting, the Employer emailed the Union the Second Company Proposal. The proposal, still without redline changes, even from its first proposal,[8] contains only a few significant changes from the Employer's first proposal.

> Article 4: Language added that the No-Strike No Lockout provision "will not be applied to punish employees in situations where [ ] a picket line is initiated by another labor union not affiliated with the Union in which there is a good faith safety concern; however, in the event that reasonable measures are taken to assure the safety of the employee, the employee shall report or return to work."
>
> Article 5: Language added that the informal employee/supervisor pre-grievance discussions "shall not in and of themselves be considered precedent setting." In addition, the time for the Union to file a grievance after an event and the time for the Company to respond was changed from 10 to 15 working days.
>
> Article 6: The Company removed from its "Non Discrimination" article the language requiring an employee to waive the right to go pursue a claim outside the grievance-arbitration procedure if the employee first pursues the claim in the grievance-arbitration procedure. It left a more traditional non-discrimination clause providing that the Company and Union would comply with "all applicable laws respecting equal employment opportunity" and that the Union agreed to "cooperate fully" with the Company in efforts to comply with executive orders and federal, state, or local legislation affecting equal employment.
>
> Article 9: Under the Tools provision, the Company added that "Employees required to use their personal vehicle for other than normal commuting costs shall be reimbursed according to the terms of the Company's travel policy, including reimbursement at the approved rate for mileage expenses established by the Internal Revenue Service."
>
> Section 15.1 Safety. In this article the Company added in the procedure for handling safety complaints that was in the 2012 Agreement but had been omitted from the Company's initial proposal.

The parties met for bargaining on July 21 in Phoenix. After some discussion in the morning of the Employer's proposal, the Union made a new counterproposal to the Company. In this proposal, the Union acceded to the Employer's proposed format for the new contract and abandoned its reliance on the format of the 2012 Agreement.

This counterproposal to the Company's second proposal followed the articles arrangement of the Company proposals and contained redlining showing where the Union differed from the Company's proposal. Substantively, the parties remained apart on a number of key issues although this Union proposal accepted many of the provisions advanced by the Employer. (e.g., 3.4 (limitations on non-employee union access to Company premises and need to advise Company of subject of desired meeting; most of the grievance-arbitration with the exception of the 5.7 limitations on the authority of arbitrator; and numerous other provisions.)

The parties remained divided on, among other issues, the zipper clause (sec. 1.4); management rights (sec. 2.1—although the Union proposed what might be called a standard management rights clause[9]; supervisors and nonunit employees working and subcontracting (sec. 2.3); union recognition (sec. 3.1); notification of union representatives (sec. 3.3); open shop (sec. 3.5); the penalties for violation of no-strike no lockout, the refusal to negotiate during a violation of the clause, and union officials' responsibilities during a violation (art.4); the Employer's proposed language on the authority of the arbitrator (sec. 5.7); the Employer's proposed unwillingness to rely on seniority in layoffs and the layoff procedure generally (sec. 8.4); on severance pay

---

[8] The Respondent claims on brief (R. Br. at 11) that it provided a "redline and clean versions" of this document to the Union, but the record does not establish that. The copy admitted into evidence (Joint Exhibit 5) contains no markings designating how it is differs from the Company's first proposal.

[9] The Union proposed the following management-rights clause in Sec. 2.1

> The right of Management in the operation of its business is vested and determine all operations; to determine the Company's objectives and solely and exclusively in the Company and is unlimited, to plan, direct, control reasonable policies, and to determine and set all reasonable standards of service; to determine what services and products, if any, shall be provided, produced, serviced or distributed, and to determine what services and duties are performed and provided by employees except as set forth in the provisions of this Agreement.
>
> The Union retains its rights as the exclusive bargaining representative as set forth in Article 12 of this Agreement. Moreover, the Company agrees not to exercise such rights in a manner that violates the National Labor Relations Act.

the Union objected to the requirement of releases, the prohibition of raising disputes in the grievance-arbitration procedure, and the cap on severance pay at 26 weeks for employee with more than 26 years' service (sec. 8.5); on Tools (art.9) the Union accepted most of the proposal but wanted employees' use of personal vehicles to be voluntary; on Hours of Work & Overtime (art.10), the Union accepted most of the Employer's proposal, but removed the introductory language from section 10.1 stating that "nothing in this agreement shall be construed as a guarantee of hours of work per shift, per day or per week," consistent with the Union's view that there was a practice of providing 40 hours work; The Union also added standby and holiday premium rates of pay.

In addition, the Union proposal anticipated making a healthcare and retirement proposal based on inclusion in a healthcare plan sponsored by the National Electrical Contractors' Association (NECA), something the Employer had suggested it would look at, while at the same time casting doubt on its feasibility (The parties had considered it in past negotiations.) The Union put its wage proposal in article 13, and proposed holding minimum wage rates the same, while giving management discretion to give additional individual raises. The Union made proposals in this article for travel, reimbursement, mileage and expense, premium pay, holidays, vacation, funeral leave, adverse weather, sick time allowance, cell phone policy, and background checks to remain in the labor agreement and not, as proposed by the Employer, be relegated to the unilaterally maintained handbook. On performance standards (art.14) the Union agreed to most of the Employer's language but limited the Employer's power to "reasonable" rules and performance standards. The Union proposed new language on assignments and reporting centers that provided rules and guidelines for geographic assignments given to employees. Finally, the Union proposed a traditional union security provision, consistent with its rejection of open shop.

Prior to breaking on July 22, around lunchtime, the Employer provided its third proposal, responding to the Union's proposal from July 21. The parties briefly went through it before breaking to return home.

Other than some minor wording changes in a few portions of the proposed agreement, the Employer maintained its positions on all substantive provisions, including management rights, zipper clause, unlimited subcontracting, supervisors working, and nonunit performance of unit work, open shop, healthcare, retirement, most of no-strike/no lockout (see changes below), grievance-arbitration, except for a minor language change (it deleted "in and of themselves" in 5.2), seniority and continuous service (see changes below), severance, hours of work (changes to standby pay discussed below), requirement that employees may be required to use their personal cars (with reimbursement to be based on IRS rates instead of "the Company travel policy"). It retained discretion to change rules, procedures, and performance standards (see agreement to notice below). The Employer fully maintained its plan (art.13) to move many major benefits to the unilaterally maintained Company handbook. The chief changes are listed here:

> The Employer agreed to recognition clause proposed by the Union (Section 3.1) and deleted the specification that the Union would designate two union stewards, but maintained the need for the Union to register in writing the stewards with the Company in order for the Employer to have an obligation to deal with them, and the need for non-employee union representatives seeking access to the facility to meet with a steward or to carry out other representational duties to "advise" the Company "of the matter requiring his attention" and to schedule a mutually agreeable time and location for the visit.
>
> The Employer proposed deleting 4.3, the prohibition on negotiations during the violation of the no-strike clause by employees or the union. However, it limited still further its concomitant "no lockout" promise (Section 4.4) by making it contingent not just on "good faith compliance" with the "no strike" clause by the Union—but now, in deleting the reference to the Union—it was contingent on "good faith compliance" generally, which would mean the "no lockout" provision was contingent on employee compliance with the no-strike clause as well.
>
> In Section 8.4, governing layoffs, the new proposal provided that—unless impractical because of "emergency circumstances"—the Employer would provide notice to the Union of five business days before implementing a layoff, including providing a seniority list to the Union identifying those slated for layoff.
>
> As it had previously promised, the Employer added standby rates of pay into Section 10.6, at the same rates as were provided in the 2012 Agreement, and which were proposed by the Union.
>
> As to Article 14, "policies, rules, regulations and performance standards," the Employer agreed that the provision should apply to "reasonable" rules and performance standards, but continued to "reserve[ ] the right to change all policies, rules, regulations, and performance standards" as long as the change did not violate the "express terms of the Agreement." The Employer added language indicating that it "will provide 7 calendar days notice of any such change."
>
> In Article 15, the Employer agreed with the Union's proposed language that "No employee will be directed by management to work under unsafe conditions or in an unsafe manner" and agreed to provide notice—7 days instead of the 10 proposed by Union.

July 28–30 bargaining in Downers Grove; proposals back and forth, and the Employer's LBF offer

The parties next met for bargaining on July 28, in Downers Grove, Illinois. The Union offered a counterproposal to Company Proposal 3. The Union's significant movement included:

> The Union agreed to the Employer's language in Article 1 Section 3.
>
> The Union agreed to a standard zipper clause by accepting the first sentence of the Company's proposal for Article 1 Section 4, while continuing to reject the more expansive subsequent sentences proposed by the Company.
>
> The Union agreed to the Employer's management rights

subsection in 2.2.[10]

The Union agreed to the Employer's provision 2.4 ("No Waiver of Rights) provision, in full.

The Union agreed to the Employer's provision 3.3 (renumbered 3.4 in the Union's proposal), concerning notification to the Company of a list of all its representatives, including agreement that the Company "shall be free to refuse to deal with any" Union representative as to whom the required written notification has not been provided to the Company.

In Article 4, "No Strike-No Lockout," the Union agreed to the Employer's provision 4.2., giving the Company discretion to mete out "immediate discharge or other discipline" to an employee engaging in a violation of 4.1 with limited applicability of the grievance-arbitration procedure, and agreed to the Company's proposal on the conditional "no-lockout" provision in 4.4, and agreed to the Company's proposal in 4.5 specifying the Union agents' extensive responsibilities with regard to the no-strike clause. In accepting these provisions, the Union struck some of the expansive definition of a strike (including such measures as "handbilling" and "protest regardless of the reason") but the no-strike clause proposed by the Union prohibited "any strike (including sympathy strike)." Other than the expansive definition of strike proposed by the Company, the Union accepted Article 4 as proposed by the Company in full.

In Article 5, grievance-arbitration, for the first time, the Union accepted most of the extensive limitations on the arbitrator's authority proposed by the Employer. With this movement, the only difference between the parties for the entire grievance-arbitration article was one sentence, the Employer's proposal in 5.7 that "Furthermore, the arbitrator shall have no power or authority to alter or change any discipline and/or discharge imposed by the Company unless such discipline is clearly arbitrary."

In Article 8, the Union moved toward but did not fully accept the Employer's removal of seniority as a basis for layoffs. However, the Union agreed for the first time that—due to lack of work—layoffs could be based on "seniority, skills, certifications, experience, and abilities of the employees," thus relegating seniority to one among many criteria, as opposed to the chief criteria, as it was under the 2012 Agreement and in earlier Union proposals.

In 8.5, the Union continued to oppose the limitation of 26 weeks severance pay for employees with more than 26 years of service. It also continued to oppose the Employer's demand for a broad waiver binding the Union and the employee from any arbitration or action related to employment as a condition of receiving severance.

In Article 9, the Union moved toward the Employer's language, accepting all of the Company's outstanding proposal, except for striking the words "accurate and truthful" from the provision's requirement that reimbursement be based on expense reporting documentation, a minor language dispute that was bridged in these July meetings.

In Article 10 the Union continued to reject the Employer language that "nothing in this Agreement shall be construed as a guarantee of hours of work per shift per day or per week." The remainder of Article 10 was not at issue, with the exception that the Union increased its demand on standby pay, and added new language defining a workday, and when a weekday rate was applicable, and when the weekend rate was applicable.

In Article 11, the Union continued, as it had in its previous proposal, to state that the Employer's healthcare proposal would be countered when the Union received the NECA benefit proposal it was still trying to secure from the NECA fund. However, while still waiting to receive the NECA benefit proposal as an alternative to Company-sponsored healthcare, the Union made a proposal countering the Employer's healthcare proposal. The Union essentially proposed the existing healthcare agreement, which provided that bargaining unit employees' coverage would be the same as nonbargaining unit coverage but added a provision that Company contributions to the cost of plans will be the same for each employee regardless of plan selected. The Union also continued to propose that while the Company could change the plan during the contract, it would continue to provide "comparable comprehensive coverage, "and requested 30 days advance notice of any changes to the insurance program.

As to Article 12, the Union continued to seek the 401(k) match that existed under the current contract that the Employer proposed to eliminate.

The Union changed its position on wages—now seeking to increase the established minimum wage rate from $34.35 to $35.38 but continued to maintain the pre-existing Employer discretion to increase wages for individuals.

The Union agreed for the first time with the Employer's proposal that "Employees covered by this agreement, however, shall not be entitled to profit sharing or other discretionary bonuses in light of the negotiated wage and benefits other provided in this Agreement."

The Union maintained its position of having the travel, expense, holidays, vacation, funeral leave, adverse weather, sick time, cell phone, and background check benefits/policies in the collective-bargaining agreement, and not have these benefits

[10] Sec. 2.2, proposed by the Company and accepted by the Union in this July 28 counterproposal stated:

> Section 2.2. Administration. It is recognized that the Company has the right to manage its business and direct its employees as in its judgment it deems is proper, unless restricted by the express language of this Agreement. Accordingly, the exercise of such right or action taken by the Company which is not specifically and clearly limited by the express terms of this Agreement, cannot be the subject of the grievance and/or arbitration procedures under this Agreement.

governed by whatever was applicable to the unilaterally developed employee handbook.

The Union eliminated the "climbing premium" that had been in its previous proposal.

The Union agreed with the Employer's proposal on Article 14 (Policies, Rules, Regulations and Performance Standards), giving the Company the right to make reasonable such rules, and to change them. With this proposal, the only difference in the Union and Company's position on Article 14 was that the Union was proposing the Company provide ten business days notice of changes in rules, while the Company was proposing to provide 7 calendar days notice.

The Union accepted the Employer's Article 15 General Provisions with the exception of Section 15.7, which provided that all benefits and obligations under the agreement terminated and "shall not survive" upon termination of the Agreement. The Union rejected this provision.

Finally, in this proposal of July 28, the Union removed all of its language on assignments that had been in its earlier proposal and that had been rejected by the Employer, thus giving the Employer new discretion over the assignment of employees.

At the July 28–30 meetings the parties discussed the Union's proposal. With the contract expiration looming, there was a flurry of proposals at these late July sessions. The Employer and the Union each made two additional proposals until the morning of July 30, when the Employer suddenly announced that "we have kind of a last best and final offer."

In the two proposals made by the Union during this period, the Union made movement on some key issues. It accepted the Employer's zipper clause proposal (art. 1, sec. 4). It moved dramatically closer to the Employer on 2.1 (Management Rights Reserved), setting the stage for agreement on that language in the Employer's July 30 LBF offer. The Union accepted the Employer's language on layoffs—removing seniority as a factor (unless in management's discretion everything else was equal)—in layoffs. As far as severance there were some language in dispute, and the Union accepted the 26-week cap, however, it added the condition that the "[26-week] maximum shall not apply to any employee laid off outside of seniority." The Union reduced its minimum wage demand to the current minimum wage, $34.35, retreating from its short-lived effort to raise that, but put a "TBD" placeholder as a provision for possible future across-the-board contractual raises. The Union reduced its standby premium proposal to that existing in the current agreement. The Union accepted the Employer's refusal to continue providing an employer match for the 401(k). It accepted the Employer's demand to move an array of benefits to the handbook, but resisted language that would state that the Employer had the right to change these benefits.

As of the Employer's "Last Best and Final" proposal (and I am condensing here—some of these changes were first made in the Company's fourth or fifth proposals exchanged between July 28–30, and not for the first time in its LBF offer of July 30), the Employer's chief move toward the Union was to withdraw its open shop and accept the Union's effort to maintain union security (July 28 proposal). In addition, the Employer removed the language in 5.7 expressly prohibiting the arbitrator from changing any discipline or discharge imposed unless the discipline was clearly arbitrary (although other language in the provision continued to limit the arbitrator's authority). The Employer also increased (on June 29) its proposal on minimum pay for the proposed second tier technicians from $25.66 to $28.84, i.e., the proposed pay reduction was $5.51 per hour rather than $8.69 per hour. The Employer provided a side letter that grandfathered technicians employed prior to 1986 with five weeks of vacation—the handbook to which the Company proposed moving employees' vacation benefit did not provide for five weeks of vacation for any employees, although under the 2012 Agreement, longtime employees were eligible for five weeks of vacation. In its LBF offer of July 30, the Company removed a few of the explicit prohibitions listed in 2.1 (Management Rights Reserved) and thereby bridged the remaining difference in 2.1 with the Union. The Employer accepted the definition of a workday and weekend proposed by the Union in 10.6. Further, in its July 29 proposal, the Employer added cell phone reimbursement to its demand in schedule A section 5 of items to be handled by reimbursement on same basis for unit and nonunit employees and subject to change at any time. There were other changes, but they were relatively minimal in impact.

Thus, as of this "Last Best and Final," there had been significant movement—on brief (R. Br. at 1) the Employer asserts that the new agreement was 90 percent agreed to—although it cannot be seriously denied that the movement of significance was toward the Company's positions. The major areas still in dispute at this point were the Employer's demand for the right for unlimited discretion in nonunit individuals performing unit work; introduction of the two-tier wage system with pay reduction for certain employees designated as Level A technicians versus the Union's demand to retain one job classification at current minimum rate of pay with the Union holding out the possibility of proposing a TBD future across-the-board wage increase; the Employer's demand (art.13) to have unilateral right to change benefits in the handbook as it changed them for nonunit employees throughout the term of the contract; section 8.5, the 26 week cap on severance for employees laid off outside of seniority; and a difference over whether the Union was bound by a waiver signed by employees to receive severance pay; article 4, a difference over how language limiting the broad proposed no-strike clause to legal limits should read; section 10.1, dispute over the Union's demand to eliminate proposed language that stated that nothing in the agreement shall be construed as a guarantee of work; article 11, the Union continued to seek a guarantee that health-care contributions would remain the same for each employee and that comprehensive healthcare comparable to what was currently in place would remain for the term of the agreement and that the Employer would not have unilateral right to eliminate or diminish coverage.

The Employer's LBF offer, described above, came about suddenly the morning of July 30. Feller announced that the Company had "kind of" a LBF offer. The Union reviewed it and Henne testified that he told the Company it was "a little early for a last, best and final offer and that we felt we could continue bargaining." According to Grindle, Henne "responded that he

didn't think that we were appropriately [at] a place for a last, best, final, that he believed that there was still a lot of issues remaining and that there was still movement possible on those issues." Henne was asking "could we set up additional dates for bargaining." Blazek and Feller stated that the Company had moved as far as it was willing to move. There was, however, no specific claim of impasse at any time during the meeting.

Blazek testified that after "we walked through" the LBF offer, the Union "grudgingly accepted it . . . and then we had the conversation where we pushed them to take this out to ratification vote." Blazek testified that "[w]e wanted to see what the membership was going to say. . . . [W]e wanted to the employees to look at this." Henne made a statement, responding to a statement made by the Company, to "clear up" that "this Local has not agreed to any of this contract." Henne made clear that the Union did not agree with, accept, or endorse the LBF offer—in these negotiations full proposals had been exchanged by both parties, but neither party had initialed tentative agreements as to individual provisions. Nevertheless, although the Union did not endorse the Company's proposal, Henne said that the Union "will put [it] out for a vote since [it] is [a] last best [and] final." Henne also told the Company "he wanted further dates to meet." Henne implied that he expected the proposal would be rejected and that after the vote he would be contacting the Company about further bargaining dates. ("This local has not agreed to anything in this contract, we have not TA'd anything . . . We will put it to a vote, considering it's a last, best final, but we will be looking at some dates once that vote goes through.")

The parties left negotiations on June 30, with the understanding that Henne would be moving to have the LBF reviewed by the IBEW and then taken to ratification with results available within 30 days. Blazek testified, "In my mind and based on past negotiations with the Union, we thought they were goin to take it out for a vote."[11]

Henne testified that he explained to the Employer's bargaining team that he "would first have to get the approval of my business manager and the international office before I could present [the LBF offer] to the members for ratification."[12]

Extension of the contract to August 12

The next day, July 31, the parties agreed on a 7-day extension for the expiring labor agreement. Henne followed up the conversation with an email to Feller stating:

> Per our conversation the Company and the Union verbally agreed to a 7 day extension that would end at 12 am EST on August 7, 2015. This will give the Union an opportunity to review the Compan[y's] proposal with the appropriate parties."

Feller responded that "I confirm we agreed to a 1-week extension of the contract for the Union to review."

Additionally, on August 3, Feller wrote to Henne referencing a severance/buyout proposal that had been discussed, but not put in writing in the July 30 LBF offer. The Employer wanted to offer the severance/buyout to the seven employees whom it was proposing to both move to Level A and cut their wages pursuant to the Company's wage/reclassification proposals. (The Employer had discussed moving 16 employees to Level A, but indicated it planned initially to cut wages to the minimum level for only seven of them.) The severance/buyout would give these employees the choice of taking the pay cut or receiving severance at the rate of one week per year of service, which was the severance available under the 2012 Agreement. Under the Employer's new proposals, severance was going to be capped at 26-weeks. Feller wrote:

> Per our discussion during negotiations, the Company agreed to offer an enhanced severance to Technicians who have been designated as A and will receive a reduced wage of $28.84 /hour. This one-time offer of enhanced severance will be 1-week per completed year of service with no maximum (exception to the 26-week maximum severance). This enhanced severance will require a signed, executed release created specifically for this purpose. This offer must be initiated within 30-days after contract ratification.

Henne replied, questioning whether this "offer was tied to [c]ontract negotiations?"

On August 7, there was a further extension through the end of the day August 12. Henne memorialized it in writing, emailing Feller:

---

[11] Blazek testified that in past contracts this process had been followed. In 2012, while still in disagreement on some articles, at the expiration of the old contract the Employer had given the Union a LBF offer. The Union put it to ratification. When it was voted down, the parties subsequently met with a mediator, made some changes—that Blazek described as rearrangements of the existing economics that did not cost the Company more—and the proposal was then ratified by the employees on the next vote.

[12] Grindle, Waters, and Blazek, all corroborated, to some extent, that Henne made reference to the offer going to the International or IBEW for review. Blazek testified that Henne said that "he needed to review [the offer] with the IBEW." Grindle testified that Henne told the Company this in response to Feller asking Henne "what he meant about not agreeing to anything." Grindle testified that Henne told Feller that "he had to run it by his boss and the IO," which Grindle identified as the "international organization, the parent organization" of the Union. Waters also testified that Henne said that as part of the process of bringing the offer to ratification it would have to be "okayed" by Paul Wright, the union president and business manager and the International Union. Although Henne might not have been crystal clear, I credit the claim that he referenced review of the offer by the international union and Wright (if not in those words) as part of the process of getting to ratification. This is further corroborated by the July 31 and particularly the August 7–8 email exchanges extending the contract (discussed below) in which Henne stated (in one instance with Feller acknowledging) that the Union was reviewing the agreement further. In the August 7 note Henne specifically said that the proposal was being reviewed with the "Local office and our International office in Washington D.C." I note that Waters' notes of the bargaining session were not extensive, and hence, it is not surprising that none of this is reflected in those notes. The same cannot be said for Grindle, who took meticulous notes. However, I found highly credible his testimony about this exchange, and why it was not in his notes although he recalls it being said, and I credit his testimony and the explanation. See Tr. 497–499.

> Per our conversation this afternoon the Union is requesting an extension of the Contract till Wednesday August 12th 11:59 pm EST. This will allow us to continue reviewing the Companies proposed Last, Best and Final offer with the proper officials at both our Local office and our International office in Washington D.C. I understand we agreed to this extension verbally, however please respond to this email at your earliest convenience.

Feller responded the next day: "I confirm we agreed to provide the Union a contract extension through Wednesday, August 12, 2015 at 11:59 pm, EST."

August 12: Union rejects taking proposal to ratification and requests further bargaining; Employer declaration of impasse

Henne's review of the LBF offer with the local and international union resulted in the Union being unwilling to put the LBF offer to a vote of employees. As Henne explained, the International Union "felt that there were too many takeaways [from] the current contract . . . not only takeaways but . . . too much negative impact to employees in the [proposal]." The Union came to the conclusion that the LBF was not acceptable and that the parties should continue bargaining without a vote.

On August 12, Henne wrote to Feller, telling him that "the Union stands ready to resume contract negotiations," and that "[t]he Union believes that the Company's 'Last, Best and Final' offer contains terms that are illegal." He wrote that the "Union further proposes that the current contract remain in effect until a new agreement can be reached."

Feller wrote back later that afternoon, asking Henne "[w]hat specifically does the Union view as illegal, and on what basis . . .?"

Henne responded within the hour, stating, "The Union believes that your proposal seeks to eliminate and/or diminish the legal rights of the Union. I'd be happy to discuss the issue in more detail at our next bargaining session." Henne wrote that he was waiting for a "response on the contract extension the Union has requested," and also asked "again, when will the Company be available to meet?"

In an August 14 email Feller reacted sharply to Henne's "request for additional bargaining." Feller wrote that "[u]nless the union has new concessions to make that may materially affect negotiations, we do not see a need to meet again in person for bargaining." He recited the number of bargaining meetings already held and asserted that "at the last session on July 30, the Union indicated that it had no further proposals or concessions to make, and Altura presented its last, best, and final offer." Feller also charged that Henne "surprised" the Company on July 30 by stating that "the union had tentatively agreed to nothing" and further stated that Henne had said "that the union would take the [LBF] offer back for a ratification vote (but as of today, 16 days later, you have failed to do so). We view both of these actions by the union as evidencing bad faith." Feller accused the Union of "even more bad faith" by suggesting that some unidentified provisions of the LBF offer were illegal and asked for details. Feller said that once the Company could review this, it would determine whether it needed to change any aspect of its proposal "or perhaps schedule another negotiating session." Feller wrote, "But in the absence of that, and in the absence of any new proposals by the union to bridge the apparent impasse we are now at, we will decline your suggestion to meet again." He added that "Of course, if you wish to fly to Phoenix to meet informally to discuss further, please advise." As to the Union's request for a further contract extension, Feller wrote, "We will consider entering into a new extension only on the condition that the union immediately submits the company's proposal to a vote, and accurately represents our areas of agreement and disagreement."

Henne wrote back on August 17, stating that "We believe that Altura's final contract offer contains illegal provisions that effectively permit Altura to change terms and conditions of employment at its whim and that undermine the Union's role as collective-bargaining representative." Henne added, "We do not mean to suggest that we find some of the contract proposals unacceptable only because we believe they are illegal, but we do feel that continued negotiations would aid us in reaching a mutually acceptable agreement. Further, your suggestion that the Union has not tentatively agreed to any of the proposals submitted by the company is erroneous and mischaracterizes the Union's concerns about the company's last offer."

Henne disputed Feller's accusations of bad-faith bargaining and asserted that "You were informed on the last day of bargaining that the Union would only submit this 'last, best, and final' to the membership after review by the President /Business Manager and the International. During our subsequent discussions about extending the current contract, I reiterated to you that we were reviewing your final proposal, and that upon completion of that review, I would inform you of our decision to hold a ratification vote." Seizing on Feller's invitation to continue "informal" discussion in Phoenix, Henne wrote that "We are pleased that you have invited continued discussions on the contract."

Feller replied by denying that any of the Employer's proposals—specifically its proposals to "have certain benefits governed by the employee handbook" and "to have bargaining unit employees maintain parity with non-unit employees"—were illegal and insisting that such provisions "are common in collective-bargaining agreements." Feller again asserted that Henne had not indicated there were further proposals to make and stated that "if the parties are deadlocked where we are, there is no need to meet just for the sake of meeting." Feller suggested a conference call between the Company and Union bargaining committees to "see if we can bridge the current differences," and noted that this would present an opportunity for the Union to make new proposals if it has any.

On August 20, Henne responded to Feller, calling for a mediator to assist the parties, a process that the expired 2012 Agreement provided for the parties to use if unable to settle their differences. Henne accused the Company of ignoring a previous request during negotiations to bring in a mediator, which he alleged violated "our express agreement as to how the successor agreement would be negotiated."

August 27 conference call with the mediator

The Employer agreed to mediation and the Employer contacted FMCS Mediator Dale Berman. A conference call between the parties and Mediator Berman was held on August 27. There was an acrimonious tone to the call. The Employer negotiators

wanted to know what was illegal about their proposal, as charged by Henne, but Henne "deferred," stating that "if we get together they will see where our problems" are with the proposal.

Returning to an argument that had developed at the final July 30 meeting, Henne told the parties that none of the proposal had been "signed off on." Henne distinguished between a process where the parties "TA'd" (i.e., reached tentative signed agreements) on discrete contract provisions from the process in these negotiations where the Company "continued to pass 1 proposal" throughout the negotiations. Henne said, "Now we do agree with some of the language because in some of the counter proposals we used that language, but we weren't able to TA anything because it was consistently one proposal."

The mediator suggested meeting for three straight days, but the Employer demurred. Feller stated, "from our perspective, we aren't sure what 3 days is gonna accomplish when we had 10 days total,"—Henne interjected that it was 8.5 days total, with one afternoon "informal with discussions, we weren't in formal bargaining." Feller said,

> to be honest with you [D]ale [Berman] I mean, we presented the last best and final, and you know, we haven't seen anything back really that addresses that, obviously then union wants to get back together and keep negotiating, but we are at a point where our expectation was that they were gonna take this out to vote which hasn't happened yet. Not sure what 3 days will accomplish[.]

Henne argued that in the last few minutes of the July 30 negotiations he told the Company "that I would have to review with my leadership and our legal team, and if it passed, I would take it out to a vote." Henne told the parties, "At this point we feel we have to change some sections of this contract before we take it out to vote. In both cases I talked with you Greg [Feller] about the extensions I need[ed] to review it with my superiors."

The Employer pressed for a meeting sooner than the third week of September. Blazek said, "I don't know what we are gonna talk about for 3 days, I'm willing to get together for a day, we are not in a position to renegotiate economics." Queried on this by Henne, Blazek said, "I have not seen or heard anything, you're asking me to meet just to meet. My general positions is the same as the beginning, we are not in a [position] to make changes." Blazek pushed to know what proposals the Union would bring to the negotiations. Henne told him "We'll have multiple proposals, but once we engage the fmc[s], these sessions should be with the mediator."

The parties agreed to one day of meetings—September 22, at Berman's FMCS office in Anaheim—but also agreed that the Company would be willing to hold the 23rd and 24th open and agreed that "if it's productive" the Company would stay longer than the one day. However, the Company declined Henne's request to further extend the contract through Friday, September 25.

September 23–24 bargaining in Anaheim, the Parties exchange further proposals; the Employer's revised LBF offer

Blazek had a scheduling conflict, so the parties did not meet September 22, but assembled in Anaheim, September 23. Present for the Union was Henne, Grindle, Stewart, and Union President/Business Manager Wright. The Employer was represented by Blazek and Feller. Attorney Anthony Byergo was also present on the 23rd only. The parties met in separate rooms with the mediator traveling between the rooms. In the afternoon the parties came together, and the Union presented a counterproposal to the Employer's July 30 LBF offer.

The Union's September 23 proposal was different in a number of respects from its previous offer. On the zipper clause (sec. 1.4), the Union proposed a traditional zipper clause comprised of the first sentence of 1.4 proposed by the Company, but struck through the more expansive subsequent sentences proposed by the Company. This was a return to the Union's position of July 28, it having proposed accepting the Company's language as of the Union's July 30 proposal. The Union added language to 2.4 (No Waiver of Rights)—that had appeared in the Union's July 21 proposal but was removed from later proposals—that reflected that not just the Company, but also the Union did not waive rights by failing to exercise them. The Company's language on this had been accepted by the Union since the July 28 proposal (Union counter to Company proposal 3), which phrased the lack of waiver as only applying to the Company.

In section 4.1 (No Strike) the Union maintained its proposal to have "actions . . . covered and protected by law" excluded from the no-strike pledge. Henne testified that he told the Company that the Union wanted the "covered and protected by law" sentence because the Union believed that some of the many actions prohibited by this broad no-strike clause would be protected by law.[13]

In 5.1, grievance procedure, the Union added new language proposing that:

> Aggrieved employee(s) and the Job Steward assigned to the area from which the grievance arises shall receive pay for reasonably necessary time spent during working hours preparing and/or presenting grievances.

In 5.7, regarding the authority of the arbitrator, the Union added language stating that "The decision of the arbitrator will be final and binding upon the parties hereto provided that it is within the Jurisdiction and authority vested in the arbitrator pursuant to this Agreement." This language had not been proposed since the Union adopted the Company's bargaining format, however, the 2012 Agreement contains language stating that the arbitrator's decision is "final and binding," language that is

[13] The no-strike clause proposed by the Employer stated that neither employees nor the Union could "encourage, instigate, promote, sponsor, engage in or sanction [ ] any strike (including sympathy strike), picketing, boycott, hand-billing, sit-down, stay-in, slowdown, concerted refusal to perform work (including overtime) and other tactics to disrupt normal operations, mass absenteeism, or any other intentional curtailment, restriction, interruption or interference with operations or work, or protest regardless of the reason for so doing." The Company had proposed, in response to the Union's concerns, adding a sentence stating that "This provision is enforceable to the extent permitted by law."

standard in most arbitration agreements.[14]

In 5.8, concerning the effect of missing time limits, in its September 23 proposal the Union proposed deleting the following (struck through) language:

> All of the time limits specified in the grievance and/or arbitration procedure shall be jurisdictional and shall be the conditions precedent upon which the grievance shall be processed further. If any and /or all the time limits are not complied with, the Company may rightfully and lawfully refuse to process the grievance further, and the grievance shall be considered null and void ~~and end then and there, without either the Union or any allegedly aggrieved team member being entitled to process the matter further to arbitration or otherwise~~. However, by mutual agreement of both the Company and the Union, the parties may agree to modify or extend any of the jurisdictional time limitations specified above in any particular case.

Previously, union proposals had not objected to this language.

In article 6 (Non-Discrimination), the Union's September 23 proposal rejected the Company's clause and stated that it would "stand on current language" in the comparable provision in the 2012 Agreement (art. 9—Non-Discrimination). The Union previously had accepted the Employer's language since the July 21 meetings.

In 8.5 (severance pay) the Union maintained its positions as of July 30, objecting to the final sentence proposed by the Employer stating that the waiver signed by an employee (who receives severance) will bind the Union, and maintaining that the 26 week severance cap should not apply to any employee laid off out of order.

In 10.1 the Union stood on its position that the agreement should not contain the language: "and nothing in this Agreement shall be construed as a guarantee of hours of work per shift, per day or per week"

The Union retained its position on healthcare (art. 11). It retained its position as of July 30, on retirement benefits (art. 12), which was in accord with the Employer's proposal on retiree benefits.

In article 13, as it had in its previous proposal, the Union placed a proposal on wages, restating its position on keeping the same minimum wage rate but maintaining the suggestion of future increases with a notation that such wages were "TBD" (to be determined). On benefits, the Union strengthened its position from what it was as of July 30. Most significantly, it added language stating that benefits in the handbook could only be changed by mutual agreement and that they were considered mandatory subjects of bargaining. It reintroduced travel rules and reimbursement, night premium, holidays, vacation, funeral leave, and sick time allowance benefits into the labor agreement, effectively removing the prior acceptance of the Employer's demand that such benefits be relegated to the Employer handbook.

In article 14, the Union stood by its previous position which was no different than the Employer's position. The Union restated its position on article 15, General Provision, which was in accord with the Employer's position.[15]

After the parties went through the Union's proposal, the parties broke and met separately. The Employer returned that afternoon, September 23, with a "Revised Last, Best, and Final Company Proposal" (Revised LBF offer) that it provided to the Union.

This Employer's Revised LBF offer changed the effective date of the contract to October 1, 2015 (previously the parties both had a proposed effective date of August 1, 2015).

The Employer maintained its positions on article 1 (including zipper clause) and 2.1 (management rights) and 2.2.

In 2.3, (nonbargaining unit employees, including subcontractors doing unit work), the Employer's Revised LBF offer tweaked some of the language but it still provided for a broad right to have nonunit individuals perform unit work at the Employer's discretion.[16] The Employer agreed that under this language, "technically," "the minute the membership ratified this agreement [the Company] could lay every one of them off."

In article 4, "No-Strike No Lockout," the Employer maintained its position, meaning that the difference between the

---

[14] In its September 23 proposal, the Union also added and then struck through language that the Employer had already deleted in its LBFO, a final sentence in 5.7 that states that the arbitrator shall not have authority to alter discipline or discharge unless it is "clearly arbitrary." The Union's simultaneous addition and strikethrough of this phrase negate each other and amounts to no change to the proposal in this regard.

[15] The Union's proposal contained some errors that the Union attributed to limitations of "printing at the federal mediator's office," and which were pointed out to the Company during the meeting. Thus, 2.1 had strikeout language that the Company had accepted in its LBF offer; Sec. 3.2 had underlining, but that union security language had already been agreed to, and conversely 3.5 (the open-shop language) appeared as struck out but had already been eliminated as of July 30. The final sentence of 3.6 should not have been struck out; the struck-out sentence—"Any employee laid off seniority shall receive 52 weeks severance"—should not have been in the document. In 8.4 the Union erroneously added language proposing ten business days for notice of layoffs, something that had already been contained in the Company's LBF offer. The third paragraph of 10.6 should not have been underlined, as it was accepted in the Company's LBF offer. In 15.3 and 15.7, the Union's September 23 proposal struck through items that already had been deleted from the Company's LBF offer.

[16] The Company's LBF offer Sec. 2.3. read:

> Work By Supervisors Other Non-Unit Employees and Others. Managers, supervisors, other non-unit employees (including, but not limited to contingent workers), and other non-employees shall be permitted to perform any work (including work otherwise performed by employees in the bargaining unit) for the operation of the Company's business.

The Company's 2.3 in its Revised LBF offer read:

> Work By Non-Bargaining Unit Employees~~Supervisors, Other Non-Unit Employees and Others~~. ~~Managers, supervisors, other~~ Non- bargaining unit employees (including, but not limited to, supervisors and contractors) ~~contingent workers, and other non-employees~~ shall be permitted to perform any work (including work otherwise performed by employees in the bargaining unit) for the operation of the Company's business.

parties' positions turned on the language used to cabin or limit the extensive definition of prohibited union and employee conduct. The Union proposed that the listed conduct was prohibited "unless such actions are covered and protected by law," while the Employer proposed that the provision would be "enforceable to the extent permitted by law."

In article 5, grievance and arbitration, the Employer responded to the Union's proposal that employees and stewards "receive pay for reasonably necessary time spent during working hours preparing and/or representing grievances," by adding a proposal to its Revised LBF offer stating that time spent "in actual grievance meetings between the Company and the Union" shall be considered time worked and compensated.

In article 5, The Employer also added the language that the Union had proposed, stating that an arbitrator's decision would be "final and binding" (provided it was within the jurisdiction and authority of the arbitrator).

The Employer remained firm on most of the rest of its LBF offer, including its two-tier wage classification proposal and reduction of the minimum wage permitted for the newly created Level A technicians. This issue, and the Employer's discretion in classification and layoff of employees generated acrimonious discussion between the parties.

The Employer made a significant change to its proposal in article 13. In article 13, while maintaining its proposal to move all benefits to the handbook, and have the benefits governed by the (potentially shifting) terms of the handbook, the Company introduced an exception for holidays, vacations, funeral leave, jury leave and sick leave. As to these benefits, while governed by the handbook, the new proposal stated that "there shall be no change in the allowances (i.e., days or hours) provided for bargaining unit employees, except by mutual agreement." As the Company, explained at the September 23 meeting, for these specified benefits, "what's in the handbook that's in effect today, that will stay in place during life of agreement unless you guys are in agreement [to make a change]."[17]

Related to the handbook issue, in this proposal the Employer added a new provision to the handbook regarding background checks titled "Addendum to Employee Handbook dated 2009". The employees' work sometimes required background checks for them to be allowed onto government locations. The 2012 Agreement had a provision in schedule A (Attachment E) that governed background checks. As discussed, under the Employer's proposal and proposed article 13, all such benefits were to be governed by the handbook. However, the handbook had no provision relating to background checks, and a provision for background checks was important for the unit employees to be able to perform their work. The Employer added this "Addendum" to the handbook. Unlike the provision from the 2012 agreement, however, this and other handbook provisions were subject to change or elimination at the discretion of the Employer.

The Employer also included in its Revised LBF offer, as Side Letter/Memorandum of Agreement #2, the severance offer for the seven employees it proposed not only moving to level A technician status but also reducing their pay. The offer put in a lengthy and detailed written document, something the Employer had previously described generally at the table and in Feller's August 3 email to Henne. This document provided that each affected employee would have the option of accepting a reduction in pay to $28.84 per hour, with an opportunity to progress on an "individualized development plan" toward Level AA status, the success of which was to be determined at the discretion of management "with no guarantee of future employment for any specified time." Alternatively, the employee could take an immediate termination of employment, sign Employer-provided waivers and receive 1-week severance for each year of employment with no 26-week cap, as was proposed by the Employer to apply in all future layoffs. In essence, the Employer was proposing that for six employees it had chosen, they would take a significant pay cut, with no guarantee of future employment if they failed to make progress on a work plan developed by the Company. Alternatively, they could terminate and receive severance at amounts permitted under the 2012 Agreement, which was more severance than the Employer proposed to provide going forward. In order to receive the severance under this severance/buyout agreement, the employee would, among other things, have to "voluntarily leave employment with the Company on or before 11/30/2015," and sign a company-provided release of all waivable employment claims, and that waiver would bind the Union as well as the employee. The proposal stated that "This side letter/memorandum of agreement will expire on January 1, 2016."

On September 24, the parties reconvened and the Union provided a counterproposal to the Employer's Revised LBFO. This proposal was not only different in substance, but this document was in a different format than the Union's past proposals. It limited itself to comparing and contrasting only those provisions as to which the parties were proposing different contractual

[17] The revised art. 13 proposal regarding the handbook now stated (with the Employer's changes to its earlier proposal underlined):

ARTICLE 13
OTHER COMPANY BENEFITS

To the extent not specifically governed by or referenced in this Agreement, all other Company -provided employee benefits and other terms and conditions of employment shall be as provided in the Altura Communication Solutions Handbook (effective June 1, 2009), including but not limited to holidays, vacations, funeral leave, jury leave, sick leave, Family and Medical Leave Act leave (and similar state and local benefits), and short term disability (STD) and long term disability (LTD) benefits. The extent, allowances, and terms of such benefits may be changed for employees covered by this Agreement, provided the same changes apply to other non -bargaining unit covered by the general terms of the Handbook; <u>except that, with respect to holidays, vacations, funeral leave, jury leave, and sick leave, there shall be no change in the allowances (i.e., days or hours) provided for bargaining unit employees, except by mutual agreement</u>. Employees covered by this Agreement, however, shall not be entitled to profit sharing or other discretionary bonuses in light of the negotiated wages and benefits otherwise provided in this Agreement.

language. In this proposal, as referenced below, the Union linked its acceptance of certain Employer proposals to the Employer's acceptance of certain Union proposals.

Thus, for the first time ever in negotiations, the Union offered to accept the Employer's section 10.1 (with its explicit recognition that "nothing in this agreement shall be construed as a guarantee of work per shift, per day or per week") thus, giving up any implication that based on practice there was a guarantee of 40 hours work. However, the Union's September 24 proposal conditioned the Union's willingness to make this movement on the Employer's acceptance of the Union's recent proposal on the zipper clause (sec. 1.4). On this section 1.4, the Union maintained its most recent position, proposing a standard zipper clause (in this case, the first sentence of the Employer's proposal) but rejecting the elaborations added to the clause by the Employer (the subsequent sentences in the Employer's proposal.)

On section 2.3, the Union accepted the language of the Employer's proposal on nonbargaining unit employees performing unit work, but added a sentence stating that: "The Company will not contract out work performed by bargaining unit employees, if it will directly cause the layoffs of bargaining unit employees." This sentence was new language but reasserted the substance of a proposal that the Union had long been making.

On 5.3, where the Employer had responded to an earlier Union proposal by proposing to allow time spent "in actual grievance meetings" to be compensable time for "an aggrieved employee and the employee job steward," the Union counterproposed by proposing that time spent "in meetings between the Company and the Union" would be compensable, "including travel time" for any "bargaining unit employee(s) and the employee job steward."

On 5.8, concerning the consequence of failing to meet a time limit in the grievance and/or arbitration procedure, the Union accepted for the first time the Employer's language, with one exception: it struck the words "or otherwise".[18]

The Union made a counterproposal on article 6 that stated:

> Both parties reaffirm their intention that the provisions of this Agreement will continue to be applied without discrimination to the extent prohibited by applicable local, state and/or federal law.
>
> This Article concerns statutory rights and shall not be within the grievance and arbitration provisions thereof. The use of the masculine or feminine gender or any titles which connote gender in this Agreement shall be construed as including both genders.

On section 8.5, severance pay, the Union indicated that it accepted the Employer's position on the first paragraph by leaving this paragraph out of its proposal dedicated to the provisions in dispute. Thus, the Union accepted the Employer's final sentence in the first paragraph indicating that the waiver required for severance also applied to the Union as to any claims related to a severed employee's employment.

In the second sentence of 8.5, the Union maintained the position it had advanced in its last proposal—accepting the Employer's 26-week maximum on severance but adding language that "The maximum shall not apply to any employee laid off outside of seniority."

As noted, the Union accepted the Employer's position on 10.1, subject to the Employer's acceptance of the Union's proposal on 1.4.

In article 11, healthcare, the Union accepted the Employer's language—including granting the Employer the right to make changes in healthcare without maintaining "comparable" coverage. The Union's only difference from the Employer's proposal was the proposal to include language that "The Company's contributions to the cost of the plan(s) will be the same for each bargaining unit employee, regardless of the selected plan." With this proposal, the Union conceded the Employer's right to have the unilateral discretion to diminish or eliminate healthcare during the term of the contract.

In article 13, the Union accepted the Employer' new language, including moving benefits to the handbook, and the employer's right to "change the extent, allowances, and terms" of such benefits for unit employees, but added that this was permitted "provided that there is no economic diminishment of such benefits."

The Union accepted strike & lockout, retirement, and all other provisions of the Employer's proposal.

With this proposal, the parties talked more on September 24. Henne expressed the view that "This union over these negotiations has moved drastically towards the company's proposals, and yet the company has not made any significant changes to their original proposals, if the company is truly trying to reach agreement, then we expect some movement on these counters today." Blazek told Henne, "we have talked about it, and the contract we are gonna end up with you aren't gonna like. The economic asks you have I cannot do that." Blazek expressed his commitment to the Company, but explained that "[I] [c]an't limit my flexibility to do what I have to do to survive."

After breaking for lunch, the parties reconvened. Feller went through the Union's proposal orally, and indicated the Employer's responses, which it promised to put in writing and send to the Union "by Tuesday," i.e., September 29. The parties broke with Feller stating, "we want an agreement, we want to move forward, we believe we've provided a fair and comprehensive

[18] Thus, the Union's proposal read:

> Section 5.8. Time Limits. All of the time limits specified in the grievance and /or arbitration procedure shall be jurisdictional and shall be the conditions precedent upon which the grievance shall be processed further. If any and/or all the time limits are not complied with, the Company may rightfully and lawfully refuse to process the grievance further, and the grievance shall be considered null and void and end then and there, without either the Union or any allegedly aggrieved team member being entitled to process the matter further to arbitration ~~or otherwise~~. However, by mutual agreement of both the Company and the Union, the parties may agree to modify or extend any of the jurisdictional time limitations specified above in any particular case.

last best and final." Blazek said, I think this is a fair contract, I get the pain involved, and it's a company issue. I'm there for the employees, want them to be in it with me. I'd like to continue working towards an agreement." The parties broke early for the day in order to get to the airport to get flights back that day.

The Employer's 2nd revised October 2 LBF offer

The Employer sent the Union a newly revised LBF offer (Jt. Exh. 17) on October 2.[19] The cover-email note to this 2nd revised LBF offer stated only:

> Bill,
>
> Please find enclosed the updated LBF incorporating the changes we discussed on 9/24/2015. Also enclosed is the MOA to address the transition of the 7-level A Techs previously identified. I also enclose the previous documents.
>
> Let me know if you have any questions.
>
> Thank you,
> Greg Feller

This proposal amounted to rejection of the Union's proposal on 10.1, and reassertion of the Employer's proposals from the Revised LBF offer on 10.1 and 1.4. It involved reassertion of the Employer's proposal on 2.3. On 5.3, the Employer counter-proposed the Union's proposal to permit grievance-handling to be compensable time, offering that "aggrieved employee(s) and the Job Steward assigned to the area at which the grievance arises shall receive pay for reasonably necessary time spent during working hours preparing and/or presenting grievances." The Employer agreed to the Union's article 6 (discrimination) provision. The Employer reasserted its existing proposal in all other respects.

Thus the parties remained divided on the wording of the zipper clause, subcontracting (i.e., nonunit employees performing bargaining unit work), health insurance (only as to the Union's request that Employer contributions to the plan be the same for each bargaining unit employee), benefits, wages and the two-tier job and wage classification, and per diem vs. actual compensation related to travel. In addition, in its October 2 email to Henne, the Employer included schedule A, which set forth the Employer's (unchanged) position on wages and reclassification, and also provided the (unchanged) "MOA to address the transition of the 7-level A techs previously identified."

October 13–November 12: The Union seeks additional face-to-face bargaining and offers proposals; the Employer continues claiming impasse

Shortly thereafter, Henne went on vacation. Union Business Representative Grindle responded to the Employer's October 2 2nd Revised LBF offer on October 13, in a letter that began a series of correspondence.

He wrote, "I believe you are aware that Bill Henne is unavailable this week, so I am writing to you in response to our receipt of your written proposal(s) from the bargaining in Anaheim, CA on the 23rd and 24th of last month." Grindle wrote to Feller:

> It was encouraging to see that movement was possible from both parties during those negotiations, and we are very interested in continuing discussions in an attempt to reach a fair contract which will simultaneously help you achieve your goals as a business. After the bargaining session in California, we believe that we have a firmer grasp on your position(s). As we've stated before, we agree that the best environment for our members is one of employment by a flourishing company. However, while we believe progress was made during our last session, we still feel that the company's approach to bargaining via proposing what it calls "last, best, and final" offers is not the best path for the parties to reach an agreement, and is potentially an attempt to unfairly leverage the negotiations rather than a good-faith effort to reach an acceptable compromise.
>
> Taking into consideration all that has gone before, including the movement which has been shown by both parties, we would like to propose additional bargaining sessions, with or without the assistance of the FMCS. I know that we all feel a sense of urgency to get this done, so I'm sure the details of such future sessions can be worked out relatively quickly.

Feller's response was pointed: he noted that the parties met for two days at the FMCS offices (September 23 and 24), and that "it was our understanding that you had no further proposals to make, which was the time to make such proposals." He stated that the Company had made its last, best and final on October 2 "and have no further room to move. It is now October 13, almost two weeks later without any further feedback until now. If you have any new proposals, please present them to us in writing for us to evaluate."

Grindle responded on October 19, disputing the implications of Feller's points:

> I have reviewed your most recent response with Bill now that he has returned from vacation. We were surprised and somewhat confused by your response on several points.
>
> You assert that it was your understanding that the union had no more proposals to make, and that if we did, that would have been the time to make them. This makes no sense. As I am sure you recall, you mentioned that Bob [Blazek] needed to leave early to catch his flight, but that the company would like to verbally respond to our most recent proposal and then follow up in writing within a couple of days. In fact, by no later than Tuesday September 29, 2015. At that time you were notified that upon receipt of your written counter(s), we would review them and get back to you. You ultimately responded in writing on Friday October 2, 2015. Subsequently, we reviewed your revised "last, best, and final" offer, and responded on the 13th.
>
> Additionally we are concerned by your response because Bob made it very clear in his parting statement that he shared our

[19] This updated proposal provided October 2, was based on and bears the date and title of the "Revised Last, Best, and Final Company Proposal" dated September 23, 2015.

> goal of actually reaching an agreement. I believe the accurate quote in part would be, "I don't think so, we've talked about a lot of these issues, and I think this is a fair contract, I get the pain involved, and it's a company issue. I'm there for the employees, want them to be in it with me. I'd like to continue working toward an agreement ". Bob made that statement as his final statement to us and including the mediator Dale Berman.
>
> The union recognizes and appreciates the company's offer to submit new proposals in writing. The union accepts the company's offer and is ready to schedule meeting dates so that we can formally present written proposals to your bargaining team. As I stated in my prior email, the union is willing to meet with or without the assistance of the FMCS with a goal of reaching a mutually fair agreement to present to our members. Please let Bill and I know if you prefer to meet with Mr. Berman, or if you would like to try meeting without him for now.

Feller responded on October 21. He wrote:

> We are open to considering any new proposal that you have to make and we will make time to meet with you within in the next 10 days in our Fullerton office. Alternatively, we would also be available to meet via video conference or conference call to expedite the process. Our open enrollment process for healthcare benefits will be coming soon, so it is critical that we schedule meeting dates within the next 10 days.

Grindle responded the next day, October 22. He told Feller:

> We will be happy to meet and offer an exchange of proposals/counter-proposals during the next 10 days. The only days which we are unavailable are October 30th, and November 4th.
>
> I believe however that under the alternating of locations which we have engaged in during bargaining the location is due to switch back to the Chicago area. Please let us know which days you and your team will be available (again, excepting October 30th and November 4th).

Feller wrote back later that day, October 22, stating that "[w]e do not have any further proposals or changes to the LBF offer we provided, and unfortunately our schedules do not allow us to travel to Chicago. If you have new proposals to present, you are welcome to come to our Fullerton office or we are happy to arrange a video conference or conference call. As previously mentioned, we will make ourselves available any day over the next two weeks."

Grindle responded the next morning, October 23 seeking "future dates when Altura's bargaining team will be available to travel to Chicago," and stating that the Union wanted to move forward towards a new contract, "however, we do not think that changing the framework of our negotiations at this late date to adhere to an arbitrary and unilateral deadline is appropriate." Grindle stated that "it appears the Company is saying that if the Union has proposals to present, and only if the Union is willing to bear the expense and burden of short-notice travel to Fullerton, CA, and only if the Union is willing to do this within the next 10 days, is the company willing to meet in person and listen to our proposals." Grindle also asked, "What is the company's intention if we are unable to satisfy the burdensome conditions which you have set forth in your response? Be assured that the Union is ready and committed to meeting as many times, and as often as is necessary to reach an agreement; we do not agree that the burden and expense should be borne solely by us."

This triggered a long late afternoon October 23 email from Feller, purporting to summarize the history of negotiations (but not altogether correctly) and accusing the Union of "a wide variety of delay tactics," despite it being "clear that the Company has been patient and attempted to work with you on this," and declaring that "the Company views the negotiations to be at impasse." Feller repeated that the Company was willing to meet via video conference or conference call, and stated that "[i]f you have actual proposals to make, please send them to me in writing and we can review to determine whether future negotiations of any sort are warranted."

Grindle's response on October 26, noted that Feller's letter "covered a lot of territory, and expressed many opinions and made several assertions which the Union disagrees with." He then reiterated his two questions from October 23: "Are there any dates in the future on which the schedules for the Company's bargaining team will allow them to meet with us in Chicago," and "what are the Company's intentions" if the Union is unable to meet in "the 10 day period which you imposed?"

Feller's response that evening was that the Company's position "is clear":

> We are willing to meet in Fullerton in person or by video or audio conference in the next now 9 days in the event that you have proposals that you are willing to share in advance that indicate that such additional meetings would be productive. Otherwise, you have our last, best and final offer.

Henne responded 8 days later on November 3. He opened his letter reciting and objecting to the Employer's position that it would not continue the standard negotiating process before seeing movement from the Union. Despite that, the Union wrote that it was responding within the time and in the manner demanded by the Employer.

"First," Henne wrote "we accept your proposal on Article 11, Section 11.1," healthcare. This was the first time in the negotiations that the Union had fully agreed to the Employer's healthcare proposal, and with it the Employer had achieved agreement to its complete discretion to change its contributions, premiums, healthcare, and plan options as it liked as long as it did so for nonunit and unit employees. The Union was dropping even its previously-maintained demand that contributions be the same for each bargaining unit employee. Noting Feller's previously-expressed concern about "the open enrollment period and the importance everybody has attached to this item," Henne wrote that "we think that should be enough to break the log jam and at least renew discussions to see where we can go."

On 5.3, compensable time for grievances, the Union counterproposed based on the Employer's last proposal. The Union accepted the limitation of compensable time to the "aggrieved employee"—and not to all employees involved (i.e., witnesses, or others involved as resources)—but counterproposed that the compensable time should apply to the "Union steward"—not the "Job steward"—and further broadened the language to state

explicitly that "travel time" was considered compensable preparation time. Thus, the Union proposed:

> Time spent in actual grievance meetings between the Company and the Union shall be considered time worked and compensable for an aggrieved employee and the Union steward. The aggrieved employee(s) and the Union steward assigned to the area at which the grievance arises shall receive pay for reasonably necessary time spent during working hours preparing and/or presenting grievances, with necessary travel being considered part of the preparation time.

Article 13 was the Employer's proposal to have benefits governed by and determined by the handbook. As to this proposal, Henne signaled to the Employer for the first time since the September 24 meeting, where the Employer had modified its article 13 proposal, that the Union would be likely to accept a proposal that moved benefits to a unilaterally-controlled handbook and permitted the Employer discretion to change benefits if it chose to do so. Henne wrote that "We see potential for agreement with your last proposal on this article; however, we have a couple of questions on the practical implementation of the language."

The Union indicated that it agreed with the side letter "grandfathering" 5-weeks' vacation for longtime employees (those hired prior to August 1, 1986). This was consistent with the signal that the Union was amenable to article 13, as the side-letter was written to apply "notwithstanding the provisions of Article 13," and acceptance of the side letter meant that employees hired after 8/1/1986, would be subject to vacation as currently called for in the Employer's handbook.

In addition, the Union, indicated through Henne's November 3 letter that it accepted the Employer's October 2 proposal on 5.8. and article 6. In both cases the Employer's October 2 revised proposal met the Union's previous proposals on those items and thus, Henne's acknowledgment was recognition that the parties were in accord on these issues rather than "new" movement on the Union's part.

Henne concluded his letter by stating that the Union's moves were "significant," and

> show our willingness to compromise in an effort to reach an agreement, and should be sufficient to persuade you to return to the bargaining table. I also think that with these issue resolved and with the time pressure you talked about in connection with the open enrollment period removed, we can continue to work together to narrow the gap and reach a contract. As part of that, we would hope to be able to work on the economics, and especially the wage issues.

Henne "urged" the Employer to return to face-to-face negotiations and contact him about a time to meet at the union offices in Chicago, but note that "[i]f you are absolutely unwilling to return to that approach, we will reluctantly agree to have the next session held by videoconference."

The Employer's response was negative. Feller wrote the next day, on November 4:

> We continue to see no new proposals on any key or material issues from you and maintain that we are at impasse. If you have a new proposal or proposals please forward them to us. We are available to meet via video conference at any time within the next week. Please first send us the new proposal /proposals and provide times you would be available to meet over the next week.

The Union responded on November 9, in a note to Feller from Henne, expressing "disappoint[ment] by the response" and noting that the Union "accepted your position on the healthcare section, accepted your position on several other items, and got close to agreement on some others except for either some minor changes or some questions we had."

Henne wrote: "It seems like your idea of negotiating is to demand that we say in advance that we'll go along with whatever you say and once we do that then maybe you'll talk to us. All of that makes me wonder if you really want an agreement or if you have a completely different goal."

Henne wrote that, "[i]n spite of my feelings about how you're dealing with us," he was attaching new union counterproposals on schedule A (wages and two-tier classification) and on the proposed buyout for proposed newly designated Level A technicians.

Henne concluded: "Like I said, I think what we sent you last Tuesday should have been enough to get both sides talking, and what we're sending now goes even further. I hope you'll be ready to resume our negotiations and work with us to bridge the remaining gaps."

The Union's new attached proposal on schedule A was the first Union proposal in negotiations that accepted the Employer's concept of a two-tier wage and job proposal. The Union's proposal accepted for the first-time portions of the Employer's "wage philosophy proposal" and delayed until March 31, 2016, the date for evaluating whether an employee should be reduced to a Level A status. It also proposed an across-the-board wage increase of approximately 3 percent in August 1, 2016 and August 1, 2017. (See, Jt. Exh. 29) (i.e., an increase in the minimum for Level A technicians from $28.84 to $29.71 on 8/1/16, and to $30.60 on 8/1/17; and an increase in the minimum for AA technicians from $34.35 to $35.38 on 8/1/16, and to $36.44 on 8/1/17).

The Union's counterproposal on the buyout of those employees designated Level A followed the Employer's proposal in essence, but provided that employees would be informed of their presumptive designation as Level A as of December 1, and have until April 30, 2016, to try to achieve the proficiencies necessary to meet Level AA status or take the severance/buyout package. In essence, as Henne explained to the Employer in his November 9 email: "Our proposal for the [Memorandum of Agreement] is based on the men being able to get the required training or coursework within the time allowed." The Union's November 9 proposal also accepted for the first time, in schedule A, section 4, the wage progression language advanced by the Employer, and the Employer's schedule A section 5, agreeing to the elimination of per diems and instead, there would be actual reimbursement for travel, mileage, cell, and expenses, subject to change at the Employer's discretion. Jt. Exh. 29, p. 3; Tr. 122.

Feller responded the next day, November 10. His note focused on the inclusion of wage increases rather than the fact that the Union accepted the concept of the two-tier wage and job classification, and the buyout:

> We have reviewed the new proposals that you have forwarded. These proposals are arguably regressive, and are certainly predictably unacceptable given that we have repeatedly and consistently advised you that we are not in a position to provide guaranteed, across the board increases. As such, we continue to consider the parties to be at impasse. Our last, best, and final offer remains on the table (as is), though since the MOA was presented to you nearly 40 days ago, we are willing to move back the effective dates by 30 days [i.e., December 30, 2015] in light of the passage of time.

The next day, Henne responded to the Employer's rejection, offering further movement directed toward the Employer's negative reaction to the union's proposal on across-the-board increases:

> I don't know how you feel the proposals and positions we've sent you over the last week are regressive, and if you want to explain that I'd like to hear it. As far as our last move being "predictably unacceptable," it's seeming more and more that no matter what concessions we make or what new approach we show we're willing to try, we can predict that you'll say no and you'll also say you're not willing to talk and try to reach agreement, so maybe you're right on that one.
>
> But here's another try, based on your position that you aren't able to provide guaranteed, scheduled increases—For the Schedule A proposal I sent on Monday, we'll withdraw the request for the increases and Instead propose that increases or bonus payments up to the equivalent of the guaranteed increases we had requested that are given to one employee have to be matched for the other employees, but that matching will not apply to amounts over that.
>
> I'm attaching the revised proposal showing this.

The revised proposal described in Henne's letter deleted the minimum wage increases and instead added the following language:

> If between April 1, 2016 and July 31, 2017 the Company increases the rate of pay to any Level A technician so it is paying him any amount up to and including $29.71 per hour it shall provide the same increase to all other Level A technicians and it will have the same obligation if, between August 1, 2017 and July 31, 2018, it is paying any Level A technician any amount over the minimum rate up to and including $30.60 per hour. Any bonus payments the Company makes to any Level A technician will be treated the same way. The Company will not be required to match increases or provide additional bonus payments to the other Level A technicians for increases it provides or bonuses it pays to any Level A technician over these amounts as specified in this paragraph.

The Employer responded the next day, November 12, in a letter that was essentially a duplicate of its November 10 letter. Feller wrote:

> We have reviewed the new proposals that you have forwarded. These proposals are arguably regressive, and are certainly predictably unacceptable given that we have repeatedly and consistently advised you that we are not in a position to provide guaranteed, across the board increases. As such, we continue to consider the parties to be at impasse. Our last, best, and final offer remains on the table (as is), though since the MOA [on the severance/buyout] was presented to you nearly 40 days ago we are willing to move back the effective dates by 30 days [i.e., December 30, 2015] in light of the passage of time.

Implementation: on December 3, the Employer announces January 1, 2016 implementation; the Parties have a conference call December 30; on January 4, 2016, the Employer confirms by letter to Employees that it has implemented

The record reveals no further communication between the parties until the evening of December 3, 2015, when Feller emailed Henne a "copy of a letter that has been mailed to your office." The email subject line read "Impasse and Implementation Letter."

Feller's December 3 implementation letter notes that he had not heard from Henne since Feller's November 12 letter. The letter accused the Union of being "unable to make substantive movement on the key remaining issues in dispute," of "engaging in delay tactics to forestall implementation of the company's" October 2 offer, and stated that "we have waited as long as we reasonably can regarding the implementation of certain economic terms consistent with our LBF [offer]." The letter then stated:

> Effective January 1, 2016, the Company will implement the following economic terms of its LBFO (which incorporates the employee handbook dated June 1, 2009):[20]
>
> Vacation—i.e., accrual based vacation (administered as per employee handbook); techs with 5-weeks of annual vacation allowance as of 2015 will have that allowance grandfathered
>
> Sick/Personal Days (SPD)—move to 6-days per year (48-hours), issued on January 1st each year for use within the current year; no roll or payout from year to year
>
> Per diem—eliminate and move to actual expenses incurred
>
> Cell phone—move to new reimbursement level
>
> 401 K—discontinue company match
>
> Severance–cap at 26 weeks effective January 1st for layoffs occurring in the future (except as applies to the seven (7) A-level techs referenced below).
>
> As to the seven (7) A-level techs, we will proceed to offer each the choice of enhanced severance, working towards AA level, or a reduction in wages effective consistent with the LBFO, but with decisions to be made by December 31, 2015, with an

[20] I note that nothing in the Company's LBF offer, or any proposal by the Company at any time during the negotiations "incorporates" the unilaterally-drafted and administered employee handbook. There is no part of the Company's proposals which is susceptible to a reading that would make the handbook a part of the collectively-bargained labor agreement if the Company's proposal was adopted as collective-bargaining agreement.

effective date of February 1, 2016.

Feller closed the letter noting that "[t]he Company will continue to reserve the right to implement other terms and conditions of employment consistent with its LBFO as long as the impasse in negotiations continues" but that it was "open to further negotiations . . . if and when the Union has substantive movement to make that may break the impasse. Please contact me as necessary for that purpose."

The Union responded on December 11, in a letter written by Paul Wright, the Union's president and business manager. The letter challenged the assertions in Feller's December 3 letter about the breakdown of negotiations and stated that the Union had

> sent you what we thought was a significant proposal on November 11, and . . . had sent other proposals before that. Your response each time was to reject our proposals and to label them as 'regressive,' even though each of them moved closer to the company's position on various subjects. And you repeated your unwillingness to schedule another negotiating session with us.

Wright's response pointed out that "The reason [Henne] was not in touch with you after the email you sent him on November 12 is that what you sent him, and the communications before that, did not suggest a response by him would get anywhere." Wright challenged Feller's assertion that the Company had been willing to meet and cited Feller "telling us that you would not even meet or talk with us unless we made what you considered to be acceptable concessions ahead of time. *To repeat our position one more time, we would like to meet with you in person or by vide/teleconference to continue negotiations, and you can contact [Henne] anytime to make arrangements.*" (emphasis in original).

Wright also asserted that the Employer had failed to negotiate in good faith, that the parties were not at impasse, that implementation would violate the NLRA, and that "Local 21 does not authorize the company to engage in direct dealing with [the employees] . . . your letter identifies as 'the seven (7) A-level techs," or with any other members of the bargaining unit." Wright closed by asking Feller to contact Henne if he was ready to resume negotiations.

Feller responded for the Employer on December 16, disputing Wright's "biased characterization of the bargaining" and asserting that "[y]ou continue to insist on wanting to meet, but present nothing suggesting such further meetings will be productive to break the impasse." Feller declared that the Employer was moving ahead with implementation, but "[n]onetheless" was willing to meet in Fullerton or by teleconference, although "we still view the negotiations to be at impasse."

The parties did have a short conference call on December 30, with Henne and Grindle on the phone for the Union, and Feller and Blazek on the phone for the Employer. Feller asked what the Union had to present today. Henne told the Company "we've moved dramatically since what we sent in Anaheim . . . every time we send anything, you say that the movement isn't enough to even warrant a conference call." Feller confirmed that "we don't really have any room for movement at this time" in any aspect of the Company's offer. Blazek contended "what we have offered is fair for everybody. We have nothing to propose, if you have something to propose we will consider it, but we don't have any room to move on what we've put out there." Henne noted that the last counter offers sent by the Union had "been mainly on monetary issues" and asked "if I sent you something on management rights, is there anything that the Company might be willing to move on." Blazek said, "that's such an open-ended question, that I don't know how to answer that." Feller again said, "we don't have any room to move really."[21]

The subject turned to the implementation, which the Employer expressed its intent to go forward with on January 1. Feller said, "let me clarify that, we are implementing the things we put on the [December 3, 2015] letter." Later he stated in response to a question, "oh yes, the things on the December 3rd letter we plan to implement on January first."

The Union, referencing the December 3 letter's statement that the seven Level A techs being offered the severance/buyout would have until December 31 to decide whether to terminate and take severance or stay at a reduced wage, asked, if the proposal is being implemented Friday, January 1, "how do the 7 employees answer if it's not been offered yet?" Feller asked Henne if he was "hung up on the timing" but that "the rest you're good with?" Henne said, that he was "not good on any of it, but having a hard time with the timing from your effective letter of December 3rd." Feller said that the Company would have to provide the employees notice and that the Employer would "work on" the timing, but that generally implementation would occur on January 1, as stated in the December 3 letter. Blazek added that "with the timing we would look at working with you to send a letter to the [employees] and envision working with you on formatting a letter and contacting them."

However, the Employer told the Union that one of the Level A employees (not scheduled for a pay cut) had resigned and one of the others took his place so that only six employees would receive the pay cut and the option of terminating with severance. The Employer again indicated it would contact the Union about a letter going to the six employees the following week. Turning back to the bargaining, Henne referenced the November 9 and 11 proposals and Feller said that the Employer had considered those. Henne told them he had nothing else further to offer at this point, but expressed the view "we might have additional offers, but I don't think that anything we offer will satisfy what the company's looking for." Blazek retorted, "to be clear, you said you have nothing further to offer, we don't either, it's not realistic to negotiate when you have nothing . . . there's nothing else for us to talk about." The call ended soon thereafter.

By letter dated January 4, 2016, to employees from Henion, the Employer stated that its implementation was effective

[21] At trial, Henne testified that his query on "management rights" referred generally to art. 2 titled "management rights," which included 2.3—the "subcontracting" clause—which the Union had consistently opposed. I find this plausible, as the Union had not been contesting subsec. 2.1 (also titled and referred to as "management rights") since the Company's July 30 offer.

January 1, 2016. The letter was not sent to the Union, but a bargaining unit employee who received it forwarded a copy to Grindle.

In its letter to employees, the Employer asserted that "negotiations have hit an impasse or stalemate, with neither party willing to move off of key issues. With the old contract now having been expired for more than five months, the Company believes that it has waited as long as it reasonably can to implement certain economic terms consistent with our most recent last, best and final offer." The Company indicated "[a]s communicated in earlier negotiations updates," effective January 1, 2016, "we plan to make the following changes in economic terms, included in the Company's LBFO (which incorporates the employee handbook dated June 1, 2009)":

> Vacation—I.e., accrual based vacation (administered as per employee handbook); techs with 5-weeks of annual vacation allowance as of 2015 will have that allowance grandfathered
>
> Sick/Personal Days (SPD)—move to 6-days per year (48-hours), issued on January 1" each year for use within the current year; no rollover or payout from year to year
>
> Per diem—eliminate and move to actual expenses incurred
>
> Cell phone—move to new reimbursement level, $70 if using Smartphone for company applications
>
> 40I K—discontinue company match
>
> Severance—capped at 26 weeks (except for enhanced severance offers being made to certain technicians)
>
> A small group of technicians will be offered a choice of taking enhanced severance, or accepting a reduction in wages with the opportunity to upgrade their skill sets (as has been bargained with the Union). Those technicians will be contacted individually to discuss those options.
>
> Please note that this is only a partial and interim implementation of terms necessitated by the deadlock in negotiations and the coming of the new calendar year. The Company remains open to further negotiations with the Union in the hope of reaching an agreement, if and when the Union has substantive movement to make that may break the impasse. If you have questions please contact me or your union representatives.

In accordance with the letter, during January the Employer reclassified certain technicians to Level A and conducted meetings with each of the six employees who were picked by the Employer to have their wages reduced as part of the reclassification. These employees received their "options package" well into January, and five of the six made their decision in February 2016. Contrary to what was stated on the December 30, 2015 conference call between the Union and the Employer, the evidence indicates that the Union was not contacted regarding the formulating of a letter to the employees being offered the severance buyout.

Five employees—David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran—accepted the severance/buyout. One employee—Veryl Carr—stayed with the employer and accepted a wage reduction to $28.84. The Union learned about the meetings from the employees not the Employer. The Union participated in three or four of the meetings by phone, making clear that the Union believed the offers of severance unlawful.

Further developments; February–April 2016

On February 5, 2016, the Employer announced to the Union that it wanted to provide individualized wage increases based on its assessment of employee qualifications to bargaining unit employees beginning the week of February 29. The expired prior labor agreement had allowed such increases, and the Employer's letter to the Union said that these increases were "consistent with individualized increases over the minimum rates implemented under the parties' past agreements." The Employer attached a spreadsheet that showed raises of either $0.25, $0.50, and $0.75 cent per hour for specified Level AA employees and no raise for the seven employees listed as Level A employees (These were Level A employees that had not been subject to the earlier pay cut and severance/buyout option). The Employer's letter asked if the Union had any objection or would like to meet to otherwise discuss further. The Employer indicated that if it did not hear from the Union by February 19, it would "assume there is no objection and we will proceed with the proposed increases."

On February 18, the Union responded, asserting that the Employer had not bargained over the proposed increases, that the Union did not agree with this conduct, requested a resumption of bargaining over all aspects of the contract, and invited the Employer to the Union's Chicago offices for bargaining at the "soonest date we can arrange." The Employer responded February 22, saying it was willing to meet—by conference call or at its Fullerton headquarters—"[i]f the union believes that our proposed increase now creates an opportunity to break the impasse in negotiations." On February 26, the Employer wrote the Union saying that if it did not "hear back from you by Monday, February 29, 2016, we plan to move forward with the proposed pay increases." On February 28, the Union wrote stating that "the Union does not believe there is or ever was an impasse, and I think you know we have repeatedly asked the company to resume negotiations." The Union wrote that "[w]e would rather meet in person and since we made the last trip we feel that the next session should be here. But if you are not willing to do that, we will meet by video or teleconference."

A conference call to discuss the proposed wage increases was held on March 4. During the call Feller brought up that the Company "still felt the Union and the Company were at impasse and that . . . if we didn't agree on this proposal, they would implement it." At the Union's request, a second call was held on the issue on March 15. The Union wanted pay raises distributed equally and mentioned to the Employer that one employee—Veryl Carr—who had turned down the severance and taken a pay cut—was not listed on the Company's employee spreadsheet. Although Blazek expressed impatience with the call, the Union asked for additional information about how employees were chosen for the merit increases, which Henne put in writing to the Company on March 21. Feller's March 24 response indicated that the increases were consistent with factors used under the old contract to provide discretionary wage increases. The Union then asked the Company to consider providing a raise generally for everyone, even if the amounts provided for each employee

differed. The Employer rejected this in an April 8 note, stating that it did not consider the Union's suggestion a proposal, and that the Company had no further proposal to make and that unless the Union "has any further proposal that would result in the union taking back a full and complete tentative agreement including all other terms of the Company's LBFO . . . it doesn't appear that additional bargaining is useful." The Union responded on April 11, reiterating the Union's view that there was never a legitimate impasse and that the Union continues to dispute the Employer's right to establish Levels A and AA. However, the Union wrote that it hoped that the standalone discussions on wages might help get an increase for employees and lead to some momentum to reestablish full contract negotiations. As for specific raises, the Union proposed that all AA employees get a 43-cents-per-hour wage and all A technicians get a 33-cents-per-hour raise. According to Henne, the total would be less than the total amount the Employer proposed spending in its original February 5 wage increase proposal (i.e. offering between 25 and 75 cent increases to AA employees and nothing to A employees). This proposal was rejected by the Employer the same day on grounds that wage rates had to be "driven by the skills and qualifications of employees and the ability to utilize employees to perform work required by our clients in the geographic markets that we serve. We are therefore rejecting the Union's proposal. Do you have any other proposals to make?"

The Union responded April 12, stating that it had made two proposals on wages but "[s]o far you've just kept saying no and standing on what you said you wanted to do to begin with. So I'd like to ask if you have anything else to propose." The Employer responded on April 12, "We have no additional proposals to make, you are in receipt of our LBFO [from October 2, 2015]."

Analysis

The complaint alleges that by its overall conduct, as of October 22, 2015, the Respondent has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

In addition, the General Counsel argues that the Employer's unilateral implementation of portions of its bargaining proposal—first announced December 3, 2015, and effective January 1, 2016—is independently violative of Section 8(a)(5) and (1).

As discussed below, I agree with the General Counsel as to both claims.[22]

I. FAILING AND REFUSING TO COLLECTIVELY BARGAIN AND IN GOOD FAITH

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." Section 8(d) of the Act defines the duty to bargain collectively as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.

The Supreme Court has observed that "[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract . . . in a process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). The parties are "bound to deal with each other in a serious attempt to resolve differences and reach a common ground." 361 U.S. at 486. The Act requires that the parties "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

"In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001) (internal citations omitted), enfd. 318 F.3d 1173 (10th Cir. 2003). "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Public Service Co.*, supra at 487. However, it has never been required that a respondent must have engaged in "wholesale and wide-ranging" misconduct in every aspect of its actions before it can be concluded that bargaining has not been conducted in good faith under the Act. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Rather, "bad faith is prohibited though done with sophistication and finesse." *Herman Sausage Co.*, 275 F.2d at 232; *Regency Service Carts, Inc.*, 345 NLRB 671, 671–672 (2005).

It is a statutory requirement that good-faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. §158(a)(5). At the same time, the employer is "'obliged to make some reasonable effort in

[22] The October 22, 2015 date alleged for the commencement of the bad-faith bargaining violation reflects preemptive acknowledgment by the General Counsel that allegations of unlawful conduct prior to October 22, would be subject to a statute of limitations defense under Sec. 10(b) of the Act. 29 U.S.C. § 160(b). The Union's initial unfair labor practice charge was filed April 21, 2016. Sec. 10(b) of the Act provides for a 6-month statute of limitations. As is obvious from the preceding account of events, much of the story relevant to the General Counsel's allegations occurred outside the 10(b) period, however, no violation is alleged (or will be found) for the pre-October 22 conduct. I note that there is no basis for objecting—and the Employer does not object—to consideration of pre-10(b) events in evaluating the allegations within the 10(b) period. Indeed, the Employer equally (and appropriately) relies upon pre-10(b) events as part of its defense of its conduct. See, *Regency Serv. Carts*, 345 NLRB 671, 672 fn. 3 (2005) ("we consider the earlier bargaining as background in elucidating the nature of the Respondent's conduct at the table during the 10(b) period"); *Fruehauf Trailer Services*, 335 NLRB 393, fn. 5, 404–405 (2001).

some direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all." *Atlanta Hilton & Tower*, 271 NLRB at 1603, citing *NLRB v. Reed & Prince, Mfg.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953). "Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining." *Public Service Co.*, supra at 487–488, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), aff'd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991); *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993) (in assessing bad-faith bargaining, "an examination of the proposals is not to determine their intrinsic worth but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement").

In this case, I agree with the General Counsel and the Union that the Respondent bargained in overall bad faith without intent to reach an agreement on and after October 22, 2015. First, in its proposals, and consistent with its stated goals for bargaining, the Employer insisted on unilateral control over virtually all significant terms and conditions of employment of unit employees in a manner that the Board recognizes as an indication of bad-faith bargaining. In addition, beginning in August 2015, the Employer realized that its initial June and July bargaining had failed to quickly obtain union agreement to a contract ceding unilateral control to the Employer. In the months thereafter, it began a course of bad-faith bargaining without intent to reach an agreement that by October and November grew steadily more at odds with the Act's requirements for good-faith bargaining. Beginning first in August 2015, but increasingly in October and thereafter, the Employer repeatedly and falsely claimed impasse, claims that were not mere rhetoric, but, particularly by mid-October began to be used as a sword to justify an unwillingness to continue to engage in the normal bargaining process. By October and November, the Employer was setting preconditions on meetings, dismissing and evading Union requests for bargaining, and rejecting without consideration new and significant Union proposals that attempted to narrow or eliminate the differences between the parties' positions. These were strategies to avoid bargaining and avoid agreement and reflected unlawful bad-faith bargaining. The General Counsel also argues, and I agree, that the Employer's implementation of portions of its final offer—announced December 3, 2015, and effective January 1, 2016—was independently unlawful. This unlawful implementation also adds to the case of overall bad-faith bargaining.

A. Proposals

As an indication of overall bad-faith bargaining, the General Counsel alleges that the Respondent insisted upon proposals that were predictably unacceptable to the Union.

As an indication of bad-faith bargaining, this factor sits astride the "[o]bvious[ ] . . . tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 486 (1960). The Board has explained that while it will not "decide that particular proposals are either 'acceptable' or 'unacceptable to a party, . . . relying on the Board's cumulative institution experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." *Reichhold Chemicals*, 288 NLRB 69, 69 (1988), enfd. in relevant part, 906 F.2d 719 (D.C. Cir. 1990); *NLRB v. Wright Motors*, 603 F.2d 604, 609 (7th Cir. 1979) ("Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to").

One aspect of the Board's review is to consider whether an employer's proposals "taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract." *Regency Service Carts, Inc.*, 345 NLRB at 675:

> An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and employees it represents with substantially fewer rights and less protection than provided by law without a contract. Id. at 488 (citing, inter alia, *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984)). "In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith." Id.

Regency Carts, supra.

One way to "leave the union and employees . . . with substantially fewer rights and less protection than provided by law without a contract" (*Regency Service Carts*, supra at 675) is when an employer's "proposals establish that the Respondent insisted on unilateral control of over virtually all significant terms and conditions of employment of unit employees during the life of the contract." Id. A labor agreement not only establishes the terms and conditions of employment for the duration of the contract, it also releases the employer from the duty to bargain during the term of the contract over subjects as to which bargaining is waived pursuant to the contract. In the absence of a contract, a union can demand bargaining over every change in a mandatory subject proposed by an employer. Through the establishment of the contract, the union typically cedes this right, at least as to matters "waived" by the contract. But where the union and employees may be worse off by accepting the proposed contract terms than by retaining the right to bargain, an inference of bad-faith bargaining is appropriate. Thus, as the Board described the problem in *Regency Service Carts*, supra at 675–676:

> These proposals establish that the Respondent insisted on unilateral control of over virtually all significant terms and conditions of employment of unit employees during the life of the contract. Taken as a whole these proposals required the Union to cede substantially all of its representational function, and would have so damaged the Union's ability to function as the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective

> bargaining. *P[ublic Service Co.]*, supra, at 489; *Hydrotherm*, Inc., 302 NLRB 990, 994 (1991) (employer's broad management-rights proposal that would make futile any grievance over a discharge and almost every other aspect of wages and working conditions was evidence of bad faith). Indeed, if accepted, the Respondent's proposals would have left the Union and the employees with substantially fewer rights and protection than they would have had without any contract at all. Such proposals demonstrate bad faith. *P[ublic Service Co.]*, supra at 489.

Here, the Respondent began bargaining on June 4, 2015, with proposals that demanded the Union cede unilateral control over virtually all meaningful terms and conditions of employment during the life of the contract. Although there were some changes in its proposals as bargaining progressed, in many aspects it maintained these positions demanding unilateral control at all times. While the Employer attended bargaining, provided information when requested, and sat through bargaining sessions—at least from June 4 until September 24—the demands it adhered to—into the 10(b) period beginning October 22, 2015, taken as a whole, provide evidence of bad-faith bargaining.

From the outset of the negotiations, the Respondent refused to consider any framework but its own—a framework involving a complete revision of the existing contract. It bargained only from its model throughout the entirety of the negotiations. And it was a format that consistently reimagined the collective-bargaining relationship in a manner that would leave the Union with less rights, and employees with less protection, than they would have under the law in the absence of a contract.

First, from day one, the Respondent insisted on an exhaustively broad management rights clause (sec. 2.1) that specifically reserved nearly every function for management. This proposal was offered in the initial bargaining session and only inconsequentially changed through the 2nd Revised LBF offer of October 2. In addition, section 2.2, while located in the management-rights article, placed threshold limits on the use of article 5's grievance-arbitration procedure:

> It is recognized that the Company has the right to manage its business and direct its employees as in its judgment it deems is proper, unless restricted by the express language of this Agreement. Accordingly, the exercise of such right or action taken by the Company which is not specifically and clearly limited by the express terms of this Agreement, *cannot be the subject of the grievance and/or arbitration procedures under this Agreement.* [Emphasis added.]

Moreover, the Respondent insisted from day one on a comprehensive zipper clause that required a total waiver of the Union's bargaining rights. To this it added an insistence on an unusually broad waiver of employee and union rights in its no-strike clause, without any explanation or justification. Thus, the Employer's no-strike proposal, which it maintained at every juncture, prohibited employees—on penalty of "discharge or other discipline, at the discretion of the Company"—from even "handbilling" or engaging in any "protest regardless of the reason for doing so."[23] As the Board pointed out in *American Meat Packing Corp.*, 301 NLRB 835, 838 (1991):

> Under that proposal, for example, if the Respondent at various times during the year failed to pay the contractually specified wages to an employee or employees, or to comply with contractual holiday provisions, and if it rejected the Union's grievances on these subjects, the injured employees would not even be able to communicate their protest in handbills to other employees or to the public during periods outside of their regular working hours.

To this, in our case, the Respondent's clause made "protest regardless of the reason" a dischargeable offense. As in *American Meatpacking*, no justification for such overreaching proposals was ever provided by the Respondent, but it evinces hostility to employee rights.[24]

These foregoing proposals, on which the Employer was unyielding in the essentials throughout negotiations, formed the legal backbone to additional proposals that, if accepted, would have left the employees worse off with a contract than without.

Chief among these was the Respondent's unwavering commitment to having the ability to have all bargaining unit work performed by nonemployees, nonunit individuals, and supervisors. This was expressly insisted upon as an aspect of the article 2 (management rights) that the parties referred to as the subcontracting clause, section 2.3. But it was far broader than that. On June 4 the proposal stated:

---

[23] The final October 2 proposal stated:

> Section 4.1. No Strike[.] The grievance and arbitration procedure set forth in Article 5 are the exclusive means of resolving any claimed violation of this Agreement, whether or not a grievance has been filed. Accordingly, there shall not be (nor shall the Union, its agents, officers, stewards, representatives, or employees encourage, instigate, promote, sponsor, engage in or sanction) any strike (including sympathy strike), picketing, boycott, hand-billing, sit-down, stay-in, slowdown, concerted refusal to perform work (including overtime) and other tactics to disrupt normal operations, mass absenteeism, or any other intentional curtailment, restriction, interruption or interference with operations or work, or protest regardless of the reason for so doing. This provision is enforceable to the extent permitted by law. This provision will not be applied to punish employees in situations where of a picket line is initiated by another labor union not affiliated with the Union in which there is a good faith safety concern; however, in the event that reasonable measures are taken to assure the safety of the employee, the employee shall report or return to work.

[24] I note that "the most reasonable construction" of the no-strike language is not that "handbilling" or "protest regardless of the reason for so doing" are only forms of or modified by "interference with operations of work." Certainly there is no evidence that the Employer made clear that its proposal did not bar all handbilling or protest. Indeed, in response to the Union's concerns, the Employer added the proviso "unless such action(s) are covered and protected by law," which in later drafts became, "This provision is enforceable to the extent permitted by law." The reason that was added was precisely because of the overly-broad unlawful sweep of the language. Again, the point is not whether the Respondent's no-strike clause was independently unlawful—a point I do not reach—but whether its overreach, in the full context of negotiations, provides evidence of bad faith. I believe it does.

> Managers, supervisors, other non-unit employees (including, but not limited to contingent workers), and other non-employees shall be permitted to perform any work (including work otherwise performed by employees in the bargaining unit) for the operation of the Company's business.
>
> By October 2, some words had been moved around and the clause read:
>
> Non-bargaining unit employees (including, but not limited to, supervisors and –contractors) shall be permitted to perform any work (including work otherwise performed by employees in the bargaining unit) for the operation of the Company's business.

The import was the same: combined with the expansive managements rights and zipper clause, the Respondent was demanding throughout negotiations that it be free throughout the term of the contract to turn any and all bargaining unit work over to supervisors, contractors—any nonbargaining unit employees—as a means of operating the business. I note that Blazek testified that he shared the view that this language gave the Company "total flexibility" in deciding when and whether to use bargaining unit employees. (Tr. 750-751.)

Indeed, the Employer 2015 bargaining proposal omitted all references from the 2012 contract that purported to identify anything called "bargaining unit work." Thus, the 2012 Agreement provided for article 4, "Technician Bargaining Unit Work", which referenced "work functions exclusively performed by Bargaining Unit employees as of August 1, 1994," and more generally "[d]uties normally performed by Bargaining Unit employees." In article 12 of the 2012 Agreement (Recognition), the contract stated that the Company "will negotiate with the Union with respect [to wages, hours, and terms of conditions] of bargaining unit employees on assignment to any geographic locations covered under the IBEW's jurisdiction prior to such assignments [with some exceptions for urgent business needs]." By contrast, the Employer's 2015 proposals were scrubbed clean of any acknowledgement or recognition of anything that could be called "bargaining unit work." Indeed, the Employer insisted at all times on language that negated the concept of "bargaining unit work": requiring, for instance, in section 10.1 of the Employer's proposal—maintained throughout negotiations—that

> Nothing in this Article or Agreement shall be construed to create job or work jurisdiction or ownership in any particular group or classification of employees (inside or outside the bargaining unit) nor to prevent the assignment of employees to other work on regular or overtime hours or to cause the inefficient or ineffective use of manpower.

Consistent with this, the Employer adamantly and at all times resisted the Union's efforts to even implicitly suggest that bargaining unit employees had some right to employment. The Employer unyieldingly insisted on language in section 10.1 that stated that "nothing in this Agreement shall be construed as a guarantee of hours of work per shift, per day or per week."

All of this is consistent with the Employer's proposal to have unfettered ability to eliminate the bargaining unit at will. Indeed, the Company negotiators agreed that "technically," "the minute the membership ratified this agreement [the Company] could lay every one of them off." This is effectively an unyielding insistence on a demand for the right to eliminate the bargaining unit and it is, in context, one of several indicia of bad-faith bargaining. See, *American Meat Packing Corp.*, 301 NLRB 835, 837 (1991). Notably, in *American Meat Packing*, the "No Work Preservation" clause permitted elimination of the bargaining unit only if "essential to the running of a profitable business." Here, the language is broader—under the Employer's proposal work could freely be performed by nonunit employees when it was "for the operation of the Company's business." And as in *American Meat Packing*, here, the zipper and management rights clause would prevent the union from even bargaining over the ramifications of an effective elimination of the bargaining unit during the term of the contract. *American Meat Packing*, supra at 837 ("there was no protection against the work's being assigned or contracted away; and the broad zipper clause . . . would prevent the Union from attempting to bargain over the ramifications of such an impact on the bargaining unite during the contract term"). See also, *In re Liquor Industry Bargaining Group*, 333 NLRB 1219, 1221 (2001) (proposals that had effect of giving employer unrestrained ability to transfer work away from unit employees and "effectively dissipate unit work" provided evidence in support of overall bad-faith bargaining), enfd. 50 Fed. Appx. 444 (D.C. Cir. 2002).

In addition to the foregoing, the Employer's proposals reserved for itself unilateral control during the life of the contract over broad areas of substantive terms and conditions of employment. Again, it cannot be ignored that, combined with the expansive management rights, section 2.2.'s limitation on use of the grievance-arbitration procedure, and the zipper clause, agreement to the proposals outlined below—with the attendant waiver of bargaining rights—would leave the Union and employees with less rights than without a labor agreement, for in the absence of such a contract changes in each of these items would, at least, have to be bargained.

The Employer proposed from the outset of negotiations and maintained throughout negotiations that there would be a wage and job reclassification that divided the unit employees into Level A and AA, with A employees being, in management's unfettered discretion, subject to significantly lower wage rates. Wage rates and an employee's classification level could be changed at management's discretion. The Respondent's written proposal is susceptible to being read that Level A and AA would be determined based on various skills employees were "deemed" to possess. The Board has recognized the subjective nature of such assessments and the discretion that they give to management in the absence of "objective criteria for assessing the decisional factors." *Royal Motor Sales*, 329 NLRB 760, 779–780 (1999). In any event, the Respondent made clear at the bargaining table and at the hearing, that "any number of things," including "their attitude" "could cause [employees] to become a . . . level A." Blazek agreed that "In terms of what employees will become a level A and what employees would become a level AA, that at all times remained in the discretion of the Company to determine. . . . And then once classified as level A that was determined in the Respondent's discretion if their pay then would be reduced." Consistent with this focus on unilateral discretion (or "flexibility" as the Employer termed it), at all times the

Employer opposed on principle any type of across-the-board wage hikes. The Employer was only willing to propose or accept a minimum wage rate for Level A and AA employees and at all times advanced proposals that provided that "Management, at its discretion, may choose to give additional increases to individual employees as warranted." (schedule A, sec. 1, October 2 revised LBF offer).[25]

The Employer proposed from the outset of negotiations and, without compromise maintained throughout the negotiations, that the decision of whom to layoff—which in the past had been significantly based on seniority, would under the new contract "be based on the skills, certifications, experience, and abilities of the employees in the Seniority Area based on the judgment of management as to which skills, certifications, experience, and abilities are necessary to perform existing and expected future client work." Seniority had a role "[o]nly if management in its sole discretion deems" employees to be laid off equal in the other factors. This rule applied to layoffs due to "lack of work or due to other business conditions." Also important, from day one, the Employer's proposal explicitly stated that "a lack of training may not be used by an employee or the Union as an excuse for not having skills, certifications, experience or abilities." The expiring agreement provided (art. 25, "Performance Standards and Training") for extensive training rights and opportunities for employees, all eliminated under the Employer's 2015 proposals. Under the Employer's proposals, layoff decisions were vested in the unilateral discretion of the Employer, and the Union would have no bargaining rights left on the subject.

The Employer's bargaining proposal, from its first on June 4, throughout negotiations, provided in article 14 that "The Company reserves the right to change all policies, rules, regulations, and performance standards, provided such does not violate any express term of this Agreement." The Employer's proposal omitted any other provision governing performance standards. See, by contrast, 2012 Agreement, article 25 "Performance Standards and Training."

The Employer's proposal on healthcare was that unit employees would be offered the same healthcare plan, benefits, and rates offered to nonbargaining unit employees. From June 4 through to its final proposal on October 2, and thereafter, the Employer maintained that the "The Company reserves the right to change insurance policies, plans, carriers, administrators, providers, benefits, coverages, deductibles, or co-payments or to self-insure as it deems appropriate, provided such changes apply in the same manner to non-bargaining unit employees."

The Union had lived with a somewhat similar arrangement under the 2012 Agreement with a key difference—a difference that highlights the Employer's attitude in these negotiations: in the 2012 Agreement the Employer's discretion to change healthcare was cabined by the promise that "the Company will continue to provide comparable comprehensive coverage" for the life of the agreement, notwithstanding its right to make changes. In these negotiations, the Employer adamantly refused to add any such language that allowed the Union to know that its concomitant waiver of bargaining over healthcare for the term of a new agreement would mean that employees would receive healthcare. The Employer was clear on this. Asked if the Employer could eliminate healthcare under its proposal, Blazek was forthright: "yeah, there's no obligation to provide healthcare, other than what's in Obamacare, we have legal, there's nothing in the agreement to do that. I don't know why we need that in an agreement, we need to be competitive." Asked at trial if the Company could "get rid of health insurance completely" under its proposal, Blazek responded, "the answer is yeah. The answer is, yes, we could." As Blazek explained in reference to getting rid of the "comparable care" guarantee: "I wanted the ability to treat everyone"—union and nonunion—"the same."

Again, the common thread is the unilateral control of critical terms and conditions of employment, a privilege that the employer enjoyed with nonrepresented employees and which Blazek made clear he wanted in his dealings with union-represented employees.

Significantly, while the broad no-strike clause applied to the disputes over healthcare, the grievance-arbitration procedure did not. Section 11.4 of the Employer's proposal, maintained continuously from June 4, throughout negotiations, stated that "Any questions or disputes concerning said insurance policies or plans or benefits thereunder shall be resolved in accordance with the terms and conditions set forth in said policies or plans and shall not be subject to the grievance and arbitration procedure set forth in this Agreement." Moreover, the Employer essentially exempted itself from any liability for failure to deliver healthcare: "The failure of any insurance carrier(s) or plan administrator(s) to provide any benefit for which it has contracted or is obligated shall result in no liability to the Company, nor shall such failure be considered a breach by the Company of any obligation undertaken under this or any other Agreement." Thus, on healthcare the Employer's proposal at all times involved unlimited discretion, no use of the contractual dispute mechanism—no matter how explicit the violation—no ability to exercise statutory rights to pressure the Company, no right to bargain, and no legal options for holding the Employer liable. The Union and employees would be better off with no contract and the hope the employer offered some form of healthcare, for which the statutory rules of bargaining and liability would apply.

Again, all of these wage, healthcare, layoff and assignment provisions were made in the context of an expansive management rights clause and zipper clause, a broad no-strike clause, and a grievance-arbitration procedure that only applied to Employer actions "specifically and clearly limited by the express terms of this Agreement" (sec. 2.2) and gave the arbitrator authority "expressly limited to a decision upon the question of alleged violation of a specific provision of this Agreement, rather than indirect or implied intent thereof," and "no authority" to "establish or change wages, the wage structure, the job classification, work methods or the benefits in this Agreement," among

[25] I recognize that the prior agreement permitted discretionary individual wage increases. But the point is that in 2015, discretionary adjustments were the only ones Altura would entertain.

other limitations. See section 5.7. Essentially, given the wide discretion expressly reserved for the Employer in the proposed agreement, there was—and there was intended to be—no meaningful way for an employee or the union to challenge action taken by the Employer with regard to wages, classifications, layoffs, work assignment, or benefits.

In terms of the bargaining, this case shares much with *Public Service Co.*, supra. There, as here, the employer came to the bargaining from the outset with the view that the evolution of the market and industry over many years warranted a contract substantively and fundamentally altering the relationship it maintained with the union for many years. There is no offense to the Act in that. But, here, as in *Public Service Co.*, the fixed and stated goal of the employer was a contract that "unlawfully insisted on proposals that granted it unilateral control over virtually all significant terms and conditions of employment during the life of the contract." *Public Service Co.*, 334 NLRB at 487. Here, as in *Public Service Co.*, "the Respondent went far beyond what the law allows—and beyond what it should allow—if meaningful collective bargaining is to be preserved." Id. at 487. This is a case, where the teachings of *In re Liquor Industry Bargaining Group*, supra at 1221, are applicable, a case involving similar overreaching efforts at unilateral discretion found here:

> Some management proposals that seek to secure the employer's right to act in a unilateral and unrestricted fashion on key terms and conditions of employment, such as establishing total employer discretion over wages and the assignment of unit work in conjunction with the diminution or abolition of grievance and arbitration processes, create a fundamental shift in the bargaining relationship and may effectively nullify the union's ability to carry out its statutory function as the employees' bargaining representative. *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991). Management rights proposals that are so comprehensive as to essentially preempt the union's representative function, and, if accepted, would leave employees with less protection than they had prior to electing a collective- bargaining representative, should be made with correspondingly proportionate incentives for the union to agree to such sweeping waivers of its statutory right to employee representation. Id. As a result, in a number of cases, the Board has held that a proposal that vested exclusive control in the employer on the setting of wages, while offering little more than the status quo in return, was significant evidence of an intent to frustrate agreement, and in conjunction with other indicia of bad faith, violated of Section 8(a)(5) of the Act.[26]

The Board is describing a situation similar to the one here. But that is not all.

The Employer's June 4 proposal also introduced a new method of retaining unilateral control that is indicative of bad-faith bargaining, if not wholly at odds with the Act. The Respondent's June 4 proposal would eliminate numerous benefits from the labor agreement but not necessarily because the Employer was proposing to eliminate the benefits, or indeed, to cut the benefits. Rather, the Employer proposed (in art. 13 of its proposals) that "To the extent not specifically governed by or referenced in this Agreement, all other Company-provided employee benefits *and other terms and conditions of employment* shall be as provided in the" Employer's unilaterally developed and controlled employee handbook, applicable generally to the Employer's nonbargaining unit employees. (Emphasis added.)[27] Blazek made clear in his testimony that the flexibility and simplicity of dealing with nonrepresented employees through a handbook, with the Company's unilateral discretion to change the entire handbook at will, was the model he was seeking in these negotiations for dealing with union-represented employees. See, Tr. 734.

The Employer amended this proposal on September 23, as part of its Revised LBF offer. It was a significant change, and it mitigates, but only in part, the severity of the problem with the proposal. The September 23 amendment maintained the problematic structure of the proposal—transferring benefits to the handbook—but introduced an exception for holidays, vacations, funeral leave, jury leave and sick leave. As to these important benefits, while still governed by the handbook, the Employer's proposal now read that "there shall be no change in the allowances (i.e., days or hours) provided for bargaining unit employees, except by mutual agreement."

The insistence on moving benefits "and other terms and conditions of employment" to the handbook, and refusal to put them in a collectively-bargained document is problematic, and in this context, evidence of bad faith. The employee handbook covers a massive array of Employer benefits, policies and procedures, and by its express terms, is "not a contract, express or implied" and "is not intended to and does not create any rights, contractual or otherwise, between [the Company] and any of its employees and should not be understood as constituting a Company representation or commitment to any employee that the policies will be followed in every case." The handbook states that the Company "reserves the right to deviate or depart from, make exceptions to interpret, modify, and apply any of its policies and policy

---

[26] Notably, in *In re Liquor Industry Bargaining*, supra at 1221 fn. 2, the Board rejected the claim (as with Altura's proposal here) that the fact that the employer's proposal set a minimum rate for employees, with discretion to give additional wages, provided a meaningful limitation on the employer's authority.

[27] Art. 13 from the June 4 proposal stated:

> To the extent not specifically governed by or referenced in this Agreement, all other Company-provided employee benefits and other terms and conditions of employment shall be as provided in the Altura Communication Solutions Handbook (effective June 1, 2009), including but not limited to holidays, vacations, funeral leave, jury leave, sick leave, Family and Medical Leave Act leave (and similar state and local benefits), and short term disability (STD) and long term disability (LTD) benefits. The extent, allowances, and terms of such benefits may be changed for employees covered by this Agreement, provided the same changes apply to other non-bargaining unit covered by the general terms of the Handbook. Employees covered by this Agreement, however, shall not be entitled to profit sharing or other discretionary bonuses in light of the negotiated wages and benefits otherwise provided in this Agreement.

provisions (including those in this Handbook) as it sees fit based on particular facts or changing conditions or as it otherwise determines for any reason or for no reason at all in its sole judgment." The handbook states that it "can be changed by Altura unilaterally at any time." Blazek agreed that the Company retained the right to change the handbook at will and to take benefits away or do anything it chooses for employees covered by the handbook.

Thus, the Employer was proposing that many Employer-offered benefits, would be offered on a discretionary basis and would not be addressed or governed by the collective-bargaining agreement. This artifice applied to numerous benefits previously in the contract, including Family and Medical Leave Act leave, disability benefits (STD and LTD), grooming and work attire (renamed personal appearance), drug and alcohol policy and accident policy, driving safety policies, including progressive discipline policy and penalties for driving violations, background checks, and accidents. Indeed, by the terms of article 13, this diversion to the handbook applied to "all" . . . terms and conditions of employment" not "specifically governed by or referenced" in the labor agreement. In some instances, this meant that benefits the employer maintained would still be provided, but pursuant to the handbook the Employer maintained unlimited discretion over their handling and provision. In other instances, this stratagem resulted in the indirect elimination of a benefit as it could not be found in the handbook. Thus, for example, the existing contract contained article 19, "Disciplinary Action" that governed the procedure for discipline, including prohibiting the Respondent from issuing discipline more than ten days after the event occurred precipitating the discipline. The Employer's proposal removed this article from its proposal, but the employee handbook "probably [did] not" (according to Blazek) have anything comparable—and thus, another term and condition of employment consigned to whatever was in the handbook, effectively disappeared, leaving the Respondent with unlimited discretion on the issue. Similarly, driving safety policies included in the 2012 Agreement, including a process for reporting, investigating, and issuing discipline for motor vehicle accidents, was removed from the proposed agreement and relegated to the employee handbook, which provided the Employer with unlimited discretion to discipline over driver policy. The transfer from labor agreement to handbook of driver safety investigations would occasion the same transfer to the Employer of unlimited authority and discretion. As Blazek made clear in his testimony and in meetings, the full outlines of the benefits and authority vested in the employer through the handbook, and removed from the contractual purview, was unclear, even to the Employer. Article 13 applied to "all other terms and conditions of employment" and asked at the hearing what benefits were applicable to article 13 that were not listed in article 13, Blazek candidly replied, "I don't know would be the general answer. So I don't know." Asked the same question in bargaining, Blazek told the Union, "Oh, goodness, I don't know." The essence is that the Employer was insisting throughout negotiations on a proposal that said, "you get what we choose to give the nonunion employees as long as we choose to give it to them, on whatever terms we give it to them."

The effect of this massive transfer of terms and conditions to the nonbargained handbook would be to leave the employees, as to all of these mandatory subjects of bargaining—not just in the position they would be if there was no contract—but rather, precisely in the position they would be in if there was no collective-bargaining representative at all.

This is in the first instance, a massively broad and severe example of the propensity, discussed above, of the Respondent to insist on retaining unilateral control of the terms and conditions of employment. Even as to benefits for which "allowances" were guaranteed under the proposal, the "other terms and conditions"—relating to the processing, handling, accrual, grounds for loss and exception, would all be as set forth in the handbook, and at the discretion of the Respondent—based on the terms of the handbook, which was not a contract or even a "commitment to any employee that the policies will be followed in every case."

But the stratagem of insisting that the benefits and other terms and conditions be shifted to the handbook is also problematic for the Employer's bargaining bona fides for a different reason. This stratagem is, if not a per se breach of the duty to bargain—a question I need not reach—evidence of bad-faith bargaining because it runs up against the Employer's obligations under 8(d) of the Act.

Section 8(d) of the Act requires not only good-faith negotiations but "the execution of a written contract incorporating any agreement reached by either party." Here, the Employer adamantly refused to place its terms and conditions on these mandatory subjects of bargaining in a collective-bargaining agreement. The statutory duty to bargain intends—indeed it requires—that terms and conditions of employment be memorialized upon request in a collectively-bargained agreement—not in an employee handbook. The Employer made no bones about its position: Feller explained on June 4, in explaining article 13, that "all other benefits same as non-union, no reason to treat employees differently, we've been doing that on all our other benefits." But, of course, this is wrong. There is a reason to do things differently with the union-represented employees—it is the statutory mandate of Section 8(a)(5) and the obligation under 8(d) to bargain in good faith for *a collective-bargaining agreement.*

Notably, the Board has rejected this "handbook" slight-of-hand even in cases where, unlike here, the employer proposed to simply "incorporate" the terms of an employee handbook into a collective-bargaining agreement.[28] Thus, in *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), the Board found that an employer's "continuing insistence on incorporating in the

[28] And to be clear—while the Employer announced in its notice of implementation on December 3, 2015, and on January 4, 2016, that its LBF offer incorporated the employee handbook—that is a claim that is unsupportable on the record. I note that in passing Blazek testified that "We were trying to incorporate the employee handbook into the document" but there was simply no proposal ever offered that would have done that. Blazek means that the proposal was that the handbook would take the place of collectively-bargained benefits on numerous subjects. The Employer's proposals did not make the handbook part of the labor agreement, by incorporation or otherwise.

agreement the employee handbook" used to operate the hotel on a nonunion basis was indicative of bad faith. The Board explained:

> The Respondent's position throughout negotiations was that this handbook and the Respondent's existing policies on wage increases and benefits were to continue to govern. Because the Respondent included the handbook as an exception to the zipper clause (a clause titled "Complete Agreement," which had otherwise been agreed upon by the parties), and because the handbook provided that the Respondent reserved the right to alter or discontinue any of the benefits or other policies contained within it at any time "according to the needs of the business," the clause would operate, at best, as what the General Counsel correctly describes as a "perpetual reopener clause" encompassing the substantial number of significant mandatory subjects of bargaining contained in the handbook. Such a provision is at odds with the basic concept of a collective-bargaining agreement. Since unions are statutorily guaranteed the right to bargain over any change in any term or condition of employment, the Union could do just as well with no contract at all. [Footnotes omitted].

307 NLRB at 95; enfd. 987 F.2d 1376, 1382 (8th Cir. 1993) (the employer "insisted at more than one meeting that the handbook form the basis for the agreement. The handbook contains a clause, however, permitting Radisson 'to amend, modify or discontinue any of the information or benefits contained herein.' In the light of this provision, the unions' acceptance of [this] proposal would have permitted Radisson to unilaterally change working conditions whenever it pleased or to require the union to renegotiate working conditions at its whim").

Of course, here, Altura's bargaining proposal did not contain even the formality of incorporation of the handbook into the collective-bargaining agreement and, also unlike in *Radisson*, here, there was no exception to the zipper clause—Altura's insisted-upon zipper clause shut bargaining tight—leaving the Union here worse off than the union in *Radisson* were it to agree to the proposed contract that relegated to the handbook the smorgasbord of benefits covered by Altura. Indeed, unlike in *Radisson*, the Union here faced the situation where *it could not agree, because the Employer would not let it agree* to the substantive terms of the benefits offered in the handbook, at least not in the 8(d) sense of agreeing "to the execution of a written contract incorporating any agreement reached if requested by either party." Thus, Altura's conduct here is even further removed from the dictates of the Act than that of the employer in *Radisson* and more akin to the employer's misconduct in *Herald Statesman*, 174 NLRB 371 (1969), enf. denied, 417 F.2d 1259 (2d Cir. 1969).

In *Herald Statesman*, the Board considered an employer that in bargaining with its union conceded that it had various policies—for instance sick leave, dismissal pay policies, and others—but was "not prepared to write [these] into the contract." Id. at 372. The Board rejected the appropriateness of this tactic:

> We cannot agree that by engaging in such a course of bargaining, Respondent was merely requesting that the Union agree to leave certain matters to its discretion. On the contrary, it is clear from the evidence set out above that Respondent asserted unequivocally on several occasions that it would not include in a contract any agreement that might be reached on certain mandatory subjects of bargaining. Under these circumstances, any protests by the Union would have been an exercise in futility for to insist at this stage upon agreement to reduce the result of any negotiations to writing would have foreclosed negotiations on that subject. The announcement in advance of a determination not to comply with the statutory requirement to reduce any understanding reached to a signed and binding agreement displays the absence of a good-faith intention to conclude an agreement. Such avoidance of the statutory obligation is a violation of Section 8(a)(5*). Further by stating that it would not include even existing company policies in the contract, Respondent foreclosed bargaining with respect to these mandatory areas. Such foreclosure is tantamount to a refusal to negotiate about such subject matters and each instance is an independent violation of Section 8(a)(5) of the Act. Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by stating that it would not include in a contract any agreed on provisions concerning pensions, hospital and medical benefits, sick leave, severance pay, dismissal notice pay and incentive pay plan.* [Emphasis added].

The Herald Statesman holding most on point with our facts is its subsidiary holding, emphasized and highlighted in the above quote, that the employer's refusal to include even existing company policies in a labor agreement was a flat refusal to bargain under §8(d). This finding was rejected by the Second Circuit, based on its view that substantial evidence did not support the underlying factual findings, but the court assumed that such conduct could, in an appropriate case, provide evidence of bad faith. That is what it is here, as it was in *Radisson*. Here, the record is clear that the Employer was willing to maintain benefits—for now—but would not have them in a collectively-bargained document. It is conduct that constitutes an end run around collective bargaining and comes to a result that leaves the Respondent free of the obligations intended by the statute to be the result of collective bargaining: the placement of terms and conditions of employment in a collectively-bargained agreement.

For all of the foregoing reasons, I find that the Employer's proposals provide indicia that support a finding of overall bad-faith bargaining. I accept Blazek's protestations at trial that the plan (and his desire) was not to use the unilateral control these proposals granted to take away all benefits from employees. But his consistent goal was to have the right to do so, and he candidly saw the Company's ability to deal unilaterally with its nonrepresented workforce as an outcome to be pursued through these collective-bargaining negotiations. In the same vein, the Respondent obscures the issue when it argues (R. Br. at 30) that it was entitled to (but did not) seek "draconian wage and benefit cuts" or "significant wage and benefit concessions." And it is not accurate when it contends (R. Br. at 33) that "most of the changes [the Employer sought in negotiations] focused on simplifying language and processes or eliminating language that was obsolete . . . in a technologically different world." The problem with the Respondent's proposals is neither their substantive harshness nor any impulse by the Board to thwart modern methods. The problem is that "[t]he Respondent's proposals on key issues amounted to little more than a demand for the surrender of"

rights that the Union possessed in the absence of a contract." *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991). Of course, while "a union might be willing to accept such comprehensive restrictions on the employees' statutory rights if the employer were offering something significant in return . . . the Respondent here was offering little more than the status quo in return for these sweeping waivers." Id.[29]

B. Other indicia of bad-faith bargaining

The General Counsel's case for bad-faith bargaining does not rest solely, or even primarily, on the nature of the proposals advanced by the Respondent. Rather, the General Counsel argues that—apart from the nature of proposals insisted upon by the Respondent—the Respondent's bargaining conduct also supports a finding of bad-faith bargaining. Specifically, the General Counsel contends that the Employer repeatedly and prematurely declared impasse, bargained with no intention of reaching an agreement, refused to meet at reasonable times and/or places, and insisted that the union provide advance contract proposals as a condition of further bargaining. Finally, the General Counsel contends that the Employer unilaterally and unlawfully implemented portions of its bargaining proposal on January 1, 2016.[30]

The Employer does not so much deny the conduct of which it is accused, but rather, disputes the significance of it, and its characterization. The Employer argues that as of and at all times after July 30, the date when it suddenly provided what it called (but, in fact, was not) its LBF offer, the parties were at a good-faith bargaining impasse. It wields this claim of impasse to justify all actions attributed to it.

The question of impasse is important here. Conduct that may be potent evidence of bad-faith bargaining in the absence of a valid bargaining impasse may be benign if carried out in a context where the parties have reached a valid bargaining impasse and exhausted the possibilities of a bargaining agreement. Thus, a valid bargaining impasse temporarily (until the impasse is broken) suspends the duty to bargain. *Richmond Electrical Services Inc.*, 348 NLRB 1001, 1003–1004 (2006); *Providence Medical Center*, 243 NLRB 714, 714 fn. 2 (1979). Conversely, when a party acts as if the parties are at impasse when they are not it is also likely engaging in conduct associated with classic indicia of bad-faith bargaining. Precisely because impasse is associated with a temporary suspension of the duty to bargain, a premature declaration of impasse is often an indicium of bad-faith bargaining. *Grosvenor Resort*, 336 NLRB 613, 615 (2001), enfd. 52 Fed. Appx. 485 (11th Cir. 2002); *CJC Holdings, Inc.*, 320 NLRB 1041, 1044–1046 (1996), enfd. 110 F.3d 794 (5th Cir. 1997).

While the Respondent relies upon its claim of impasse to justify its conduct, in this case it is assuming exactly what it must but cannot prove. The evidence does not show a lawful and valid impasse on July 30—or any date thereafter. Rather, the evidence shows that once the Employer realized in mid-August 2015, that it had not obtained the Union's assent to the new agreement that it wanted, and that the Union was not putting the Employer proposal up for ratification, the Employer, frustrated and impatient with the bargaining process, began falsely claiming impasse and then, after September 24, withdrawing from the good-faith bargaining process.

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.*, 241 NLRB 40, 46 (1979), enfd. mem. 615 F.2d 917 (5th Cir. 1980). The Supreme Court has endorsed the view that "impasse is ... that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 484 U.S. 539, 543 fn. 5 (1988) (citations and internal quotations omitted). When there is genuine impasse, neither party is willing to move from its position in spite of the parties' best efforts to achieve agreement. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586, 596–599 (1999), enfd. 236 F.3d 187 (4th Cir. 2000).

"Whether a bargaining impasse exists is a matter of judgment." *North Star Steel, Co.*, 305 NLRB 45, 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). "The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft*

---

[29] I reject the Respondent's contention, throughout its brief, that the Union's willingness, over time, to go along with so many of the Respondent's proposals undercuts the objective evidence that Respondent's insistence on these proposals was indicative of bad-faith bargaining. The Union's acquiescence merely shows that the Employer's bad-faith bargaining netted results at the bargaining table. That is not exculpatory. *Harrah's Marina Hotel and Casino*, 296 NLRB 1116, 1135 (1989) ("Nor is it any defense that the Union tentatively agreed to many of the Respondent's regressive proposals. . . . [T]his shows only that it was interested in reaching an ultimate agreement, unlike the Respondent"); *Eastern Maine Medical Center*, 253 NLRB 224, 246 fn. 28 (1980) ("To the extent that Respondent argues that because MSNA tentatively accepted some of its proposals, it is absolved of a bad-faith bargaining charge, Respondent is mistaken. A union does not "waive" refusal to bargain charges by signing up for the best deal it can obtain and continuing to make an effort to reach agreement"), enfd. 658 F.2d 1 (1st Cir. 1981); *Utility Workers Union of America*, 203 NLRB 230, 240 (1973) ("The fact that the charging [party] Employers in these cases have capitulated to the Respondents' bad-faith bargaining tactics and have knuckled under, at least in major part, to the Respondents' unlawful designs to merge the separate bargaining units, is no grounds to withhold either a finding or a remedy"). See, *NLRB v. General Electric Co.*, 418 F.2d 736, 736 (1969) ("Almost ten years after the events that gave rise to this controversy, we are called upon to determine whether an employer may be guilty of bad-faith bargaining, though he reaches an agreement with the union, albeit on the company's terms"), enfg. 150 NLRB 192 (1964).

[30] The General Counsel also argues that the unilateral implementation of the severance/ buyout proposal resulted in bypassing of the Union and direct dealing when the Respondent advised six employees that they could choose the severance or remain with a pay cut. For reasons explained below, I do not reach or rely upon the allegations of bypassing/direct dealing, either as independent violations or as evidence in support of overall bad-faith bargaining.

Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968). However, "[i]t is not sufficient for a finding of impasse to simply show that the employer had lost patience with the Union. Impasse requires a deadlock." *Barstow Community Hospital*, 361 NLRB 352, 360 (2014), enforcement denied on other grounds, 820 F.3d 440 (D.C. Cir. 2016). In order to find an impasse, "[b]oth parties must believe they are at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); See also *NLRB v. Powell Electrical Mfg*., 906 F.2d 1007, 1011–1012 (5th Cir. 1990).

That an employer had reached its final position does not demonstrate that the union has, and therefore, that there was impasse. *Grinnell Fire Protection*, 328 NLRB at 586 ("even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so"). Moreover, "[t]he fact that Respondent believed that the Union would never agree to Respondent's . . . proposals does not establish an impasse." *Ford Store San Leandro*, 349 NLRB 116, 121 (2007). "Where, as here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms. . . . Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so." *Grinnell Fire Protection System,* 328 NLRB at 586. Thus, a concession by a party on a significant issue precludes a valid declaration of impasse, even if there is a wide gap on other issues because there is reason to believe that further bargaining may produce additional movement. *Saunders House v. NLRB*, 719 F. 2d 683, 688 (3rd Cir. 1983). "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967).

An impasse, once reached is a temporary state and easily broken. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982) ("As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force") (citations and internal quotations omitted); *Royal Motors Sales*, 329 NLRB 760, 762 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001). Anything that creates a new possibility of fruitful discussion breaks impasse. *Airflow Research & Mfg. Corp*., 320 NLRB 861, 862–863 (1996); *Jano Graphics, Inc.*, 339 NLRB 251, 251 (2003) ("[A]ny impasse on July 29 was broken on August 4, when the Union informed the Respondent that it had new proposals and was seeking further bargaining"); *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983) ("Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse . . . [including] bargaining concessions, implied or explicit"); *PRC Recording Co.*, 280 NLRB at 636; *Pavilions at Forrestal*, 353 NLRB 540, 540 (2008), adopted and incorporated by 356 NLRB 5 (2010), enfd. 684 F.3d 1310 (D.C. Cir. 2012). "In short, a genuine impasse is not the end of collective bargaining." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974).

The burden of proving that an impasse exists is on the party asserting the impasse. *CJC Holdings, Inc.*, 320 NLRB at 1044; *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. 9 F.3d 113 (7th Cir. 1993); *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996).

In this case, in sum, the evidence demonstrates an employer that participated in a modest number of collective-bargaining sessions in the 7/1/2 weeks before the contract was to expire. When this bargaining did not result in a contract, the employer asserted impasse, reluctantly attended one additional bargaining session led by a mediator at the urging of the Union, and thereafter refused to meet in the parties' normal rotating system of bargaining locations, demanded advance proposals from the Union, and when they were received, unreasonably dismissed them as not warranting further collective bargaining.

Putting aside the legal ramifications, and but for the Act, perhaps it all could be considered savvy negotiating: all the while, the Employer's actions drew the Union closer and closer to the Employer's position. Indeed, that is one of the problems for the Employer's impasse claim: the Union kept moving toward the Employer, and making significant proposals, even when the Company quibbled or outright refused to meet. Neither in words nor action did the Union draw a line in the sand, and not cross it. To the contrary, the Union repeatedly made significant movement—three times in November—just in the hopes of securing a meeting with the Employer. And, on the Employer's end, it made some movement too, at least through October 2, which of course, only cuts further against its resort to a claim of impasse as of July 30. The test for impasse, of course, is not whether the Union rushed to agree in full with every proposal made by the Employer. The fact that the Union took a harder position at the outset of negotiations does not mean the Union would not yield later in the process after the parties had the opportunity to engage in further bargaining. "Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and late in the process." *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979), citing generally *F. A. Reynolds Co.*, 173 NLRB 418, 424 (1968), enfd. 424 F.2d 1068 (5th Cir. 1970).

Before negotiations began on June 4, 2015, the Employer knew but the Union did not know the significant changes in the agreement, and in the relationship, that the Employer was going to seek in these negotiations. Despite the Employer's knowledge, and because of the Union's lack of it, the scheduling for bargaining and the process were consistent with how the parties bargained in the past. When the Employer provided its opening proposal on June 4, along with Blazek's explanation for it, it quickly became apparent that the scheduled days were insufficient to consider and bargain through Employer proposals jettisoning thirty years of bargaining history. A brief conference call was added June 11—at which not much was accomplished—a bargaining session was added in Phoenix for July 21–22, and the

parties extended the June 23–24 session a ½ a day into June 25, and again extended the July 28–29 meetings ½ the day into July 30. Thus, by July 30, the parties had met in person for bargaining in four sessions comprising a total of 7 days and 2 ½ days.

This may have been "normal" for the parties' past negotiations, but these were not "normal" negotiations for the parties. Rather, this was an effort by the Employer to radically alter the collective-bargaining agreement. These negotiations were intended to "remake the agreement" (R. Br. at 1) as the Employer considered the current agreement to be an "artifact" (R. Br. at 6). As Blazek explained, the Company was proposing an agreement that was "dramatically different from what we have today," and "changed every article of the agreement." (The changes were so extensive the Employer refused the Union's request for a redlined version of the old agreement asserting it would be of no value). Blazek declared on June 4: "I don't want language that was written 50 years ago, we need to start fresh." It would be predictable that in these circumstances it would take far longer for the parties to reach an agreement—or impasse—than in past years where relatively minor changes in the status quo had been the parties' goal.[31]

As set forth above, in the parties' June and July bargaining, although extremely one-sided in the sense that significant movement was toward the Respondent's positions, movement was occurring. This was the case through to July 30, when the Employer suddenly introduced what it called (but was not) its Last, Best and Final offer.[32]

As referenced above, between July 28–30 the Union, among other things, accepted the Employer's zipper clause, moved significantly closer on section 2.1, accepted language on layoffs, accepted a 26-week severance cap but with a condition on employees laid off out of seniority, reduced its minimum wage demand, reduced its standby premium demand, accepted the Employer's elimination of the 401(k) match, and made movement toward the Employer on article 13. The Employer, for its part, during these sessions, withdrew its open shop proposal, and modified the amount of the proposed pay cut (which it would apply at its discretion to some but not all employees redesignated as Level A technicians). There is no impasse to be found on this record as of July 30. Indeed, at the time, the Employer did not claim that the parties were at impasse.

The Respondent now argues that the parties were at impasse on July 30, because with contract expiration approaching the Union did not make an additional offer that day but rather, the parties broke for the Union to review the LBF offer in anticipation of placing it before the membership for ratification. This does not follow in the slightest.

First and foremost, July 28–30 had been days of significant movement toward the Employer's position. As Feller put it in his October 23 letter to the Union, "We made extensive headway in reaching a tentative agreement, with only a couple open items at the time of the contract expiration on July 31." Or as the Respondent puts it on brief (R. Br. at 1), as of July 30 the parties were "90%" in agreement. Both these comments are something of an overstatement, but they make the point.

Impasse is not proven because the Union does not have a counterproposal ready one day after the Employer suddenly drops a proposal it calls final onto the table. There is no evidence that the parties had exhausted bargaining. Indeed, The Union told the Employer that it was early for a last, best, and final offer and that "we felt we could continue bargaining." The Union made it clear that it was not agreeing to the Employer's proposal but that because the Employer was calling it a LBF offer, the Union would be putting it to a vote—but that after that vote the Union would be looking for more dates for bargaining. ("This local has not agreed to anything in this contract, we have not TA'd anything. . . . We will put it to a vote, considering it's a last, best final, but we will be looking at some dates once that vote goes through").

Notably, neither a ratification vote nor the contract expiration date, by themselves, indicate impasse. The Union's apparent willingness to have employees consider the Employer's offer—it subsequently changed its mind—does not indicate that bargaining has been exhausted. As the Board explained in *Ead Motors Eastern Air Devices Inc.*, 346 NLRB 1060, 1063 (2006),

> the fact that there is a ratification vote does not itself show that the parties are at impasse. More particularly, if the vote is to approve the proposal, there is a contract. If the vote is to reject it, there must be more bargaining. A separate issue is whether more bargaining would be futile because the parties are at impasse. But that issue turns on the factors noted above, not on the mere fact of a negative ratification vote.

Moreover, a contract's upcoming expiration date is an artificial deadline in terms of the bargaining obligation. *Ead Motor*, supra at 1063–1064; *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 322 (D.C. Cir. 2015) ("the expiration of the agreement does not have bargaining significance"); *Whitesell Corp.*, 352 NLRB 1196, 1197–1198 (2008) (no impasse based on artificial deadline where "Respondent declared impasse even though the parties exchanged proposals and reached agreements the day before and the day of the impasse declaration" and cases cited

[31] Thus, the parties' relatively stable bargaining history in past contract years combined with the uncharted waters of this bargaining weigh against a finding of early impasse—not in favor of it. *Stein Industries, Inc.*, 365 NLRB No. 31, slip op. at 4 (2017) (significant departure in negotiations from long history of negotiations weighs against finding of impasse); see *TruServ v. NLRB*, 254 F.3d 1105, 1118 (D.C. Cir. 2001) ("Company from the outset put Union on notice that it sought to address significant concerns about competitiveness and productivity by substantially modifying the parties' bargaining agreement. To this end, the negotiation period was lengthier than usual").

[32] Events in this case confirm Judge Posner's recognition in *Chicago Typographical Union Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991), that final offers do not necessarily prove impasse:

> The final offer was followed not by implementation but by bargaining followed by another final offer followed by more bargaining. This has gone on for almost a year and a half. Apparently the use of "final offers" as bargaining ploys is common. Indeed, if the company is mistaken about impasse having been reached, it cannot lawfully terminate bargaining even if it wants to. After final offers come more offers.

therein), affirmed and adopted, 355 NLRB 635 (2010).[33]

No doubt, as Blazek testified, the Employer "pushed" the Union to take the July 30 LBF offer to a ratification vote. The Employer hoped that the employees would give the Company what it had yet to get in bargaining—the Union's agreement to the Employer's offer. Clearly the Employer was disappointed in August when it learned that the Union decided not to put the Employer's July 30 offer to employee ratification. But just as clearly, neither calling a proposal a LBF offer nor the Union's initial willingness to consider employee ratification makes for an impasse when—in bargaining—there is movement such as there was on July 28–30 on key issues. Even setting aside the concerns (discussed above) with the content of the Respondent's proposals, as of July 30, there was no basis to conclude that further negotiations would be futile.

It was at this time—particularly after the Employer realized that the Union was not going to submit the July 30 LBF offer to ratification—that the Employer began to openly "decline [the Union's] suggestion to meet again" due to "the apparent impasse we are at" (August 14), and accuse the Union of bad faith. Feller wrote again, on August 17, in response to the Union's request for bargaining, "we will decline your suggestion to meet again." Pushed by the Union to meet with a mediator to assist, the Employer expressed its skepticism, with Blazek announcing, "My general position is the same as the beginning, we are not in a [position] to make changes."

But at the negotiating session the Employer did make changes, and so did the Union. The mediator-led September 23 and 24th session involved many new developments.[34]

At the mediator-led bargaining session of September 23, the Union brought a new proposal to the table. As detailed above, it moved toward the Employer's position in some regards, traded and linked movement on others, and in places refused to accept Employer language that, as of July 30, it had been willing to accept.[35]

Notably, the Employer came back to the table on September 23 in response to the Union's new proposals with a Revised LBF offer, containing a number of significant changes, by itself suggesting that the claims of impasse were inaccurate. *Coastal Cargo Co.*, 348 NLRB 664, 664 fn. 1 (2006) (in finding no impasse, "We also rely on the fact that the Respondent demonstrated that further movement was possible by presenting the Union with multiple final offers after indicating that it had reached a point where it could not bargain further").[36]

---

[33] I note that in both Feller's August 14, and his August 19 correspondence with Henne, he stated that at that July 30 meeting Henne "indicated you had no further proposals." (August 19); ("the union indicated that it had no further proposals or concessions to make" (August 14)). Not only are these claims hearsay, but they were disputed at trial by Henne, and not corroborated. I reject the claim. It is and was a highly misleading claim, an obvious effort to create a record of impasse after-the-fact. Feller did not testify.

[34] The Respondent's assertion (R. Br. at 35, 36) that the Union "insisted" on mediation is without record support. The record shows that the Employer, although reluctant to resume negotiations—with or without a mediator—agreed to meet with the mediator and even arranged for the mediator. Indeed, the Employer admits in its brief (R. Br. 28) that it "willingly agreed to mediation" (see also R. Br. at 37 ("While the Company did not believe it had any obligation to mediate, it agreed to do so"). No more needs to be said about the Respondent's repeated claim on brief (R. Br. at 35, 36, 46) that the Union unlawfully insisted on mediation. The Respondent also complains that it took too long to schedule the September 23–24 bargaining session with the mediator, but ignores that before agreeing to meet with the mediator it declared that it was declining to meet, accused the Union of bad faith, and as a precondition to "perhaps schedul[ing] another negotiating session" demanded to know the details of Henne's assertion that "[w]e believe that Altura's final contract offer contains illegal provisions that effectively permit Altura to change terms and conditions of employment at its whim and that undermine the Union's role as collective-bargaining representative."

[35] The Union's discussions with its officials and International Representatives had led it to the view that in an effort to reach agreement, it had been too willing to compromise with the demands for unilateral control sought by the Employer. The Union brought to the table proposals that included a more traditional zipper clause, changes to 2.4 (No Waiver of Rights), new grievance procedure language (5.1) seeking to make compensable time employees and job stewards spent working on grievances, language stating that the decision of the arbitrator will be final and binding (5.7), changed the default language (5.8) that described the fatal effects of the Union missing a time limit in the grievance-arbitration procedure, resubmitted the 2012 Agreement's language on nondiscrimination (art. 6 in the proposal), and significantly, in art. 13, the Union attempted to retain numerous benefits as benefits in the labor agreement and not have them moved to the employee handbook, it proposed language that the benefits in the handbook could only be changed by mutual agreement. The Union raised the prospect of there being some kind of wage increase (TBD) for employees over the course of the agreement. Many of these changes were significant, some new, and some put back into contention issues that the Union had previously been content to not object to. As discussed below, I do not belief that this represented bad-faith bargaining by the Union or that, as the Employer asserts, it justified any of the Employer's bargaining misconduct.

[36] This Employer offer changed the effective date of the contract to October 1, 2015, and the Employer rewrote the language on 2.3, although it remained very broad. The Employer responded to the Union's proposal in art. 5 and countered with language that time spent "in actual grievance meetings between the Company and the Union" shall be considered time worked and compensated. The Employer also added language that the Union had proposed, for the first time proposing that an arbitrator's decision would be "final and binding" (provided it was within the jurisdiction and authority of the arbitrator). The Employer also made a highly significant change to art. 13, proposing, as it had before, that all benefits and "other terms and conditions" not covered in the agreement would be subject to the handbook, but for the first time agreeing that as to some key benefits: holidays, vacations, funeral leave, jury leave and sick leave, while still governed by the handbook, "there shall be no change in the allowances (i.e., days or hours) provided for bargaining unit employees, except by mutual agreement." Finally, on September 23, the Employer provided for the first time, a written draft of contractual language for a side letter/memorandum of agreement, through which it proposed to offer seven of the employees whom it was moving to Level A and reducing their wages a choice of taking severance pay and terminating, or remaining at lowered pay and with no guarantee of future employment. Although buyouts had been discussed before, this

On September 24, the Union countered providing a written counterproposal to the Company's Revised LBF offer—offering some significant changes from just the day before.[37]

The Employer then reviewed the Union's proposals, going over them verbally, with Feller telling the Union "there's certain things we can agree to and some we can't." The Employer then orally described some changes it was willing to accept.

This movement and discussion—including new proposals introduced by both parties—does not jibe with the Employer's claim that the parties were at a bargaining impasse when this meeting ended, and even less so, when the one before it on July 30 ended. *Stein Industries*, 365 NLRB No. 31, slip op. at 5 ("Significantly, even when it declared impasse, the Respondent recognized that the parties were not irreconcilably deadlocked: it agreed to continue bargaining with the Union at any time over the upcoming week"). See also, *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 324 fn. 5 (D. C. Cir. 2015) ("Of course, if an employer repeatedly claimed different positions as a "last offer," it would not be credible"). And while the Employer said once more, for a third time, that with its new oral response to the Union's movement, *this* was its LBF offer (as distinguished from its two previous similarly-titled proposals) the parties ended the September 24 meeting with Blazek saying, "I think this is a fair contract, I get the pain involved, and it's a company issue. I'm there for the employees, want them to be in it with me. I'd like to continue working towards an agreement."[38]

This was the last face-to-face bargaining meeting the parties would have that year. The parties left with the understanding that the Company would submit another written proposal setting out and formalizing its oral response to the Union's proposal by the next Tuesday, September 29. It did this (but on Friday, October 2), providing a written 2nd Revised LBF offer.[39]

There was no claim or indication of impasse or finality by the Employer at the conclusion of the September 24 meeting, or in its email note to the Union when it supplied the October 2 2nd Revised LBF offer. This last face-to-face meeting had been productive and involved new positions by both the Employer and the Union, including a newly drafted proposal by the Employer to offer pay cuts or severance in a buyout to certain members of the bargaining unit. Impasse is not created because the Employer loses patience—or wants to end the process.

After this point, however, one begins to see in the record that the Employer's obstruction of the bargaining process—only voiced but not acted upon in August—reached full flower in October and November. At this point, the Employer ceased any pretense of engaging in a traditional bargaining process. At this point, the evidence is clear that the Employer was no longer seeking agreement, but rather, bargaining in bad faith.

In Henne's absence, Grindle wrote to the Company on October 13. The Union requested additional bargaining—"with or without the assistance of the FMCS." This was met with the Employer's statement that the October 2 proposal was its "Last Best and Final offer," and that instead of meeting to bargain, "If you have any new proposals, please present them to us in writing

---

was the first time the Company proposed contract language detailing its intentions.

[37] The Union accepted for the first time the Employer's 10.1 (with its explicit recognition that "nothing in this agreement shall be construed as a guarantee of work"), however, conditioned the Union's willingness to make this movement on the Employer's acceptance of the Union's new proposal on the zipper clause (sec. 1.4). On Sec. 2.3, the Union accepted the new language of the Company's proposal on nonbargaining unit employees performing unit work, but added a sentence stating that: "The Company will not contract out work performed by bargaining unit employees, if it will directly cause the layoffs of bargaining unit employees." On 5.3, the Union countered the Employer's new language from the day before by proposing that time spent "in meetings between the Company and the Union" would be compensable, "including travel time" for any "bargaining unit employee(s) and the employee job steward." On 5.8, concerning the consequence of failing to meet a time limit in the grievance-arbitration procedure, the Union accepted for the first time the Company's language, with one exception: it struck the words "or otherwise." The Union made a counterproposal on art. 6 (No Discrimination). On sec. 8.5, severance pay, the Union signaled acceptance of the Employer's position on the first paragraph by leaving this paragraph out of its proposal dedicated to the provisions in dispute. This indicated that the Union accepted the Company's final sentence in the first paragraph indicating that the waiver required for severance also applied to the Union as to any claims related to a severed employee's employment. In the second sentence of 8.5, the Union maintained the position it had advanced in its last proposal—accepting the Employer's 26-week limitation on severance, but adding language that "The maximum shall not apply to any employee laid off outside of seniority." As noted, the Union accepted the Employer's position on 10.1, subject to the Employer's acceptance of the Union's proposal on 1.4. In art. 11, healthcare, the Union made a significant change, accepting the Employer's language—including granting the Employer the right to make changes in healthcare without providing "comparable" coverage. The Union's only difference from the Employer's proposal was the proposal to include language that "The Company's contributions to the cost of the plan(s) will be the same for each bargaining unit employee, regardless of the selected plan."

[38] I note here that in October 13 correspondence to Grindle, in reference to the September 24 bargaining, Feller offered what appears to be—as he did in follow-up to the July 30 meeting—another effort to create a post hoc record for impasse. Feller wrote that "At the conclusion of those meetings on September 24th, it was our understanding that you had no further proposals to make, which was the time to make such proposals." As Grindle explained in his responsive letter of October 19, "this makes no sense." It doesn't. The September 24 meeting ended with the Company promising to provide a written version of its (2nd) revised LBF offer (it gave it orally) and with Blazek stating "I'm there for the employees, want them to be in it with me. I'd like to continue working towards an agreement." I reject the assertion, or implication of Feller's note (which in any event is hearsay) that the Union gave the Employer any reason at the close of the September 24 meeting to think that it had no interest in making further proposals.

[39] This proposal rejected the Union's 10.1, reasserted the Employer's proposals from the Revised LBF offer on Secs. 10.1 and 1.4., reasserted the Employer's position on 2.3, counterproposed the Union's proposal (on 5.3) to permit grievance-handling to be compensable time and agreed to the Union's art. 6 (discrimination) provision. Thus, the parties remained divided on the wording of the zipper clause, subcontracting (i.e., nonunit employees performing bargaining unit work), health insurance, benefits, wages and the two-tier job and wage classification.

for us to evaluate."

In a series of exchanges through October, the Employer asserted that the parties were at impasse and said it was not available to travel to Chicago for bargaining. Instead of agreeing to meet for bargaining in Chicago (which as the Union argued, consistent with the alternating locations that the parties used, was overdue for a meeting), Feller told the Union on October 21, that the Company would only meet in "our Fullerton office" or via video conference, but that "our open enrollment process for healthcare benefits will be coming soon, so it is critical we schedule dates within the next 10 days." On October 23, Feller repeated that the Company was willing to meet via video conference or conference call, but stated that "[i]f you have actual proposals to make, please send them to me in writing and we can review to determine whether future negotiations of any sort are warranted." The Union objected but later correspondence from Feller made clear that this offer was a deadline and conditioned upon advance approval of union proposals. On October 26, Feller wrote that the Company's position "is clear":

> We are willing to meet in Fullerton in person or by video or audio conference in the next now 9 days in the event that you have proposals that you are willing to share in advance that indicate that such additional meetings would be productive. Otherwise, you have our last, best and final offer.

This email made "clear" that advance proposals were a precondition to meeting. This demand for advance proposals, refusal to consider resuming bargaining in the Chicago area, or even in person, and insistence on arbitrary deadlines,[40] was repeated in response to Union demands for bargaining in a dismissive response by Feller on November 4.[41] In his November 10 and November 12 responses to Union demands for bargaining, Feller simply rejected the Union's proposals, reasserted impasse, and did not even address the Union's request to meet for bargaining.

Of significance to the bad-faith bargaining case against the Respondent is the statutory duty under 8(d) requiring a party to "meet at reasonable times and confer." This duty is not satisfied "by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference." *Twin City Concrete, Inc.*, 317 NLRB 1313, 1313–1314 (1995), quoting, *NLRB v. U.S. Cold Storage Corp.*, 203 F.2d 924, 928 (5th Cir. 1953). An employer may not set preconditions that must be satisfied before it will agree to resume face-to-face meetings. *Columbia College of Chicago*, 363 NLRB No. 154, slip op. at 5, 23 (2016), enfd. in relevant part, 847 F.3d 547 (7th Cir. 2017); *Circuit-Wise, Inc.*, 309 NLRB 905 (1992). An employer may not defer a request to bargain with a promise to "evaluate" the union's concerns and make arrangements to meet "if appropriate." *Twin City Concrete*, supra at 1314; *Beverly Farm Foundation*, Inc., 323 NLRB 787, 793 (1997) ("Respondent greeted the bargaining invitation with a demand that [the Union] submit its proposals in writing. The Union refused to comply, correctly construing Respondent's attempt to impose this condition as an illegitimate requirement to bargain by mail. . . . [T]he Union's request to meet and resume bargaining on August 4 imposed a reciprocal obligation on Respondent. By refusing to resume direct negotiations with the Union, Respondent failed to bargain in good faith, thereby violating Sec. 8(a)(1) and (5) of the Act"), enfd. 144 F.3d 1998 (7th Cir. 1998). In addition, in assessing a party's good faith, the Board has found that, considering all the relevant circumstances, a parties' insistence on or refusal to attend a location for bargaining may bear on assessment of its good faith, and may be deemed a stratagem to avoid bargaining. *Burns International Security Services*, 300 NLRB 1143, 1144 (1990). That is the case here, where the demand for preconditions, arbitrary deadlines, and flat refusal to continue the parties' established practice of alternating bargaining locations was wielded as a means of avoiding bargaining.

In addition to the Respondent's resistance to sitting down to bargain, compelling evidence of bad-faith bargaining is found in its repeated dismissals of—its unwillingness to even meet over—the Union's new proposals.

As described above, beginning on November 3, the Union tried three times—through the making of new and significant proposals—to entice the Employer to continue bargaining. The Employer's continued dismissal of every effort by the Union to address significant issues in dispute between the parties is the opposite of good-faith bargaining. Through its continuing conduct in October, but even more pointedly by November, I think it clear that the Employer was no longer bargaining in a manner consistent with its statutory obligation to bargain in good faith and with an intent to reach agreement. *U.S. Gypsum Co.*, 200 NLRB 1098, 1101 fn. 41 (1972) (the obligation of good-faith bargaining is not satisfied by a party's mere willingness to "enter into a contract of his own composition"); *Marriott In-Flite Services*, 258 NLRB 755, 764 (1981), enfd. 729 F.2d 1441 (2d Cir. 1983), cert. denied 464 U.S. 829 (1983).

On November 3, while protesting the Employer's refusal to continue the standard bargaining process by coming to Chicago without preconditions, the Union not only accepted the Company's offer to meet via videoconference but offered a proposal that made significant changes. For the first time, the Union

[40] The deadline was purportedly based on upcoming open enrollment for healthcare insurance. However, none of the proposals—and nothing ultimately implemented—required any change in the provision of healthcare coverage. Rather, the dispute over the healthcare was, as with so many issues, over the extent of the Employer's discretion to make changes. Feller's demand that any meeting occur in this period, after advance submission of bargaining proposals, appears to have been simply the placement of one more obstacle in the path of bargaining, rather than reflecting a legitimate need of the Employer.

[41] Feller wrote:

> We continue to see no new proposals on any key or material issues from you and maintain that we are at impasse. If you have a new proposal or proposals please forward them to us. We are available to meet via video conference at any time within the next week. Please first send us the new proposal /proposals and provide times you would be available to meet over the next week.

unconditionally accepted the Employer's proposal on healthcare.[42]

In agreeing to meet by videoconference, instead of face-to-face, the Union might be said to have called the Employer's bluff. By any measure, the Union's movement on healthcare was significant. Its additional suggestion that it could accept article 13 was also no small matter for the negotiations.[43]

However, the Employer replied the next day, dismissing the proposals, reasserting that the parties were at impasse, and conditioning meeting by video conference on the Union "first send[ing] us the new proposal/proposals."

The Union responded on November 9, noting the significant changes offered in its last correspondence, attaching new written counterproposals accepting for the first time the concept of the two-tier wage and classification and the "wage philosophy" long objected to by the Union,[44] and counterproposing (and mostly accepting) the Employer's pay cut and severance/ buyout proposal, first put in contractual language by the Company at the parties' last bargaining meeting in September.[45]

Feller's response, on November 10, was dismissive, criticized the Union's new proposal for proposing any wage increases, asserted continued impasse, and made a change to the severance/buyout proposal, moving back the effective dates for employees to accept it to December 30, 2015 "in light of the passage of time." There was no mention of the Union's demand for bargaining, no offer to meet by videoconference, at the Company's headquarters, or otherwise.

Again the Union tried, writing to the Employer the next day, November 11, revising its schedule A proposal to withdraw the wage increases and instead proposing bonus payments, and attaching the rewritten proposal.[46]

Feller responded the next day, November 12, this time not bothering to craft a new letter. He sent the same response he had sent to the Union on November 10.

Three times the Union made new proposals, new movement, on issues of unquestionable significance to the Employer, the Union, and the bargaining. Three times the Employer refused (or ignored) the Union's request to meet, even by videoconference. Instead, the Company announced implementation on December 3, essentially ignoring the Union's demands and efforts to bargain. Feller's December 16 response to Union President Wright's December 11 letter demanding bargaining made clear that the Employer was committed to implementation—not bargaining—an attitude it demonstrated again in the December 30 conference call.

This is an employer that by November had diminished and shut down the bargaining process that is required by the statute. The Employer's claim that impasse justified its actions is a case of assuming and wielding the very defense that it has failed to prove. Any impasse that existed prior to this—and I do not believe there ever was a valid bargaining impasse—was surely broken when the Union submitted proposals seeking a face-to-face bargaining and making significant movement on significant subjects in dispute on November 3, 9, and 11.[47]

---

[42] With this move the Union dropped its remaining demand that unit employees all would be subject to the same contribution requirements. In addition, by mail, the Union counterproposed on 5.3.

[43] Henne suggested there was "potential for agreement" on art. 13 but stated that the Union had "a couple of question on the practical implementation of the language." Thus, Henne's suggestion was that the Union was open to the Employer's effort to transfer a wide-range of benefits from the collective-bargaining agreement to a unilaterally-maintained handbook where the Employer would be free to change the value of benefits to employees.

[44] The Union's proposal on schedule A was the first Union proposal in negotiations that accepted the Employer's concept of a two-tier wage and job proposal. The Union's proposal accepted portions of the Employer's "wage philosophy proposal" and delayed until March 31, 2016, the date for evaluating whether an employee should be reduced to a Level A status. It also proposed an across-the-board wage increase of approximately 3 percent in August 1, 2016 and August 1, 2017. (See, Jt. Exh. 29) (i.e., an increase in the minimum for Level A technicians from $28.84 to $29.71 on 8/1/16, and to $30.60 on 8/1/17; and an increase in the minimum for AA technicians from $34.35 to $35.38 on 8/1/16, and to $36.44 on 8/1/17).

[45] The Union's counterproposal on the buyout of those employees designated Level A followed the Employer's proposal in essence, but provided that employees would be informed of their presumptive designation as Level A as of December 1, and have until April 30, 2016, to try to achieve the proficiencies necessary to meet Level AA status or take the severance package buyout. In essence, as Henne explained to the Company in his November 9 email: "Our proposal for the [Memorandum of Agreement] is based on the men being able to get the required training or coursework within the time allowed." The Union's November 9 proposal also accepted for the first time, in Schedule A, sec. 4, the Wage Progression language advanced by the Company, and the Company's schedule A sec. 5, agreeing to the elimination of per diems and instead, accepting the Employer's proposal for actual reimbursement for travel, which under the proposal would be subject to change at the Company's discretion. Jt. Exh. 29, p. 3; Tr. 122.

[46] Henne wrote:

> But here's another try, based on your position that you aren't able to provide guaranteed, scheduled increases—For the Schedule A proposal I sent on Monday, we'll withdraw the request for the increases and Instead propose that increases or bonus payments up to the equivalent of the guaranteed increases we had requested that are given to one employee have to be matched for the other employees, but that matching will not apply to amounts over that.
>
> I'm attaching the revised proposal showing this.

[47] The Respondent asserts (R. Br. at 37–38) that it refused to come to the Chicago area to bargain because the parties were at impasse, once more assuming what it must prove and relying again on its claim of impasse to excuse it from the statutory duty to bargain in good faith. I note that I reject the Respondent's argument that offers of telephone or video conferences—that, in any event, were often not followed through on when accepted by the Union—served as an adequate substitution for face-to-face negotiations. While the parties occasionally had phone conferences, they were not effective bargaining sessions. It is a good example of why precedent requires face-to-face negotiations if demanded. *U.S. Cold Storage Corp.*, 96 NLRB 1108 (1951) ("It is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table. Indeed, the Act imposes this duty to meet"); *Westgate Corp.*, 196 NLRB 306, 313 (1972)

The Respondent cites *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227 (D.C. Cir. 1996) and *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001) for its claim of impasse, but these cases are inapposite. In both, the Court of Appeals refused to enforce a Board order in which the Board found no impasse (or impasse that was broken) based on union declarations of no impasse that were not backed up by substantive movement of any significance. Thus, in *Serramonte Oldsmobile*, the court found that "not a single one of the Union's statements cited by the ALJ actually committed the Union to a new position or contained any specific proposals." 86 F.3d at 233. "Instead," the court concluded, "the record reflects that the Union's attorney offered only vague generalities and neither explicitly agreed to any of the employer's proposals nor offered any specific counterproposals." Id. In *TruServ Corp.*, the court found that "[a]bsent conduct demonstrating a willingness to compromise further, a bald statement of disagreement by one party to the negotiations is insufficient to defeat an impasse. . . . Similarly, a vague request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future concessions, is equally insufficient to defeat an impasse where the other party has clearly announced that its position is final." 254 F.3d at 1117. These points are inapposite because in the instant case, the Union repeatedly made specific, written proposals accepting or moving towards the Employer's position on highly significant issues. It did so while acceding to the Employer's illegitimate demands for proposals in advance of the Company deciding whether to meet. Moreover, unlike in these court cases, here, at least until October 2, the Respondent kept moving too—revising its "final" offer on September 23 and then again on October 2 (which appears to have been a written formal revision of oral changes described by the Company on September 24). And, finally, neither *TruServ* nor *Serramonte* involved an assessment of impasse in the context of a record of bad-faith bargaining generally.

On this record, the Employer's claim of impasse justifying its refusal to bargain is without force. Indeed, had the parties been at impasse after October 2 (and I do not believe they were) the duty to bargain was reactivated by the Union's demands for bargaining coupled with the issuance of meaningful changes in proposals. As noted, above, "Anything that that creates a new possibility of fruitful discussion (even if it does not create likelihood of agreement) breaks an impasse . . . [including] bargaining concessions, implied or explicit." *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983); *PRC Recording, supra* at 636 and 640; *Jano Graphics, Inc.*, 339 NLRB at 251 ("[A]ny impasse on July 29 was broken on August 4, when the Union informed the Respondent that it had new proposals and was seeking further bargaining"). See also*, Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 257 (2006) (finding no good-faith bargaining where the respondent listened and responded to the union's proposal regarding the effects of ceasing operations but then summarily rejected all but one of the union's proposals without providing an explanation or counterproposal, and did not respond when the union requested further bargaining). In this case, the Union's offers of proposals in November were not just promises of movement on significant issues—they were movement. *Larsdale, Inc.*, 310 NLRB at 1319 ("Union's counterproposal on this date, containing a number of concessions, was a sign that the Union was willing to modify its proposals. Given this movement by the Union, the Respondent was not justified in concluding that negotiations were at impasse simply because the Union's concessions were not more comprehensive or sufficiently generous"). There was no impasse in the face of the Union's series of proposals in November, and it was not good-faith bargaining for the Respondent to dismiss and ignore the Union's demands for bargaining.

In addition to impasse, the Respondent's chief defense, on brief, at the hearing, and even in the course of bargaining, was to level accusations of bad faith and delay against the Union. The Employer argues that the Union engaged in bad-faith bargaining by not putting the July 30 LBF offer to ratification, then by returning to the bargaining table on September 23 with new proposals, some on matters not disputed on July 30. More generally, the Employer asserts that the Union's repeated demands to bargain after July 30 and through December were bad faith attempts to forestall impasse and avoid implementation of the Company's final proposal. I do not accept any of this, certainly not as a defense to the Employer's bargaining conduct.

To begin, the Union was straightforward enough about why, after Henne indicated on July 30, that it intended to proceed to ratification, the Union declined to do so: after July 30, the International Union and Local Union President Wright reviewed the proposal and they made clear that it should not go to a vote. The International Union "felt that there were too many takeaways [from] the current contract . . . not only takeaways but . . . too much negative impact to employees in the [proposal]." So the Union did not put the proposal to a vote. That is the explanation. There is no evidence at all that it was done in bad faith or for delay. Rather, after considering the matter internally, ratification was not a bargaining tactic that the Union was willing to pursue. Certainly there was not (and there is no claim that there was) a binding agreement for the Union to take the Company's July 30 proposal to ratification.[48] And while Henne led the Company to

("Willingness to negotiate by telephone does not satisfy the obligation to meet; face-to-face meetings are required"). I note that the Employer's assertion (R. Br. at 38) that telephone conferences are more reasonable because the Employer is "in the business of installing and repairing such equipment," and the assertion that (R. 40) "the Act must accommodate modern technology"—by allowing the Employer to limit meetings to video or phone conferences—are makeweight arguments.

[48] Ratification is a "subject unrelated to wages and terms of conditions of employment," and thus, even a Union's stated intention to take a proposal to ratification does not constitute a binding bilateral agreement to do so. *C & W Lektra Bat Co.*, 209 NLRB 1038, 1039 (1974) ("We are unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment"), enfd. 513 F.2d 200 (6th Cir. 1975); *Houchens Market of Elizabethtown*, 155 NLRB 729, 735 (1965), enfd. 375 F.2d 208 (6th Cir. 1967) (in any event ratification may not be insisted on by the employer regardless of whether the parties understood that the employees should vote on the contract"); *Personal Optics*, 342 NLRB 958, 962 (2004)

believe he intended to put the matter to ratification—I believe he intended to do so at the time—Henne was clear that the Union was not accepting or endorsing the proposal and did not agree with it. Although I have found, above, that reference to seeking review from the IBEW or Wright was made by Henne, I do not consider that significant. It is not bad faith for the Union to decide, upon due consideration, that it is not in the interest of the bargaining process to put a proposal to ratification, even after initially indicating that it would do so.

Instead of choosing to invoke ratification, the Union demanded more bargaining and, albeit reluctantly, the Employer resumed bargaining with a mediator. The Union came to bargaining with reworked proposals, including proposals the Employer coins "regressive" because they challenged Company proposals that had not been in dispute on July 30. The Employer argues strenuously that this "regressive" bargaining by the Union was indicative of bad faith. I do not agree. For the same reasons that the Union would not take the July 30 offer to ratification, the Union decided to return to the bargaining table and "push back" on some of the more problematic Company proposals that sought such extensive unilateral control of terms and conditions of employment. The Union had acquiesced to some of these proposals in an effort between July 28–30 to get an agreement. That effort failed and the Union, after review with the IBEW and Wright, revamped its positions. However, nothing in the Union's new proposals suggest an effort to frustrate agreement.

A regressive proposal is "not unlawful in itself," rather it presents as bad-faith bargaining only if offered in bad faith, such as "for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp*., 331 NLRB 223, 225 (2000); 26 Fed. Appx. 435 (6th Cir. 2001). "What is important is whether they are 'so illogical' as to warrant the conclusion that . . . offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement." *Barry-Wehmiller Co.*, 271 NLRB 471, 473 (1984), quoting *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 103 (1981). Here, the Union was not attempting to thwart agreement, but to bring to the table proposals that would enable a bargaining agreement.

Notably, while the Employer argues on brief that the Union's proposals evinced bad faith, at the time, the Company took it in stride. It did not claim the new proposals were "bad faith" bargaining and it responded to the Union's proposals and offered significant new proposals in the September 23-24 bargaining. The Union's changes did not frustrate bargaining and did not thwart agreement.

More generally, the Employer claims that the Union's actions from July 30 onward manifested delay and bad faith prompted by an illicit motive to "forestall potential implementation of the terms of the Company's LBFO," (R. Br. at 46) and that this justified the Company's actions. On one level the claim is simply untrue and ignores that beginning August 14, less than two weeks after July 30, the Employer began months of ignoring, quibbling (i.e., we will talk informally and decide whether it is worth meeting), minimizing, and rejecting outright Union proposals and efforts to meet. In fact, the Employer agreed to one face-to-face session after July 30, despite repeated efforts by the Union to establish more meetings, in an environment in which the predicates for impasse are sorely lacking. There is simply nothing to the Employer's claim that the union unreasonably delayed negotiations in a manner that justified the Employer calling it quits, or that suggested bad faith.

But more to the point, the Employer's claim of Union malfeasance rests mostly on the unusual argument that the Union kept offering bargaining proposals in an effort to forestall implementation of the Company's October 2 proposal. This seems to me, were it true (and even if the Employer were not bargaining in bad faith), not only a nonoffense, but a vindication of the Board's impasse rule. One theory of the Board's rule permitting employer implementation upon impasse is that it provides one party, the employer, with a tool of "economic leverage" to encourage collective bargaining. *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1032 (D.C. Cir. 1997). If the fear of being struck by that tool incentivizes a union to compromise, to offer new proposals, and to seek accommodation with the employer—well, that is collective bargaining. The proposals the Union made in November 2015 in an effort to ignite bargaining were real. There is no evidence that they were not. It is unconvincing, indeed, it might be said to be an admission, for the Employer to complain that the Union's dedication to bargaining slowed the Employer's efforts to implement its proposal. And the Employer's argument would be without force even if it had otherwise bargained in good faith. In the context of its bargaining conduct of its repeated false claims of impasse going back to August, its resistance to and rejection of meetings, its issuance of ultimatums as to deadlines and on preconditions before it would meet, its dismissal of Union bargaining efforts is particularly misconceived.

Based on all of the above, I find that from October 22, 2015, the Employer failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.[49]

C. Implementation (as a further indicium of bad-faith bargaining and as an independent violation of the Act)

Counsel for the General Counsel alleges that further evidence of bad-faith bargaining is found in the Respondent's unilateral implementation of certain new terms and conditions on January 1, 2016. She also argues (GC Br. at 40) that the unilateral implementation is an independent violation of Section 8(a)(5).

It is well-settled that unilateral changes may be indicia of a lack of good-faith bargaining. *Whitesell Corp.*, 357 NLRB 1119 (2011); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996); *Atlanta Hilton & Tower*, 271 NLRB at 1603; *Omaha World-Herald*, 357 NLRB 1870, 1885 (2011) ("When such unilateralism occurs during bargaining, it is generally proof

("Even if the Union's prior statements arguably may have led the Respondent to believe that the Union would conduct a vote of the bargaining unit, there was never any such agreement between the parties).

[49] An employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Southcoast Hospitals Group, Inc.*, 365 NLRB No. 100, slip op. at 22 fn. 20 (2017); *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956).

that the employer has not bargained in good faith"). Moreover, in general, a unilateral implementation in the absence of a valid bargaining impasse is a per se breach of the Act, independently unlawful without regard to good or bad faith. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Southcoast Hospitals Group*, 365 NLRB No. 100, slip op. at 26 (2017); *Omaha World-Herald*, 357 NLRB at 1885.

In defense, the Employer renews its claim of impasse as privileging its implementation. However, "[a] finding of impasse presupposes that the parties prior to the impasse have acted in good faith." *Circuit-Wise, Inc.*, 309 NLRB at 918. "A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes." *Wayne's Dairy*, 223 NLRB 260, 265 (1976); *White Oak Coal Co.*, 295 NLRB 567, 568 (1989). Post-impasse implementation is permitted "but only insofar as the new terms meet carefully circumscribed conditions," including that "[t]he collective-bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238–239 (1996); *Don Lee Distributor*, 322 NLRB 470, 492 (1996) ("An impasse may be arrived at only when the parties have reached their disagreement after bargaining in good faith"), enfd. 145 F.3d 834 (6th Cir. 1998); *United Contractors Inc.*, 244 NLRB 72, 73 (1979), enfd. mem. 539 F.2d 713 (7th Cir. 1976).

While an employer's unfair labor practices do not automatically preclude the possibility of the parties reaching a good-faith impasse, where, as here, the unfair labor practices go directly to the parties' bargaining disputes, and were the chief reason for the breakdown in bargaining, there is not much to an employer's claim that, notwithstanding the unremedied unfair labor practices, it is free to implement because it has bargained to an impasse. As discussed above, in this case, the prerequisites for a valid impasse were destroyed by the Respondent's consistent manipulation of the bargaining process with its repeated false claims of impasse, demands for preconditions to bargaining, failure to participate in the bargaining process, failure to respond to repeated Union proffering of proposals on significant subjects, and, of course, the adherence to proposals that sought overreaching discretion and control over the employees' terms and conditions of employment. Based on this bargaining conduct, there was no valid impasse and no right to implement, either on December 3, 2015, when implementation was announced, or on January 1, 2016, when the changes were implemented. The deadlock that existed in December 2015, was not a bona fide impasse as the Respondent engaged in an unlawful course of bad-faith bargaining and that unlawful conduct was a chief cause of the collapse of the bargaining process.

In its claim of impasse, the Respondent relies on Feller's December 3 implementation letter, in which he notes that he has not heard from Henne since Feller's November 12 letter (in which Feller dismissed Union demands for bargaining and substantive movement). In his December 11 response to Feller, Wright pointed out that "The reason [Henne] was not in touch

with you after the email you sent him on November 12 is that what you sent him, and the communications before that, did not suggest a response by him would get anywhere." The Respondent (R. Br. at 22) seizes on Wright's point and declares it a "significant concession" allegedly demonstrating impasse. It is not. What it is, is a perfect example of the Respondent's misconceived view that it can dismiss, ignore, and belittle the Union's efforts to bargain for months, until the Union finally gives up, and then Respondent can triumphantly declare impasse and implement. The statute commands collective bargaining not begging, and the Union does not have to beg meetings forever. That is the point of the statutory requirement of good-faith bargaining.

Notably, under Board precedent, the unilateral change is considered unlawful from the time it is announced—in this case December 3—and not when it became effective on January 1, 2016. *ABC Automotive Products Corp.*, 307 NLRB 248, 249–250 (1992), enfd. mem. 986 F.2d 500 (2d Cir. 1992); *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 3 fn. 9 (2015); *UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8, slip op. at 1–2, fn. 5 (2016). The announcement on December 3 was, on its face, presented as a fait accompli, and was issued in the absence of impasse. And although it listed the effective date of implementation as January 1, 2016, it also indicated that the employees would only have until December 31, 2015 to decide if they wanted to take the severance or the pay cut.[50]

In any event, even assuming that the unlawful implementation occurred on January 1, 2016, there is nothing to the Employer's claim that a lawful good-faith impasse developed in December. The Respondent's commitment remained to implementation—not meeting to bargain—and it gave no consideration to the multiple proposals that the Union had offered in November.

Finally—in addition to its impasse defense—the Respondent (R. Br. at 45), citing *Mackie Automotive Systems*, 336 NLRB 347 (2001) and *RBE Electronics*, 320 NLRB 80 (1995), alleges that it was free to implement even in the absence of impasse based on the Union's alleged delays and avoiding of bargaining. Notably, while both cases reference this "limited exception" (*Mackie*, supra at 349; *RBE*, supra at 81) to the general rule requiring impasse for implementation, neither involves such a situation. Cases that do sharply illustrate the inapplicability of the exception to the circumstances here. See, e.g., *M&M Contractors*, 262 NLRB 1472, 1477 (1982) (allowing implementation in absence of impasse "in light of the particular circumstances present here, especially the Union's refusal from April to early November to give Respondent a date on which it would meet to bargain, and the Union's early November demands for an immediate meeting followed by refusal and delay in setting up a meeting date"), review denied 707 F.2d 516 (9th Cir. 1983); *AAA*

[50] The issue of dissemination of the December 3 announcement to employees—the "Impasse and Implementation Letter" letter was sent to Henne and Grindle—is not well-developed in the record. I note that one member of the Union's bargaining team, Stewart, was an Altura employee. Stewart was among those provided the severance/buyout option. He contacted the Company in December regarding the severance/buyout. In addition, I note that the January 4, 2016 letter to employees indicates that the Company had previously announced the implementation to employees ("As communicated in earlier negotiation updates, we plan to make the following changes. . .").

Motor Lines, Inc., 215 NLRB 793 (1974) (implementation allowed where employer "diligently and earnestly" sought bargaining with union but union "refused to meet with Respondent at any time for purposes of negotiating a new contract").[51]

I also agree with the General Counsel that the Respondent's unilateral implementation constitutes an independent violation of Section 8(a)(5) and (1). However, as I read it, the complaint is missing a clear statement that the unilateral implementation is alleged as an independent violation of the Act. If that was intended, the first subparagraph of paragraph 7 of the complaint could have been clearer. However, the complaint clearly alleges the facts of the January 1, 2016 unilateral implementation, including the specific portions of the Employer's revised LBF offer, alleges that these subjects were mandatory subjects of bargaining, and alleges that these proposals were implemented in the absence of a valid impasse and without first bargaining to a good-faith impasse. (Complaint paragraphs VI(c), (d), and (e).) The issue was truly central to this litigation. The independent unlawfulness of the implementation is an issue "closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). It is an appropriate violation to find. See, *E.I. Dupont De Nemours*, 355 NLRB 1096, 1103 fn. 12 (2010) (finding violation for unilateral implementation during bargaining for collective-bargaining agreement was closely connected to complaint allegations and fully litigated where complaint alleged failure and refusal to bargain over changes), enf. denied on other grounds, 682 F.3d 65 (D.C. Cir. 2012); *Galaxy Towers Condominium Association*, 361 NLRB 364, 365 fn. 6 (2014) ("Although the premature declaration of impasse and subsequent implementation of new terms and conditions of employment are not specifically alleged in the complaint, these issues were fully litigated and closely connected to the [pled] issue of the Respondent's right to unilaterally subcontract bargaining unit work").

I note that given my findings and conclusion, there is no need to provide further analysis of events beyond implementation. Suffice it to say that nothing in the record of post-implementation events could serve to remedy the unfair labor practices found. Nor do I see any grounds for additional independent unfair labor practices based on the unlawful implementation. This includes the complaint's allegation that the meetings with employees to give them the option of executing the unlawfully implemented buyout/severance agreements constituted direct dealing and/or bypassing of the Union. As argued by the General Counsel on brief, the alleged direct dealing/bypassing is part of the res gestae of the unlawful implementation. It is distinguishable on those grounds from the direct dealing and bypassing found in *Grinnell Fire Protection Systems Co.*, 328 NLRB at 585 fn. 3, which involved an employer that, after (unlawful) implementation of its final contract offer, offered certain employees *higher* wages than provided for in its contract offer. By contrast, the Union, relying on *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), suggests (CP Br. at 23–24), that the severance/buyout proposal was a proposal to directly deal that could not be implemented, even upon impasse and, indeed, could not lawfully be insisted upon to impasse. In any event, under the circumstances, a direct dealing/bypassing finding would be essentially cumulative with no material effect on the remedy. I do not reach it on those grounds.

CONCLUSIONS OF LAW

1. The Respondent Altura Communication Solutions, LLC (the Respondent) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party International Brotherhood of Electrical Workers, Local 21 (the Union) is a labor organization within the meaning of Section 2(5) of the Act and, at all material times, based on Section 9(a) of the Act, has been the designated and recognized exclusive representative for purposes of collective bargaining of the following appropriate unit of the Respondent's employees:

> All full-time and regular part-time field service technicians based at reporting locations throughout the United States (except New York City), but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

3. On or about October 22, 2015, and thereafter, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the collective-bargaining representative of the unit employees.

4. On or about December 3, 2015, and January 1, 2016, by unilaterally changing terms and conditions of employment for unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having failed to bargain collectively and in good faith with the Union shall be ordered, on request, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

---

[51] I need not reach a third issue concerning the Respondent's implementation, briefly referenced (GC Br. at 30–31) by the General Counsel. This issue concerns the discretionary nature of the proposals implemented—assuming the proposals implemented were, indeed, the proposals in the Employer's proposal—and the lawfulness of implementation of such proposals even if the parties were, in fact, at a lawful bargaining impasse. I need not reach this issue as doing so would not materially affect the remedy. *See Stein Industries*, supra, slip op. at 6 fn. 12 (given finding of implementation in absence of impasse unnecessary to reach alternative rationale for violation if impasse had been reached).

The Respondent, having unlawfully unilaterally implemented changes in the terms and conditions for its unit employees on and after December 3, 2015, and again on January 1, 2016, as part of its implementation of its bargaining offer, shall, upon the Union's request, rescind the changes and restore the status quo ante, and shall maintain the status quo ante in effect until the parties have bargained to agreement or a valid impasse.

The Respondent having unlawfully offered severance/buyout agreements that were accepted by the following employees, shall offer David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

The Respondent shall make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral implementation of changed terms and conditions of employment, including employees who severed employment or received a pay cut, pursuant to the unlawfully offered severance/buyout agreements. Additionally, having found that the Respondents violated the Section 8(a)(5) and (1) by ceasing to make contributions to employees' 401(k) accounts from January 1, 2016, the Respondent shall make such contributions, including any additional amounts due the plan in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and make whole the unit employees for any loss of interest they may have suffered as a result of the failure to make such payments.[52]

The make whole remedy shall be computed in accordance with *Ogle Protection Service, In*c., 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), or *F.W. Woolworth Co.*, 90 NLRB 289 (1950), as appropriate, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[53]

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate those employees who accepted the unlawfully implemented severance/buyout offer (David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran) for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate the employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 13 a report allocating backpay to the appropriate calendar year for the employees. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall be ordered, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, to notify and, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time field service technicians based at reporting locations throughout the United States (except New York City), but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

In the complaint and in the conclusion to her brief (GC Br. at 40-41) counsel for the General Counsel requests that as part of the remedy for the violations found, the Respondent should be ordered to commit to a bargaining schedule with the Union, that the Union's negotiating costs and expenses from October 22, 2015, to the present should be reimbursed, and that employees' make whole remedy should include payment for consequential economic harm incurred as a result of the Respondent's unlawful conduct. The first two are extraordinary remedies that the Board has ordered on occasion. The third does not reflect extant precedent. Almost by definition, extraordinary (much less unprecedented) remedies are not self-evidently appropriate. In any event, while I agree that the Respondent's violations of the Act are serious, I am unconvinced that the requested extraordinary remedies are warranted as part of the remedy.

My survey of the cases where the Board imposes a bargaining schedule remedy reveals that they involve cases where the egregious misconduct of the employer is qualitatively different than the misconduct confronted here.[54] In this case, while I do not

---

[52] To the extent that an employee has made personal contributions to the 401(k) savings plan that have been accepted by the plan in lieu of the Respondents' delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a set-off to the amount that the Respondents otherwise owe the fund. See, e.g., *Capital Iron Works Co.*, 355 NLRB No. 138 (2010) (incorporating by reference 355 NLRB 127, 129 fn. 4 (2010)).

[53] The make-whole provision will be computed in accordance with *Ogle Protection Service*, supra, for losses that do not involve cessation of employment status or interim earnings. Thus, the *Ogle* calculation will apply to any make-whole remedy stemming from the unilateral implementation of changes to vacation, sick/personal days, per diem, cell phone, 401(k) and severance cap. However, for the five employees who severed employment pursuant to the unlawfully implemented severance/buyout offer, any make-whole remedy for losses from that change will be calculated in accordance with *F. W. Woolworth Co.*, supra. The application of these rules to specific individuals and amounts owed are matters for compliance.

[54] *Gimrock Construction*, 356 NLRB 529, 529 (2011) (bargaining schedule remedy imposed where employer had refused to meet and bargain with union for over 11 years including over four years after enforcement of the Board's order by the Court of Appeals), enforcement denied in relevant part on other grounds, 695 F.3d 1188 (11th Cir. 2012); *Profession Transportation, Inc.*, 362 NLRB 534, 535 (2015) (bargaining schedule imposed where employer cancelled seven consecutive

want to understate the seriousness of the Respondent's unfair labor practices, and their pernicious effect on the bargaining process, this is an employer that did meet (at times), did bargain (at times), did provide information requested of it, and whose conduct was free of expressions of the unbridled animus and contempt for the union or employees that accompany some bad-faith bargaining cases. It is not a recidivist, as far as I know. Moreover, in terms of its failure to diligently meet, which is the failing to which a schedule is directed, the Respondent's hesitance and then failure to meet, and its preconditioning of meetings, developed as part of its false contention that it had bargained to impasse. Stripped of that contention, and if acting in accordance with the traditional remedies issued as part of this case, I see no reason to believe that this employer will fail to bargain based on an appropriate schedule.

The General Counsel also requests that the Union be reimbursed for its costs and expenses incurred in collective bargaining from October 22, 2015 to the present. The Board's "long established practice" is to "rely[ ] on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations." *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enfd. in relevant part, 118 F.3d 795 (D.C. Cir. 1997). The remedy of requiring the respondent to reimburse the charging party for negotiation expenses is reserved for "cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." Id. (citations omitted). In such instances, an order to reimburse the charging party for negotiation expenses "is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." Id. at 859. While I agree that the Respondent's unfair labor practice are substantial and that, to date, have "infected the core" of the bargaining process, I do not believe that it has been shown, or is obvious, that traditional remedies will be ineffective or not deter future misconduct. While there is no doubt that the Respondent's unlawful conduct resulted in a waste of the Union's resources, I do not see grounds on which to conclude that an award of bargaining expenses is "necessary to ensure a return to the status quo ante at the bargaining table." The Respondent and the Union have a history of successful negotiations. These negotiations were different. As I have found, the Respondent's attitude toward these negotiations resulted in misconduct that destroyed the bargaining process. However, I believe this misconduct---new to the parties and new to the Respondent after many years of bargaining—is remediable through traditional remedies, at least at this point. Should traditional remedies fail to coerce lawful and good-faith bargaining conduct, the matter would likely be viewed in a different light.

Finally, as noted, the General Counsel's request for consequential damages does not reflect extant precedent. I believe it is for the Board to consider in the first instance. *Omega Construction Services, LLC*, 365 NLRB No. 72, slip op. at 3 fn. 3 (2017).

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at each of the Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed any 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 October 22, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 13 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[55]

ORDER

The Respondent Altura Communication Solutions, LLC, Fullerton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with the International Brotherhood of Electrical Workers, Local 21 (Union) as the exclusive collective-bargaining representative

bargaining sessions and insisted to impasse that any collective-bargaining agreement reached would be nullified and the employer would no longer have to recognize the union if the Supreme Court affirmed the D.C. Circuit's decision in *NLRB v. Noel Canning*); *Thermico Inc.*, 364 NLRB No. 135, slip op. at 3 fn. 4 (2016) (bargaining schedule imposed because 11 months passed since the union's first bargaining request, the respondent refused or did not respond to the union's bargaining requests, and the respondent abrogated its obligation to bargain pursuant to a bilateral settlement); *Camelot Terrace*, 357 NLRB 1934, 2005 (2011) (bargaining schedule imposed because where respondent engaged in flagrant and "aggravated unlawful" behavior and failed to comply with the bargaining schedules in two settlement agreements), enforcement granted in relevant part, 824 F.3d 1085 (D.C. Cir. 2016); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2, 733 (2011) (bargaining schedule imposed due to egregious misconduct that included the respondent soliciting and encouraging petitions to decertify the union, withdrawing recognition from the union based on one of the petitions that the respondent solicited, and failing to provide information that the union requested), enfd. 540 Fed. Appx. 484 (6th Cir. 2013).

[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of the employees in the following unit:

> All full-time and regular part-time field service technicians based at reporting locations throughout the United States (except New York City), but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) Unilaterally changing terms and conditions of employment for bargaining unit employees by implementing portions of its final contract offer without bargaining to a good-faith impasse.

(c) 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) On request by the Union, bargain with the Union as the exclusive-collective bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time field service technicians based at reporting locations throughout the United States (except New York City), but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) On request by the Union, restore to unit employees the terms and conditions of employment that were applicable prior to January 1, 2016, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining.

(c) Within 14 days from the date of this Order, offer David Pickett, Jeff Stewart, Jerry Nanson, Brian Stark, and Paul Curran, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make whole the unit employees, with interest, for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, in the manner set forth in the remedy section of this decision, including but not limited to making contributions to employees 401(k) accounts that the Respondent would have paid but for the unlawful unilateral changes, and making whole employees who severed employment or received a wage cut pursuant to the unlawfully offered severance/buyout offers on and after January 1, 2016.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year.

(f) 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, social 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 backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 13, 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 in each language deemed appropriate 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since October 22, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the 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.

Dated, Washington, D.C. July 27, 2017

---

[56] 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."