Universal Fuel, Inc. *and* International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 4. Case 05–CA–034622

September 27, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On October 20, 2009, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions with supporting argument, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The 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 modified and to adopt the recommended Order as modified and set forth in full below.[2]

1. We agree with the judge, for the reasons discussed in his decision, that the Respondent, Universal Fuel, Inc., violated Section 8(a)(5) and (1) of the Act by engaging in overall bad-faith bargaining with the Union. Thus, as the judge found, in the course of initial contract negotiations, the Respondent:

- opposed the Union's proposal on union security for purely "philosophical" reasons, without advancing any legitimate business justification;
- late in negotiations, reneged on several tentative agreements previously reached with the Union, and made regressive proposals concerning those matters without good cause;
- also late in negotiations, introduced new and unpalatable proposals on subcontracting and picketing without any legitimate business justification;
- insisted on negotiating over a permissive bargaining subject, the amount of fees to be paid under a proposed agency shop arrangement;
- withdrew its October 8 and November 6 contract proposals because the Union had not accepted either in time for the proposal to be approved by the United States government pursuant to the Service Contract Act of 1965;[3] and
- falsely informed employees that union security was the only issue preventing agreement, and cast blame on the Union.

As did the judge, we find that the Respondent's conduct, viewed in its entirety, indicates that the Respondent was bargaining without a sincere desire to reach a collective-bargaining agreement. See, e.g., *NLRB v. Reed & Prince Mfg. Co.,* 118 F.2d 874, 885 (1st Cir. 1941), cert. denied 313 U.S. 595 (1941).[4] Unlike the judge, however, we find it unnecessary to determine whether any of the individual acts just described was unlawful in and of itself. Instead, the Respondent's conduct, as a whole, supports the judge's determination that the Respondent was not bargaining in overall good faith and thereby constitutes a violation of Section 8(a)(5).[5]

2. We turn now to remedial issues. We shall order the Respondent to cease and desist and to bargain in good faith. In agreement with the judge, we shall also extend the certification year for 1 year.[6]

3. In addition, as recommended by the judge, we shall order the Respondent to reinstate its October 8, 2008 bargaining proposal for a reasonable period of time and to sign a contract incorporating the terms of that proposal if the Union accepts it. See *TNT Skypack, Inc.*, 328 NLRB 468, 469–470 (1999), enfd. 208 F.3d 362 (2d Cir. 2000); *Mead Corp.*, 256 NLRB 686, 686–687 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983). There is no merit in the Respondent's contention that such a remedy will contravene the Supreme Court's decision in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), or Section 8(d) of the Act. In adopting this portion of the judge's Order, we are not imposing contract terms on the parties without their consent. If the Union accepts the proposal, it is one

[1] The Respondent has implicitly 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] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall modify the judge's recommended Order to require that backpay and/or other monetary awards shall be paid with interest compounded on a daily basis.

We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

[3] 41 U.S.C. 351 et seq., recodified without material change at 41 U.S.C. 6701 et seq., Pub. L. 111–350, 124 Stat. 3677 (Jan. 4, 2011). This point is discussed further below.

[4] In reaching this conclusion, we find it unnecessary to rely on the Respondent's refusal to continue holding bargaining sessions exclusively in Maryland.

[5] Indeed, that appears to be the Acting General Counsel's theory of the case.

[6] The Respondent did not file an exception to this recommendation.

that the Respondent "formulated and voluntarily offered." *Mead Corp.*, 256 NLRB at 687. The Respondent can hardly contend that it is being forced to make a concession within the meaning of Section 8(d) by being required to accept the terms of its own offer. Id. And, of course, if the Union rejects the October 8 proposal, the parties will continue bargaining toward agreement.

Nor is there merit to the Respondent's contention that it should not be required to reinstate its October 8 proposal because (for reasons explained below) it may not be able to secure reimbursement from the Federal government for the wage rates incorporated in that proposal if the Union accepts it.[7] When the Respondent engaged in bad-faith bargaining in the weeks leading up to the original deadline for reimbursement, it effectively created the uncertainty of which it now complains. Board law is clear that the Respondent, as the wrongdoer, must bear the burden of this uncertainty. See *TNT Skypack, Inc.*, 328 NLRB at 470. We are not persuaded that the Union breached some equitable duty that would now foreclose an otherwise appropriate statutory remedy for the Respondent's unfair labor practice. The Respondent still is free to seek retroactive approval of the wage rates, if the Union accepts the October 8 proposal.

4. We do not, however, adopt the portions of the judge's remedy and recommended Order requiring the Respondent to bargain "at locations in reasonable proximity to the bargaining unit" and according to a schedule of the judge's devising.[8] The Respondent's negotiators made at least three trips from the Respondent's headquarters in Alabama to Maryland, where six bargaining sessions were held at the Union's training center near the Respondent's Patuxent River facility. We are not persuaded that the Respondent must continue to incur all the burdens of traveling for negotiating purposes, especially given that the Union is part of a large international union that presumably is able to shoulder some of those burdens. Indeed, when the Respondent informed the Union after October 8 that it would not return to Maryland, but would be willing to meet with the Union in Alabama, the Union promptly agreed. In these circumstances, we find it sufficient instead to order the Respondent to meet with the Union at a mutually acceptable location.[9]

Nor do we find it appropriate to order the Respondent to bargain according to the judge's recommended schedule. The Respondent met with the Union on six occasions prior to November 6. At those sessions, the parties exchanged proposals and reached tentative agreements on a number of subjects. There is no allegation, and no evidence, that the Respondent dragged its feet in scheduling bargaining sessions, canceled sessions without valid reasons, agreed to meet only for brief periods of time, failed to send representatives with authority to conclude agreements, or engaged in any other kinds of dilatory tactics. The vice in the Respondent's conduct lies not in the difficulty of getting the Respondent to the bargaining table, but in what it did once it got there. We are remedying the latter conduct, and that it all that is required here. We shall modify the judge's recommended Order and notice accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Universal Fuel, Inc., Patuxent River, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 4 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit set forth below.

(b) 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 in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning

[7] As a contractor covered by the Service Contract Act, the Respondent is required to pay at least minimum rates set by area wage determinations, for which it is reimbursed by the government contracting agency. If the Respondent and the Union agree on wages and benefits that are higher than the area minimum, and incorporate the higher rates in a collective-bargaining agreement, the Government will reimburse the Respondent for the higher rates if the contracting officer finds that those rates are reasonable. For the Respondent to receive compensation for the higher rates set forth in the Respondent's October 8 proposal, however, the parties would have had to submit the collective-bargaining agreement to the contracting officer by December 1, 2008. Although the parties had not reached a contract on November 6, the Respondent asked the Union to join the Respondent in requesting the contracting officer to incorporate the tentatively agreed-on wages and benefits into the new area wage determination for December 1, but the Union refused. In these circumstances, the Respondent urges that it would inequitable for the Board to require it to pay the higher than area standard rates contained in the proposal because it would not be compensated by the Government for the rates in excess of the area minimum.

[8] The judge ordered the Respondent to bargain "on request within 15 days of the issuance of a Board Order for a minimum of 24 hours per month and at least 6 hours per session, or any other schedule mutually= agreed upon between the Respondent and the Union."

[9] We nevertheless find that the judge appropriately ordered the Respondent to reimburse the Union for the costs and expenses it incurred in traveling to Alabama to attend the November 6, 2008 bargaining session. Reimbursement for that travel is based on the Respondent's conduct at that session, not the mere location of that session.

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 Mechanics, Mechanic Helpers, Drivers, Fuel Distribution/Drivers, LOX Plant Operator, Lox Plant Lead, Supply Tech (Supply Clerk), Account Clerk II (Gas Station Operator, MDGAS (MOGAS) Operator), and Dispatcher Driver Operators employed by the Respondent at its Patuxent River NAS facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) Reinstate its October 8, 2008 contract proposal and afford the Union a reasonable period of time to accept that offer or to make counterproposals, and if an agreement is reached, sign a contract, with retroactive pay and benefits based on the wage and benefit rates contained in that offer, making employees whole in the manner described in the remedy section of the judge's decision, as modified in this decision.

(c) Reimburse the Union for costs and expenditures related to the November 6, 2008 negotiation session, in the manner set forth in the remedy section of the judge's decision, as modified in this decision.

(d) Within 14 days after service by the Region, post at its Patuxent River, Maryland facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 5 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 certification of the Union issued by the Board on February 8, 2008, is extended for a period of 1 year commencing from the date on which the Respondent enters into negotiations with the Union.

Dated, Washington, D.C. September 27, 2012

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	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

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 recognize and bargain with International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 4 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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

[10] 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."

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 Mechanics, Mechanic Helpers, Drivers, Fuel Distribution/Drivers, LOX Plant Operator, Lox Plant Lead, Supply Tech (Supply Clerk), Account Clerk II (Gas Station Operator, MDGAS (MOGAS) Operator), and Dispatcher Driver Operators employed by us at our Patuxent River NAS facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL reinstate our October 8, 2008 contract offer and afford the Union a reasonable period of time to accept that offer or to make counterproposals, and if an agreement is reached, WE WILL sign a contract with retroactive pay and benefits based on the wage and benefit rates contained in that offer, making employees whole in the manner described in the Board's decision.

WE WILL reimburse the Union for costs and expenditures related to the November 6, 2008 negotiation session, in the manner set forth in the Board's decision.

UNIVERSAL FUEL, INC.

Patrick J. Cullen, Esq., and *M. Anastasia Hermosillo, Esq.,* for the General Counsel.
Chris Mitchell, Esq., of Birmingham, Alabama, for the Respondent.
Brian Bryant, Grand Lodge Representative of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Washington, D.C. on April 22 and 23, 2009. The charge was filed on November 13, 2008, by the International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 4 (the Union) against Universal Fuel, Inc. (Respondent).[1] The amended complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith by its overall conduct and by: reneging on tentative agreements that all job assignments, promotions, layoffs, and recalls would be controlled by seniority; reneging on tentative agreements that discipline and discharge would be for just cause; making regressive proposals regarding seniority; introducing the issue of subcontracting late in negotiations; refusing to accede to union-security provisions because of philosophical objections; adhering to its proposal on union security and dues check-off that would set, by contract, the amount of fees paid by nonmember employees despite the Union's continued refusal to bargain over this permissive subject; making contract proposals that denied employees the right to picket under all circumstances; making contract proposals contingent upon approval by the United States government and withdrawing those proposals because the Union did not accept them in time to be approved by the United States Government; and on or about November 7, falsely informing employees that the only issue preventing agreement with the Union was union security.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs by the General Counsel and the Respondent, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with its principle office and place of business in Daleville, Alabama, and an office and place of business at that Naval Air Station Patuxent River (NAS Pax River), located in Patuxent River, Maryland, has been engaged in the business of refueling military aircraft for the United States Navy, at NAS Pax River, pursuant to a contract with the United States government Department of Defense. During the past 12 months, a representative period, Respondent, in conducting its business operations described above has been engaged in providing services to the United States government valued in excess of $50,000. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Following an election held on January 30, in which the Union won by a vote of 22 to 5, the Union was certified on February 8, as the exclusive collective-bargaining representative of Respondent's employees in the following unit appropriate for bargaining:

> All full-time and regular part-time Mechanics, Mechanic Helpers, Drivers, Fuel Distribution/Drivers, LOX Plant Operator, Lox Plant Lead, Supply Tech (Supply Clerk), Account Clerk II (Gas Station Operator, MDGAS (MOGAS) Operator), and Dispatcher Driver Operators employed by Respondent at its Patuxent River NAS facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

There were three witnesses who testified during this proceeding. For the Union, Joseph Compher and Anthony Provost

[1] All dates are 2008 unless otherwise specified.

[2] General Counsel's unopposed motion to correct the transcript dated June 5, 2009, is granted.

[3] In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth herein.

appeared as witnesses. Compher is a business agent, who had worked for the Union since 1996. He served as lead negotiator for the Union at negotiations with Respondent, save for the last session on November 6. Provost, at the time of the hearing, worked for the International Association of Machinists and Aerospace Workers, Eastern Territory, as a special representative. Provost served as lead negotiator for the Union at the November 6, session, which was also attended by Compher. Provost had worked for the Union since 1993, in different positions.[4] Chris Mitchell also testified. Mitchell served as chief spokesperson for Respondent during all the negotiation sessions, and he has been a practicing labor attorney since 1973. Mitchell has provided legal services for Respondent since some time in the 1970's, and Respondent has had its contract to perform work at NAS Pax River since some time in the 1970's.

John Crawford is Respondent's president. Charles Evans is Respondent's general manager at NAS Pax River. Mitchell's testimony reveals Respondent employs about 15 full-time and16 or 17 part-time employees in the above bargaining unit at NAS Pax River. Respondent is covered by the Service Contract Act (SCA), which results in area wage determinations by the Department of Labor setting minimum rates for which Respondent pays its unit employees. Mitchell testified that if the Respondent and Union agree to a collective-bargaining agreement and submit it to the government contracting officer in a timely manner, the contracting officer will, if the terms of the contract are reasonable, accept the contract rates and incorporate them into the area wage determination as the basis for the wages and benefits for the employees covered by the agreement. The collectively bargained rates and benefits, if approved, can be above the area standard rates, and Respondent would be compensated by the government for the higher approved rates. The parties stipulated that all parties were aware, during negotiations, that Respondent had to submit any agreed upon collective-bargaining agreement to the contracting officer by December 1 of any given year, in order for Respondent to receive reimbursement for collective-bargaining agreement rates paid to employees that are above the area wage standard rates.[5] There was nothing to prevent Respondent from paying its employees above the area standard rates, although the government will not reimburse Respondent for those higher payments unless they are incorporated in an approved collective-bargaining agreement.[6]

The Union requested to begin bargaining by letter, dated March 3, from Compher to Crawford. Mitchell's testimony reveals negotiations began on June 24. Mitchell testified that all the sessions, except for November 6, were held in Maryland, at the Union's training center, which is located a few miles from NAS Pax River. Mitchell testified the parties met at that location on June 24, 25, 26, July 24, October 7, and 8. Mitchell testified that Mitchell, Crawford, and Evans attended all of the negotiation sessions for Respondent, except Crawford was not present on June 24. He testified Compher was the Union's chief spokesperson and he attended all the sessions. Also in attendance for the Union at the Maryland sessions were two of Respondent's employees, and another individual whose status Mitchell did not know. The parties' last session was held on November 6, in Birmingham, Alabama. It was attended by Mitchell, Crawford, Evans, and John Byrd, one of Respondent's owners, and Provost and Compher for the Union. William McFadden, a federal mediator, also attended the November 6 session.

Mitchell identified a handwritten proposal which, absent the obvious insertions and modifications, was presented to the Union by Respondent on June 24 and 25. Mitchell's bargaining notes for the June 24 session, reveal that a tentative agreement was reached that date for Respondent's proposal on seniority, which provided that promotions and job assignments shall be based on seniority. Mitchell's notes and testimony reflect that layoffs and recalls by seniority were amended into the proposal on June 24, and were included as part of a tentative agreement on seniority. Mitchell's notes for the June 25 session reveal that there was a tentative agreement on seniority, which is Section VI of Respondent's June 24 contract proposal.[7] Mitchell testified it was his recollection that there was a tentative agreement that all promotions, job assignments, layoffs, and recalls shall be based on seniority, provided that the senior employees could perform the work.

Mitchell's notes for the June 24 session state at page 4, "Section VIII- agreed to change 'good and proper' to 'just' cause." Section VIII refers to Respondent's proposal on discipline and discharge. Mitchell testified that Respondent agreed to change its proposal containing a "good and proper" standard to use the "just cause" standard on June

[4] I found Compher and Provost to be credible witnesses and to have testified as to events as best they could recall them. I have credited their testimony as set forth in this decision, unless otherwise stated.

[5] Compher testified Mitchell informed him of the December 1 date early in negotiations.

[6] Compher testified that, in addition to Respondent's employees, the Union represents employees of other employers at the NAS Pax River, including units at DynCorp International; L-3 Communications; Eastern GCR; and at Sikorsky Aircraft. Compher testified the Machinists Union also represents employees at Boeing and Lockheed Martin.

[7] Compher testified his notes reflect that there was a tentative agreement on seniority on June 25, and that layoffs and recalls by seniority were added to Respondent's initial proposal as part of the agreement. He testified there was an admission by Respondent that they always had layoffs and recalls by seniority in that Crawford and Evans told the Union that layoffs had been made by seniority. There is a discrepancy in the bargaining notes of Compher and Mitchell and as to their testimony about layoffs and recall, with Compher stating and his notes reflect that the past practice was layoff and recall by seniority, and Mitchell stating there had never been a layoff. Compher testified that Crawford and Evans told the Union across the table that all promotions, job assignments, and training assignments were made by seniority as part of Respondent's past practice, and I have credited this aspect of Compher's testimony. There is a dispute between Mitchell and Compher's notes as to the date of the first meeting, with Compher's notes stating it was June 23 and Mitchell's notes stating it was June 24. Any references to a June 23 or 24 meeting in this decision are referring to the same meeting.

24, pertaining to discipline. He testified that in his view discharge is a form of discipline. Mitchell testified that as of the end of the October 8, bargaining session, the "just cause" standard for discipline was not an open issue. Compher testified they never talked about the just cause discipline and discharge standard from the time it was agreed to in June until the November 6 session.

Mitchell testified that during the October 7 session Mitchell stated Respondent was at about 90 percent of where it could go on wages and benefits and they needed to move negotiations along because they were getting toward a position where they needed to make and would be making a final offer.[8] Mitchell testified union security was discussed on October 7, and that it was discussed in every session. Mitchell testified the Union's proposal on union security never changed from their initial proposal that was sent to Mitchell a few days before the first meeting. Mitchell testified that on October 7, Mitchell made the statement that the Union's proposal on union security was not acceptable. Mitchell testified, "I believe I said that it was dead, and spelled out the letters, d-e-a-d." Mitchell testified he said Respondent was willing to consider a compromise between its position on union security and the Union's position, but that the Company was not willing to accept the Union's position. Mitchell testified the Union made two responses to that. He testified Compher said that he did not see how the Union could make any compromise in that it had made its minimum offer on union security. Mitchell testified that union committee member Delahay "was a little more colorful and said that the Union's proposal was not d-e-a-d, it was a-l-i-v-e and would be in the final agreement."[9]

Mitchell testified that, during the October 8 session, Compher explained the Union's ratification process. He testified this was done in connection with Respondent saying they were prepared to make their final offer. Towards the end of the day on October 8, Mitchell asked the Union to give the company their position on all open items. Compher responded to the request. Mitchell's notes reflect the five open items listed by the Union were union security, pay for stewards while investigating grievances, the cost of various examinations and licenses, the grievance procedure and what issues could be taken to arbitration, and shoe allowance and how frequently the company would replace employees' shoes. Mitchell testified he then asked the Union to give Respondent all open issues in priority order and Compher listed eight: a request to reclassify all truckdrivers to be fuel supply distribution operators, which would have given them a substantial pay increase; union security; arbitration language; pay for lead persons; pay for boiler tenders; shift differential pay; safety shoes; and dispatcher pay.

Mitchell testified that at the end of the day on October 8, Respondent made a last and final offer by a verbal presentation. Mitchell testified the Union replied that if Respondent would accept their proposal on union security and change several other items, including some of the pay items they could buy the committee's support and they would encourage the employees to ratify the agreement. Mitchell testified the Union's proposal was rejected and Respondent stated its last and final offer stood.

Compher denied that Mitchell stated Respondent was making its last and final offer during the October 8 session. Compher testified he asked Mitchell on October 8, if the offer was Respondent's last and final offer and Mitchell would not reply. Compher testified the Union did not take the offer back for ratification because they did not have a tentative agreement pending ratification. He testified that they had time to continue bargaining and that, at that time, they had not even used the services of the FMCS.

Compher sent Mitchell an email dated October 10, requesting the resumption of negotiations during the week of October 13 to 18. Compher went on to state, "The Union is also requesting the assistance of the Federal Mediation and Conciliation Services and will contact them for assistance and hope that you will agree also. As we have in the past the Union will provide a meeting place at the Union facility at no cost to the parties." Mitchell sent an email to Compher dated October 15, stating, "As promised, attached is an updated proposal that incorporates all agreements reached to date and sets forth the Company's position on any open items. This represents an excellent contract for the employees, and we are prepared to present it to the Contracting Officer at any time."[10]

I do not credit Mitchell's claim, over Compher's denial, that on October 8, Mitchell told Compher that Respondent's October 8 offer was Respondent's last an final offer. Mitchell tended to testify in a somewhat ambiguous fashion. Moreover, there is no notation in either Mitchell's or Compher's October 8 notes that Mitchell informed Compher on October 8, that Mitchell had presented Respondent's last and final offer on that date. Both individuals were experienced negotiators and it is likely

[8] Mitchell's October 7, notes state twice "When do you want us to make you our Final proposal?"

[9] Compher testified he recalled Mitchell objecting to the Union's union security proposal on October 7, but could not recall if it was stated that it was "D-e-a-d" spelling out the word. Compher testified that he did not recall union negotiating committee member responding it was a-l-i-v-e. However, he testified it may have happened as negotiations were contentious. Compher testified as follows when questioned by Mitchell:

> Q. Do you recall me telling you that there was room for compromise between the company's position and the union's position on union security?
>
> A. I recall telling you that-- yes, I recall telling you that there was nowhere for us to go. This was proposed by the rank and file. I do recall telling you that.

Compher testified that employees selected the Union's union security proposal language during contract proposal meetings held by the Union.

[10] Mitchell attached to his October 15 email a written version of Respondent's offer made verbally during the October 8 negotiation session. Respondent's written offer emailed on October 15, is referred to herein as Respondent's October 8 offer.

they would have recorded such a statement in their notes if it had been said. Moreover, the emails following the October 8 session, also do not support a statement that Respondent had stated it made its last and final offer on that date. In this regard, by email dated October 10, Compher requested a resumption of bargaining with the assistance of a federal mediator. Most significantly, Mitchell sent a written version of the October 8 offer to Compher in an attachment to an email, dated October 15. While Mitchell described the offer in the email, he never labeled it as a final offer in the email. It would seem that he would have done so, if that was the case. Finally, Respondent made a new proposal on November 6, the very next bargaining session.

The proposal Mitchell sent Compher via email dated October 15, is entitled, "COMPANY PROPOSAL AS OF CLOSE OF NEGOTIATIONS ON OCTOBER 8, 2008." It states at the top of page 2, where the substantive language begins that "((TA) means Tentatively Agreed)." It is stated in Respondent's October 8 proposal under SECTION V MANAGEMENT RIGHTS that:

> UFI has and shall retain all rights and discretion to plan, direct, and control all operations and to make all necessary and appropriate decisions to carry on the business of the Employer, unless a decision made or an action shall conflict with or violate an express term of this Agreement.

Included in the October 8 proposal under SECTION VI Union Security is the following:

> Employees shall remain free to join or refrain from joining the Union and to pay or refrain from paying union dues or fees or assessments. Neither the Employer nor the Union will coerce any employee in the exercise of these rights. The Union can send a designated representative to the Employer's premises one day a month for the purpose of collecting dues or other charges. The Employer will not interfere with this process.

Included in the October 8 proposal under SECTION VII SENIORITY, is the following:

> All promotions, job assignments, layoffs, and recalls shall be based on seniority provided that the senior employee is qualified and available to perform the work in question. (TA)

In the October 8 proposal under SECTION IX DISCIPLINE & DISCHARGE, it is stated, "All discipline will be imposed for just cause." Included in the October 8 proposal under SECTION XI STRIKES & LOCKOUTS, it is stated, "There will be no strikes or lockouts of any kind during the term of this Agreement."

Compher responded to Mitchell's October 15, email by email dated October 16, in which Compher stated, "As I indicated in my e-mail, the Union is prepared at any time to resume negotiations as requested. Without our proposed Union Security, we will not take it back to our members for ratification."[11]

Compher testified the next and final bargaining session was held on November 6, in Birmingham, Alabama. Compher testified that when they last met on October 8, Respondent indicated they were not going to come back to Maryland. Compher testified that, following the October 8 session, Compher sought Federal Mediator McFadden's assistance in having Respondent return to Maryland to resume negotiations. Compher testified that McFadden told Compher that Respondent would not come back to Maryland, but Respondent was not opposed to the Union coming to Alabama. After discussing it with Compher's superiors, the Union agreed to meet in Alabama. Compher requested, through McFadden, that they meet that week. However, McFadden informed Compher that Respondent agreed to meet on November 6.[12]

Compher testified that he and Provost were paid by the Union for preparation time for the November 6 session, and they were paid for time spent during negotiations. He testified if he had not gone to Alabama, he could have attended to other union business. The Union paid for their flight, meals, rental car, parking, and hotel rooms in Birmingham. The Union paid for the bargaining meeting suites. Compher testified he asked McFadden to make arrangements for the parties to meet at the FMCS office in Birmingham. However, McFadden could not secure space there. McFadden informed Compher that Respondent offered to have negotiations at their law firm. Compher testified it is a large law firm, and he felt intimidated about holding negotiations there. Compher testified he asked Respondent to split the cost of a meeting room at a neutral facility, but McFadden told him Respondent refused to pay any cost.

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[11] The Union's proposal on union security included the following language:

> (A) All employees in the bargaining unit must as a condition of continued employment be either a member of the Union and pay union dues or pay an agency fee to the Union, but not both.
> (B) All employees within the bargaining unit on the effective date of this agreement who are not union members must, as a condition of continued employment, pay to the Union while on the active payroll, an agency fee equal in amount to monthly membership dues, ...
>
> . . . .
>
> (D) Any employee required to pay an agency fee, membership dues, or initiation or reinstatement fee as a condition of continued employment who fails to tender the agency fee or initiation, reinstatement, or periodic dues uniformly required, shall be notified in writing of his delinquency. A copy of such communication shall be mailed to the Company not later than fifteen (15) days prior to such request that the Company take final action on delinquency. The Company will within ten (10) workdays, after receipt of notice from the Union, discharge any employee who is not in good standing in the Union or fails to pay applicable agency fees as required by paragraphs A-D of this Article. Any employee so discharged shall be deemed to be discharged for "just cause". "Good standing" is defined as in compliance with standards permitted by NLRB and court decisions relating to Union shop requirements.

[12] Compher's testimony that Respondent refused to return to Maryland was not denied.

Compher testified that, prior to the November 6 session, the parties had reached many tentative agreements, including: recognition; on seniority, on jury duty, vacations, and holidays, and on discipline and discharge. Compher testified they had reached a tentative agreement on fringe benefits. They had reached a tentative agreement "on the wage aspects." He testified they had also reached a tentative agreement on shift differential. Compher testified that if something was not marked TA by the parties, it did not mean there was no tentative agreement. Compher testified that on November 6, "certainly the biggest issues that were left open was the union security. There was a job reclassification that was left open. There was certainly the grievance and the arbitration provisions were left open. Shoe allowance, what was left open. You know, that's some of the things that was still left open." Compher testified that none of these subjects were tentatively agreed to on November 6. Provost testified that, prior to going to Birmingham, he met with Compher concerning Respondent's October 8 proposal, and they went through the six to eight open items. Provost testified the open items were the grievance procedure and arbitration; the no strike no lockout provision; the effective date of the contract, the shoe allowance and a couple of other items. Provost testified union security was still open and there was a major problem with that issue.

Provost testified bargaining began on November 6, by he and Compher arriving at the hotel and then waiting for the Respondent, as one of the members of Respondent's team was late.[13] Provost testified that when they started the meeting, Provost identified himself, and they went over the issues that he and Compher believed were open.[14] Provost testified they went into a discussion on union security. Provost testified Mitchell "made a claim that the Union had the ability to negotiate rates on the union security, on the pay, and he was kind of elusive, wouldn't tell me where he got his information, so I stepped out and made a phone call." Provost testified Mitchell made the comment at the beginning of the meeting, while Provost was reviewing the items the Union believed were open. Provost testified that, at that time, Respondent had not made any new proposals.

Provost testified that at 10:45 a.m. on November 6, the Union received a document from Mitchell labeled, "COMPANY PROPOSAL B." It is stated on the cover page of the document: CHANGES: (1) Section V; (2) Section VI; (3) Section VII-one sentence; (4) Section IX; (5) Section X; and (6) Section XI. Provost testified that at the time the Union was tendered Company Proposal B no one from Respondent told the Union that Respondent's October 8 proposal was still on the table. The changes in Company Proposal B are set forth below.

In SECTION V MANAGEMENT RIGHTS, the following provision was added:

> These rights of management included the following: (1) to subcontract all or part of the operation, (2) to make job assignments and promotion and staffing decisions in the interest of efficient operations, (3) to schedule work and change hours of operation and shift schedules to meet the needs of the Navy, (5) to determine the equipment to be used, (5) to determine and direct work methods and process, (6) to assign, require, and distribute overtime work, (7) to discipline and discharge employees, (8) to lay off and recall employees, (9) to establish and enforce work rules and safety rules. These rights are listed only as examples and do not include or represent all management rights.

SECTION VI UNION SECURITY, included the following new provisions:

> All nonprobationary employees in the bargaining unit must be either a member of the Union and pay union dues or pay an agency fee to the Union, but not both.
>
> All nonprobationary employees within the bargaining unit who are not union members must pay to the Union while on the active payroll an agency fee equal in amount to fifty percent (50%) of monthly dues to cover the cost of collective bargaining and contract administration. Employees entering the bargaining unit or employees who are rehired with seniority or transferred with seniority into the bargaining unit after the effective date of this Agreement who do not become union members, or having become do not remain union members, must while on the active payroll, pay such fee to the Union.
>
> Employees who are union members shall pay an initiation fee and membership dues to the Union while in the bargaining unit and on the active payroll as long as they remain members of the Union; provided that in no event shall the initiation fee and membership dues exceed the amount specified in the Constitution and/or By-Laws of the Union.
>
> The Company agreed to deduct from an employee's payroll check, Union dues, initiation fees, or agency fees for all employees covered by this Agreement, provided that the Union or the employee delivers to the Company a written authorization to make such deductions, signed by the employee, irrevocable for one year or the expiration date of this Agreement, whichever shall occur sooner.
>
> Such payroll deductions shall be remitted to the Secretary Treasurer of the Union the week immediately following the week the payroll deductions are made.

SECTION IX DISCIPLINE & DISCHARGE, contained the following provision:

> The Company retains the right to discipline and discharge employees as an inherent right of management. Any employee or the Union can challenge any disciplinary action imposed upon proof that the discipline imposed was arbitrary, capricious or discriminatory.

[13] Provost testified that technically he was the chief spokesman for the Union during the November 6 session, since he is above Compher in the Union's hierarchy. However, he let Compher continue to assume that role and tried to assist Compher to obtain a conclusion on the contract.

[14] The first page of Mitchell's notes for November 6, state "7 unresolved issues."

With respect to SECTION XI STRIKES & LOCKOUTS, the following provision replaced the one contained in the October 8 proposal:

> There will be no strikes or lockouts of any kind during the term of this Agreement. There will be no picketing of any kind by employees represented by the Union, and such employees will cross any picket lines in order to report to work or perform their job assignments.

Provost testified that they took a break for the Union to review Proposal B and when the Union returned from its review of the document, "We went through the changes of the sections where they made the changes." Provost testified there was a discussion about the changes to union security at that time. He testified, "Basically, he's trying to make the claim that we had the ability to negotiate changes in the fees, agency fees that would be that the members would have to pay if- you know, if we had an agreement, there would be a minimum amount of 50 percent."

Provost testified that after Mitchell reviewed the changes, the parties took a break. Provost testified, "we kind of had to take a break because we went there believing there was six to eight issues open, and when we got this document, all of a sudden it became like 15 because there were some changes made; in my belief, was regressive bargaining. So when we went back, we pointed that out to the company, and Rick did it, and he was extremely upset." Provost testified he also told the Respondent it was regressive. Provost testified Respondent gave no response to his assertion. Provost testified that during the discussion, Compher told Mitchell that subcontracting was never an issue until today. Provost testified that Mitchell did not say anything in response to that comment. Provost testified he asked Mitchell why they had to have a subcontracting clause because it was basically not allowed under a service contract in that they have to get a special permission from the Navy to do anything like that. Provost testified you are dealing with fuel for the jets and with the security clearance that it takes to even get near these planes, it is not something they can just say we are going to call a sub in here to go do some work. They have to follow the military regulations for clearances. Provost testified he did not get a response to that question stating, "I was making a statement, sir, basically to them and letting them know what we believed was wrong." Provost testified, "I didn't get a response to almost any of my questions, Your Honor."

Provost testified that, after the break, they discussed union security with Respondent. Provost testified, "I was trying to find out where he was getting his information." Provost testified Mitchell kept "making a claim that the Union had the ability to negotiate increases or decreases in agency fees. We told him, one thing is it's illegal—Beck, General Motors Beck ruling." Provost testified that he said that it was he who made that claim. Provost testified, "I also told him that it goes against our constitution, and for us to negotiate something outside of what the constitution is, is also illegal. The constitution is set up by delegates, and I explained this to the Company, that the delegates from every local in the IM, which is 500, over 500 locals, meet every four years to come up with our constitution. And in that constitution they set the guidelines on what's allowed, you know, what we run by. So when we go out and organize or we negotiate contracts, we have to follow it in those guidelines of that constitution. For us to go outside of them would violate it and in turn would allow somebody to go to the Department of Labor and file charges against us." Provost testified concerning Respondent's response, "All they said was they believe we had the ability to negotiate that change. He said that to me more than once."

Provost testified Mitchell did all of the talking for Respondent. Provost testified that during the meeting, both he and Compher asked Mitchell more than once if he would be interested in talking to the Union's general counsel concerning Respondent's proposal on union security, or to the Union's international president. Provost testified Mitchell did not respond to that offer. Provost testified that on November 6, the Union never said or insisted that non members pay 100 percent of dues. He testified that the Union's proposal on union security did not require that they do so.[15]

Provost admitted that the Union's written proposal on union security to Respondent did not say anything about proportional dues for objectors. However, Provost testified:

> THE WITNESS: Your Honor, he would not hear of it. We tried to offer—just like I stated earlier, we offered that to him to come to closure. If he was so concerned with the employees not having to pay dues that didn't want to pay, we told him- and Rick testified to this, and I told him the same thing, that we would teach them how to show employees to become objectors through the Beck disclosure. And he would not have one thing to do with it.
>
> . . .
>
> JUDGE FINE: Did you make another proposal aside from the written proposal?
>
> THE WITNESS: Not in writing, but we did make a verbal proposal.
>
> JUDGE FINE: Did you make a verbal?

[15] During his testimony, Provost was shown by Mitchell and he identified a contract NAS Patuxent River where Provost served as lead negotiator for the Union with DynCorp International LLC. The signature page is dated September 12, 2007. The union security clause in that contract contains a provision stating, "Union membership is required only to the extent that employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues or, in the case of an objecting service fee payer, shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities." Mitchell testified he did not recall where he obtained a copy of the DynCorp contract, stating it was in a file of mine labeled, "Union Contract Proposal."

THE WITNESS: Yes, we did, sir.
JUDGE FINE: And what was your verbal proposal?
THE WITNESS: That we would help him, if he had his concerns—
JUDGE FINE: Help Mr. Mitchell?
THE WITNESS: Mr. Mitchell and the company to show the people that had these concerns, they didn't want to pay dues, how to become objectors, perfected objectors or nonmembers, and he would not respond to those two items at all, not at all. And we offered that more than once, sir.

Provost testified that, at no time during the November 6 meeting, did anyone from Respondent state that the October 8 proposal was still on the table. Provost testified that at the end of the November 6 meeting there were additional open issues besides union security, including: the grievance and arbitration procedure; the no strike/no lockout clause; the shoe allowance and subcontracting. Provost testified, "The Company left the subcontracting provision in there. That wasn't even an issue until that day."

Provost denied telling Mitchell during the meeting that he did not have to worry about withdrawing Proposals A and B because neither would be accepted by the Union. Provost testified that Mitchell asked Provost if there was a requirement that the Union bring Proposal B back to the members, and Provost told him there was no requirement. Provost testified that, during the meeting, Mitchell "had a smirk on his face because technically I don't think he cared what I had to say, but I wanted to say it anyway. And I made a comment to him that it would be like me going to Alabama, which is a right-to-work state, and locking up every contract in there with a union security clause, which is illegal in that state. Him asking us to open up, having an open shop inside of a facility that's all closed shops was like asking me to give him my first born."

Provost testified Respondent's November 6 changes really upset the Union because they were changes to prior tentative agreements. He testified, "They also made some changes that upset me because there were provisions that the people in there enjoy, that the Company followed prior to the Union ever even organizing them, and they regressed from them and took them provisions away, like layoff and recall. If there was a layoff or recall, they already admitted that if there was one, they go by seniority, prior to negotiating it with us. And the same thing with promotions."

Compher also testified the November 6 meeting was to begin at 9 a.m., but that Respondent arrived late, and that the session started close to 10 a.m. and it ended around 2:15 p.m. Compher testified that once they were at the table, the mediator opened up the bargaining session by stating his role and setting forth the major issues keeping the parties apart. He testified then there was a caucus. When the union officials returned to the room, Respondent gave them a proposal that was labeled on its face and identified by Mitchell as Proposal B at around 10:45 a.m.[16] Compher testified the union officials were very upset by Proposal B. He testified the proposal went back on prior tentative agreements and added new language not previously discussed. Compher explained Respondent made regressive proposals in seniority and discipline and discharge, where there had been prior tentative agreements. Compher testified that for lack of a better word, "I was pissed." Compher testified the Union had agreed to Respondent's request to come a long way by coming to Alabama. He testified, "We were there. And we didn't have much time to get this thing done, and it was pulled out from underneath our feet."

Compher testified the parties had not tentatively agreed to management rights prior to November 6, "but—and I could tell you what the company had on the table in October was fine with us, and I indicated to that across the table. It wasn't an issue. It was not highlighted by either party on October the 8th on what the outstanding issues were."

Compher testified when Proposal B was given to the Union "things got contentious." Compher testified, "I said this is a crock of shit. We come all the way here and you wanted to pull back on proposals, things that we already agreed to. I said this is—my words were—." "I said this is a bunch of bullshit. I said we have already agreed to tentative agreements long—you know, before even coming down here in the process of negotiations. Now you want to pull them back, pull the rug out and renege on deals and agreements that we had?" Compher testified that Mitchell had no response. Compher testified that Mitchell did not say anything about the prior proposals still being on the table.

Compher testified Respondent's November 6 proposal "took away seniority being the factor with job assignments, with layoffs, with recalls." Compher testified this was discussed at the table and it was very contentious. He testified, "I specifically wanted to know why, you know, again, this is bullshit, you know, why are you taking away things that have already been agreed to, things that are already done currently, today? This is regressive, going backwards, you know, this is nothing more than what they're doing today, we agreed to, and it was very contentious." Compher testified as follows:

JUDGE FINE: What was the response?
THE WITNESS: There was none.
JUDGE FINE: No explanation?
THE WITNESS: Not that I can recall, sir.

Compher testified it was asked by the Union at the November 6 meeting, "Why are you pulling off things again that we agreed to for discipline and discharge for just cause." Compher testified, "The Company said you want things, we want things. That's all they said." Compher

[16] Compher initially testified it was identified as Plan B, but corrected his testimony stating it was Proposal B. Compher also referred to the document as "Plan B" at various points in his testimony.

testified Mitchell made the statement. Compher testified there was a lot of yelling and screaming about this at the meeting.

Compher testified Respondent's November 6 proposal introduced new subjects into the management-rights clause, including subcontracting. Compher testified that on November 6, there was discussion of the subcontracting proposal. He testified, "We were vehement why they were including things into this management's rights clause as far as subcontracting. That was not discussed prior to these negotiations, that was never an issue, and again, it was very—" Compher testified he thought the Union received the same response from Mitchell, which was that "you want things, we want things."

Compher testified Respondent's November 6 proposal addressed union security. He testified, "It was the major discussion of that day." Compher testified it was the first time the Union had seen a proposal where employees who object to being full dues-paying members pay a specified percentage of an agency fee. Compher testified, "I explained very simply to Mr. Mitchell across the table that we can't bargain this percentage, it's illegal. If you don't believe me, here is my attorney's or general counsel's name and number and here's our international president's name and number, if you don't believe me that we cannot bargain this. I offered that up to Mr. Mitchell." Compher testified that during the November 6 meeting, the union officials made the statement that negotiating the amounts agency fee payers paid was illegal because it violated the Union's constitution and bylaws. Compher testified Mitchell gave no response.

Compher testified that, during prior bargaining sessions, Mitchell had told Compher that Respondent had "philosophical differences" about having a union-security provision in the contract. Compher testified, "Mr. Mitchell had always stated to me, across the table, on numerous occasions, that he had a philosophical difference with employees having to pay dues." Compher testified that was the only reason Mitchell gave in objecting to the union's proposal on union security. Compher could not recall the dates it was said, but he testified it was stated many times at more than one bargaining session. Compher testified in negotiation sessions prior to November 6, the Union told the Respondent the employees had a right not to join the union, and that they did not have to pay full dues. He testified that on November 6, the Union told Respondent that the Union would assist the employees on how to apply to become an agency fee payer or objector. Compher testified, "We told them we can't bargain any types of percentage because it's illegal. And I believe at that time Mr. Mitchell made the statement he believes that we can convince our higher-ups, whatever that—"

Compher testified that during negotiations, the Union never demanded that an objector pay 100 percent of dues. Compher testified the Union sends employee objections to full dues payments to the Union's headquarters, to the General Secretary's department, and they figure out how much the objector has to pay for collective-bargaining representation. He testified, "that's the part of what we were trying to tell the Company we would help them do, guide them in the right direction."[17] Compher testified that dues checkoff was in Respondent's Proposal B. However, Compher could not recall whether it was discussed on November 6. Compher testified it was the percentage on union security that was driving the talks.[18]

In reviewing, Proposal B, Section 11, Compher testified that picketing had not been discussed by the parties prior to November 6. Compher could not recall if picketing was discussed on November 6. Compher testified, "I was just disturbed with this percentage, union security and all these changes. I can't recall–"

Compher testified that on November 6, after the Union raised objections to Proposal B, Respondent modified its offer. Compher testified that when Respondent came back from their second caucus on November 6, they said layoff and recall would be by seniority, and the discipline and discharge would be for just cause. However, Compher testified promotion and job assignments by seniority were not put back on the table. Compher testified the Respondent also offered to raise the fees paid by objectors from 50 to 75 percent of dues. Compher testified the Union stated they could not bargain this. Compher testified the Union again offered for Mitchell to talk to the Union's general counsel and the Union's international president, but Mitchell declined.

Compher testified that, after the Union raised objections to the November 6 proposal, Respondent did not inform the Union that the October 8, proposal was still on the table. He testified that no one from Respondent informed the Union that October 8 proposal was still on the table when the modified version of Proposal B was presented. Compher testified Respondent's officials never said anything about the October 8 proposal the entire day. He testified that between November 6 and December 1, no one told him that the October 8 proposal was still on the table. Compher testified that no one explained to him at the table why Respondent labeled the November 6 proposal as Proposal B.

Compher testified the Union never agreed to accept the modified version of Proposal B, if Respondent would accept union security. Compher testified he never told Respondent that if the company would agree to 100 percent nonmember agency fees, the union would agree to a con-

[17] Compher testified the Union explained to Respondent many times during negotiations that the agency shop clause the Union proposed was a proposal that came from the rank and file employees. Compher testified the employees made the selection of the proposed provision during a contract proposal meeting conducted by the Union.

[18] Compher testified the Union proposed dues check off before November 6. He testified Respondent did not agree to it. He testified Respondent had previously proposed that once a month the Union could go down to the facility and solicit the collection of dues. Compher testified he responded that it was illegal to go on to a federal facility and solicit dues. Compher testified he told Mitchell that throughout negotiations. Compher could not recall if Mitchell ever gave an explanation as to why Respondent opposed dues checkoff.

tract. Compher testified that would be illegal. Compher testified they could not negotiate a percentage of what the dues objector has to pay, that it was against the Union's constitution. Compher explained that under the Union's constitution they "had to refer them—any dues objector has to go to the General Secretary—we cannot bargain that. It's illegal." Compher testified as follows:

> Q. BY MS. HERMOSILLO: Were there other reasons, aside from union security, that the union did not want to agree to the modified version of Proposal B?
>
> A. Well, other reasons was the change in the seniority. I mean, we hadn't even gotten to other discussions as far as the grievance arbitration. We didn't get to discussion with shoes. There was other open issues that we had highlighted that we came down to talk about and never even got the opportunity to talk about.

Compher denied that Mitchell made the statement at the end of the November 6 session, that both of the Company's proposals were being withdrawn or would be withdrawn effective December 1. Compher testified that Mitchell never made the statement that he was going to withdraw either proposal on November 6.

Compher testified that during negotiations from June through November, the Union only made one proposal on union security. Compher testified the agency fee referenced in the proposal is not equal to the amount of dues. Compher credibly testified that, while there is nothing the proposal that says the agency fee would be reduced, it was explained to Mitchell several times across the table. Compher testified they talked about the agency fee payer from day one. Compher testified Mitchell asked him what it meant and Compher explained it in its entirety. Compher testified, "I explained to you exactly what our proposal was, and I explained to you several times during negotiations, if any employee wanted to object to paying dues, we would tell them how to go, where to go, and what to do. I explained to you that several times. You can't dispute that."

Compher could not recall whether on November 6, the Union presented Respondent with a counterproposal on strikes and lockouts, stating, "We may have." Compher testified he did not submit a written proposal to Mitchell on November 6, concerning strikes and lockouts. He testified Provost may have tendered such a proposal, that he did not know. Compher testified a marked up version of a strikes and lockout provision was not presented back to him on November 6. However, Compher testified he may have seen the proposal that day.

Mitchell testified the meeting on November 6 started with some discussion on union security. He testified that McFadden said it was his goal to bring this matter to a conclusion and there were six or seven unresolved issues. Mitchell's notes state there were seven unresolved issues.[19] Mitchell testified there was some discussion pertaining to the zipper clause contained in Respondent's October 8 proposal, then there was more discussion of union security and that the Union had to have union security. Mitchell testified that Respondent took a caucus, and presented Company Proposal B. Mitchell testified, "I said that our first proposal was still on the table and Proposal B was presented as an option." Mitchell testified in reference to the first proposal that he was referring to the October 8 proposal which he labeled at the hearing as Proposal A. When asked if he labeled it as Proposal A during negotiations, Mitchell testified, "I think at some point I did probably use the term Plan A, but I think initially I did not. I think initially I referred to it as just the company's last offer, which it was at that point, the company's last and final offer, the October 8 proposal."

Mitchell testified that, during the November 6 meeting, they went through Proposal B. He testified the changes identified on the front page of Proposal B were changes that had been made to the October 8 proposal. Mitchell testified the Union expressed dissatisfaction with it. After the discussion, the Union took a caucus and came back and identified specific parts of Proposal B that the Union wanted changed. Mitchell testified there was discussion of subcontracting with the Union asking why it was there. Mitchell testified, "I said that it was put in there for no specific reason, but simply because it was—that management's rights proposal was taken from another document and it was plugged in there. That document had subcontracting on it. There was a question about what could or would Universal Fuel subcontract, and I said I couldn't think of anything other than perhaps the mechanical work exception. If Universal Fuel had ever gotten a contract to do mechanical work of some type. But that was not anticipated." Mitchell testified there was no further discussion of subcontracting during the meeting. Mitchell testified when the Union came back from their caucus they presented their counterproposal to Proposal B, and at that time they did not request any change in the language on subcontracting. Mitchell testified subcontracting had not been discussed prior to November 6.

Mitchell testified the Union's counter proposal was part written and part verbal. He testified the Union stated concerning Proposal B, Section 5: item 2, they wanted job assignments, promotions, and staffing decisions to be based on seniority; item 7, they wanted discipline and discharge to be for just cause; and item 8; they wanted layoffs and recalls to be by seniority. Mitchell testified that as to Section 6, the Union stated they would not agree to 50 percent of monthly dues for agency fee payers and that it had to be 100 percent. The Union went to Section 7 and said that they wanted the prior language about job assignments, promotions, layoffs, and recalls inserted there. As to Section 9, the Union wanted just cause reinserted for discipline and discharge. Concerning the grievance proce-

[19] Mitchell testified that, prior to the meeting, Mitchell was told by the mediator that the Union would never accept any contract proposal in the state of Maryland that did not have mandatory payment of dues. Mitchell testified that based on the mediator's remarks and in consultation with his client, Mitchell prepared Proposal B.

dure, the Union wanted the language that was contained in the October 8 proposal reinstated. He testified the Union also presented a written proposal to replace Section 11, strikes and lockouts.

Mitchell testified Respondent then took a caucus over lunch, and came back and made a counterproposal to the Union's counterproposal. Respondent's counterproposal was for the most part verbal, but Respondent also marked up the Union's no strike proposal and gave it back to the Union as a counterproposal. He testified the things Respondent agreed to change included making layoff and recall decisions by seniority, discharging employees only for just cause, changing the no strike language by making alterations to the Union's written proposal and thereby dropping the no picketing language contained in Respondent's Proposal B, and pertaining to union security increasing the agency fee payer amount to 75 percent of dues.

Mitchell testified the Union took a caucus, came back, and said that they could not and would not accept any offer that did not have 100 percent of dues for agency fee payers. Mitchell testified that was the only thing discussed after the caucus. He testified, "I'm not saying the Union may have had other disagreements with the final version of Proposal B. But the only differences that were expressed at the table were 75 percent versus 100 percent." There was some discussion and the parties said they were not going to change their positions on that subject. Mitchell testified the mediator stated it was too bad the parties were so close but could not reach agreement. Mitchell testified that, at that point, in order to protect Respondent from getting caught in a timeliness issue, he stated that Proposals A and B would be withdrawn if not accepted by December 1. Mitchell testified Provost stated Mitchell did not have to worry about that because neither of those proposals were going to be accepted. Mitchell testified there have been no requests for meetings after November 6.

Mitchell testified Respondent's Proposal B made on November 6, made changes to items that had previously been tentatively agreement to by the parties. He testified that Proposal B when first given to the Union contained as a management right that job assignments, promotions, and staffing positions were to be done in the interest of efficient operation. It also included layoff and recall as a right of management. Mitchell testified that under Respondent's preexisting work conditions work assignments were controlled by seniority for part time employees. Mitchell testified the general practice is to take the Navy's flight schedule posted on the board, and the part-time employees can sign up for the open shifts based on seniority. Mitchell testified full-time employees work a more fixed schedule and their job assignments are determined by that schedule. He testified it was his understanding that seniority is used as a factor in determining the schedule of full-time employees. Mitchell later testified, "if the gist of the question is, in the past, has the Company generally applied seniority principles in a nonbinding sort of way to assign jobs, the answer to that is yes."[20]

Mitchell testified Respondent's Proposal B initially provided pertaining to union security that agency fee payers must pay the Union an agency fee equal in amount to 50 percent of monthly dues. Mitchell testified that after the Union said the agency fee had to be 100 percent; Respondent came back and modified it to 75 percent. Mitchell testified, "That's what they said at the meeting on November 6th. They said, we're not authorized to accept anything less than 100 percent." Mitchell also testified the Union said they would not negotiate over the amount of fees paid by agency fee employees, "and they said that all of the company's proposals on union security are illegal. And after caucuses where they called somebody, they said, on November 6th they came back and said that it had to be 100 percent." Mitchell admitted stating in his affidavit that the Union said "in negotiations that they cannot negotiate over the amount that agency fee payers will pay,

[20] Mitchell testified that he believed he stated in his pre-hearing affidavit in presenting Proposal B to the Union that he told the Union that the Respondent was looking for more management security in exchange for union security and that this was the reason that seniority was removed as a consideration for job assignments, promotions, layoffs, and recalls, to provide greater flexibility for management. Mitchell testified at the hearing that, "Proposal B gave the Union most of what it was asking for, for union security, and proposed in return greater flexibility and greater management decision-making discretion in managing the workforce."

Mitchell identified a copy of a management rights clause, which he testified Compher gave to Respondent during the period of the July 25 or October 7 sessions in the context of the parties' discussion of union security. Mitchell testified that Compher did not necessarily tender the management-rights clause as a proposal, but said he wanted to give Respondent the type of management rights language the Union had in other contracts. He testified Compher stated if this language will make you more comfortable so Respondent was more willing to progress on things like union security and other issues, this is the type of language the Union has in other contracts. Mitchell in identifying the management rights clause testified, "I think this document was in my file under union contract proposals." He testified Respondent was only presented certain pages of the contract during the meeting. Mitchell testified he subsequently learned that the contract language Compher presented to him pertaining to manage rights came from the DynCorp contract. Compher testified he did not recall tendering Mitchell management rights provision in question, and he testified in reference to the remarks Mitchell attributed to him pertaining to the identified management rights provision that "that was never said."

Mitchell's testimony as to when he received the management-rights clause and the manner in which he maintained it as a union proposal was vague at best. I do not credit his claim it was tendered to him by Compher with the remarks he attributed to Compher over Compher's denial. In this regard, Mitchell admittedly had access to the complete DynCorp agreement, but could not explain how he received it. The language contained in the DynCorp management rights clause respecting assignments, promotions, and layoffs, was contrary to the tentative agreements the Union and Respondent had reached pertaining to those subjects in June, and I find it highly unlikely that Compher would have tendered Mitchell the proposal with the remarks Mitchell attributed to him. Moreover, the management rights clause tendered to the Union on November 6, was not taken from the DynCorp agreement, nor was the union security provision Respondent presented to the Union on that date taken from that agreement.

based on the union's constitution and that it is illegal." Mitchell testified Respondent kept the 75 percent agency fee in Proposal B until the proposal expired on December 1.

During his testimony, Mitchell referred to Respondent's written October 8 proposal as Proposal A, although it was not labeled as such on its face. Mitchell testified that on November 6, "I told the group that both Proposal A and Proposal B would remain open until December 1." Mitchell testified that on November 6, he told the Union they had Respondent's last and final offer referring to Proposal A and B. However, Mitchell then went on to testify as follows:

> Q. Do you recall saying in your affidavit that you did not explicitly say, at this time, that Proposal A was still on the table?
>
> A. I may have said that, but what I said in my -- I mean, what I said at the table was both Proposal A and Proposal B would be withdrawn as of December 1. I may not have said Proposal A is on the table, I may have said it that way, but I said clearly, I say that simply by labeling this, General Counsel's 5, Proposal B, that that means that Proposal A is still out there. But at the end of the day, I said that both proposals, A and B, would be withdrawn December 1, which I think implies that they're both out there, if I didn't say that expressly.

Mitchell explained that at the conclusion of bargaining on November 6, Respondent was withdrawing its contract proposals if not accepted in time to submit them to the government by December 1. Mitchell testified he specifically referenced Proposal A, although he did not call it A at the time. He testified, "I said the October 8th agreement would also be withdrawn if not accepted by December 1." Mitchell testified he told the Union at the conclusion of bargaining on November 6, session that he could not let Respondent get into a situation where it would have to pay the wages and benefits in the contract proposals without being reimbursed by the government. Mitchell testified that was the reason for withdrawing the proposals as of December 1. Mitchell testified that based on what he had told the Union on November 6, all of Respondent's contract proposals were withdrawn if they were not accepted by December 1.[21]

Mitchell testified that concerning Respondent's Proposals A and B, that "I've testified that they were—the proposals were labeled Proposal B and were referred to in the negotiation as Plan A at times, and Proposal B or Plan B. And again, the purpose of these documents is just to show the general understanding of what those terms, and specifically Plan B, mean." Mitchell testified Respondent did not renege on tentative agreements on seniority or discipline because Proposal A remained on the table as an alternative to Proposal B until it was withdrawn on December 1.

Mitchell testified the reason Respondent did not agree to the Union's proposal on union security was because Respondent has a strong belief in individual freedom and liberty and that employees should not be compelled to support organizations or causes they do not believe in. Mitchell testified, "We discussed that at great length during the negotiations." Mitchell testified, "What we said is that we had no problem with anyone who wants to join and pay dues or pay an agency fee with the Union, but we did not believe that it was appropriate to compel someone against their will to support causes that they disagree with—and there were not many, but a couple of people there—that we believed that everybody's rights should be respected and that those people, though they may be few in number, deserve to have their opinions and their beliefs treated with as much respect as members of the majority. And we did say that repeatedly during the negotiations. Again, we—well, we invited the Union, in negotiations, to compromise on its version of union security." Mitchell testified, "I would say one reason is that the Union's refusal to consider or offer any compromise." Mitchell testified, "We invited compromise. The other side said there's not going to be any. And that is also one reason for our position." However, Mitchell admitted stating in his affidavit that Respondent did not agree to the Union's proposal on union security because Respondent has a strong belief in individual freedom and liberty and that employees should not be compelled to support organizations or causes they do not believe in. Mitchell admitted to not citing the Union's inflexibility on union security in his affidavit as an impediment to an agreement. He testified, "I did not say that that day, no. But I would say, in negotiations, part of any party's position is the reaction and response from the other side."

Mitchell identified a memo from Evans distributed to employees following the November 6 meeting. Mitchell approved the memo before it issued. It states as follows:

> The Company and Union met in Birmingham, Alabama on November 6, with a Federal Mediator. The issue discussed was union security – mandatory union membership and payment of dues by all employees. All pay and benefit items and other contract language were agreed upon.
>
> The Company's position was that all employees should have the freedom to choose whether to join the Union or pay dues or agency fees. The Union insisted that all employees must either join the Union or pay an amount equal to Union dues. Those who do not should be fired, according to the Union.
>
> The Company went against its beliefs and proposed that: (1) those who want to join the Union can do so and have their dues and initiation fees paid through payroll deduction; (2) those who do not want to join the union must pay 75% of dues to cover the cost of

[21] Mitchell testified there were no modifications to Proposal A, the October 8 proposal on November 6. He testified, "Proposal A was not discussed at that meeting, other than at the first of the meeting and at the very end." While he claimed he informed the Union at the end of the November 6 meeting that Respondent was withdrawing both the October 8 proposal and Proposal B, Mitchell testified his bargaining notes for November 6, show that a last and final offer by Respondent was presented in the singular on that date.

> collective bargaining, and they too can pay this through payroll deduction if they choose; and (3) no one will be fired over whether they do or do not join the Union or pay dues.
>
> The Union refused to accept his, and the negotiations ended in a standoff.
>
> The new contract year begins December 1, 2008. The Company told the Union that it intends, as it has done in the past, to ask the Contracting Officer to approve an increase in wages and benefits. There is no assurance that the increases agreed upon at the bargaining table will be accepted by the Contract Officer.

Compher responded to Evans memo with a posting to employees on the Union's website where he stated:

> I wanted to give you an update on negotiations in Birmingham. First off, the letter that was put out by the company on Friday does not tell the "TRUTH". The Company's letter does not tell you that they wanted to take "AWAY" seniority provisions that were already "AGREED" to. The Company's letter does not tell you that the Company "WALKED" away from the table on Thursday, while we were waiting for the Mediator to get the parties moving. The Company's Letter does not tell you the Company did not want to talk about the GRIEVANCE and ARBITRATION procedures and the BOOTS. The Only thing the Company wanted to do was talk about the dues instead of everything that was open. Further, the Company wanted to try and negotiate additional management rights, weaken the grievance and arbitration procedure, and SENIORITY, and NO-STRIKE AND NO-LOCKOUT.
>
> The Union went to Birmingham in an effort to resolve the issues and negotiate a Contract, but the only thing the Company wanted to do was "REGRESS BARGAIN" when the Company threw (sic) out another offer "PLAN B" which is an unfair labor practice and we are going to file "UNFAIR LABOR PRACTICE" charges with the LABOR BOARD. The Company's action in Birmingham by trying to take things away that was already agreed to were just merely a waste of time instead of trying to get an agreement with the Union. The Company in it's letter stated that they are going to try and submit the wage increase but they know full well the Contracting Officer will not accept it without a Contract with your Union and we will show you that in a Letter from the Contracting Officer saying just that.
>
> Please keep one thing in mind, without a good UNION SECURITY CLAUSE, A GOOD GRIEVANCE AND ARBITRATION PROCEDURE, YOU HAVE NO VOICE IN THE WORKPLACE AND ARE WITHOUT SOLID REPRESENTATION, and REPRESENTATION YOU VOTED FOR BY CHOOSING THE I.A.M. TO REPRESENT YOU. "STAY STRONG AND TOGETHER AND WE WILL PREVAIL."

Mitchell testified as to open issues that Respondent and the Union never reached agreement on the Union's request to reclassifying the truckdrivers to FSDOs. Mitchell testified he was unsure whether the parties reached agreement on arbitration language because at the end of the day the Union stated they wanted the language from Proposal A back in. He testified, "That would indicate, perhaps, agreement with the company's language on Proposal A. I would say that that was not any clear agreement, though." Mitchell testified there was no express agreement on shoe allowance. Mitchell admitted the Union never specifically agreed to Respondent's subcontracting proposal. He testified that in the Union's counterproposal they did not object to the subcontracting language indicating to Mitchell that the Union did not have a major problem with it.

Mitchell testified Respondent made another contract proposal by letter from Mitchell to Compher dated February 18, 2009. It states in the letter, "Further, and in response to Mr. Provost's direct question last Monday, while we are prepared to compromise from our position on Section VI (Union Security), we are not willing to accept the Union's only proposal on this subject. We are ready to meet and discuss this and other matters if you desire to do so." Mitchell testified Respondent's February 18 offer is the October 8 proposal updated to provide current wage rates and to adjust proposed wage increases to the next anticipated contract year and for 2 years thereafter, which would be December 1, 2009. Mitchell testified the Union has never responded to the February 18 proposal. Mitchell testified Respondent made this proposal after the Region issued a proposed remedy that required Respondent to reinstate Proposal A, the October 8 proposal.

A. Credibility

One area of dispute in this case is how Mitchell described Respondent's "Proposal B" to the union officials during the November 6 meeting. Provost credibly testified that at 10:45 a.m. on November 6, the Union received a document from Mitchell labeled, "COMPANY PROPOSAL B." The cover page of the document identified six areas where there were changes to Respondent's October 8 proposal. Provost credibly testified that at the time the Union was tendered Company Proposal B no one from Respondent told the Union that Respondent's October 8 proposal was still on the table. Provost testified that after Mitchell reviewed the changes, the parties took a break. Provost testified, "we kind of had to take a break because we went there believing there was six to eight issues open, and when we got this document, all of a sudden it became like 15 because there were some changes made; in my belief, was regressive bargaining. So when we went back, we pointed that out to the Company, and Rick did it, and he was extremely upset." Provost testified he also told the Respondent it was regressive. Provost testified Respondent gave no response to his assertion. Provost credibly testified that, at no time during the November 6 meeting, did anyone from Respondent state that the October 8 proposal was still on the table. Provost denied telling Mitchell during the meeting that he did not have to worry about withdrawing Proposals A and B be-

cause neither would be accepted by the Union.[22]

Similarly, Compher credibly testified the union officials were very upset by Proposal B. He testified the proposal added new language that had never been discussed before including such areas a management rights. Compher listed the regressive proposals in Proposal B in areas where there had been prior tentative agreements. Compher testified that for lack of a better word, "I was pissed." Compher He testified, "We were there. And we didn't have much time to get this thing done, and it was pulled out from underneath our feet." Compher testified when Proposal B was given to the Union, "I said this is a crock of shit. We come all the way here and you wanted to pull back on proposals, things that we already agreed to." Compher testified that Mitchell had no response. Compher testified that Mitchell did not say anything about the October 8 proposal still being on the table. Compher testified he accused Respondent of regressive bargaining to which there was no response. Compher testified Respondent's officials never said anything about the October 8 proposal the entire day. He testified that between November 6 and December 1, no one told him that the October 8 proposal was still on the table. Compher testified that no one explained to him at the table why Respondent labeled the November 6 proposal as Proposal B. Compher denied that Mitchell made the statement at the end of the session on November 6, that both of the Company's proposals were being withdrawn or would be withdrawn effective December 1. Compher testified that Mitchell never made the statement that he was going to withdraw either proposal on November 6.

Thus, Provost and Compher credibly and consistently testified that during the November 6, meeting, they were not informed by Respondent that the October 8 proposal was still on table. They also both credibly testified that the union officials were very upset by Respondent's Proposal B and that they accused Respondent of regressive bargaining on November 6, by the changes made in Proposal B from the October 8 proposal with no response from Respondent.

On the other hand Mitchell's testimony about informing the Union that the October 8 proposal was still on the table was vague and somewhat inconsistent. Mitchell initially testified that when Respondent first presented Proposal B, "I said that our first proposal was still on the table and Proposal B was presented as an option." Mitchell testified in reference to the first proposal that he was referring to the October 8 proposal which he labeled at the hearing as Proposal A. When asked if he labeled it as Proposal A during negotiations, Mitchell testified, "I think at some point I did probably use the term Plan A, but I think initially I did not. I think initially I referred to it as just the Company's last offer referring to Respondent's October 8 proposal." However, Mitchell then went on to testify as follows:

> Q. Do you recall saying in your affidavit that you did not explicitly say, at this time, that Proposal A was still on the table?
> A. I may have said that, but what I said in my -- I mean, what I said at the table was both Proposal A and Proposal B would be withdrawn as of December 1. I may not have said Proposal A is on the table, I may have said it that way, but I said clearly, I say that simply by labeling this, General Counsel's 5, Proposal B, that that means that Proposal A is still out there. But at the end of the day, I said that both proposals, A and B, would be withdrawn December 1, which I think implies that they're both out there, if I didn't say that expressly.

Thus, while Mitchell initially testified that he told the Union that the October 8, proposal was still on the table when he first presented the Union with Proposal B, he admitted later on that he may not have done so. Similarly, while Mitchell initially testified that he referred to the October 8 proposal as Plan A, at some point during the November 6 meeting, Mitchell later testified that at the conclusion of bargaining on November 6, Respondent withdrew its contract proposals if they were not accepted in time to submit them to the government by December 1. Mitchell testified he specifically referenced Proposal A, although he did not call it A at the time. He testified, "I said the October 8th agreement would also be withdrawn if not accepted by December 1." He testified at that time they were not calling it Proposal A, "It was just called the October 8th proposal."

In sum, I found the testimony of the union officials to be clear and convincing that they were never told that the October 8 proposal was still on the table during the November 6 session. Moreover, the credible testimony of the union officials reveals that they accused Mitchell and Respondent of regressive bargaining as to Proposal B on November 6, with no response from Mitchell. I therefore find that Mitchell was aware on November 6, that the union officials were operating under the assumption that on November 6 the October 8 proposal had been withdrawn and supplanted by Respondent's Proposal B. In fact, I have concluded it was Respondent's intent to lead the union officials to that conclusion. In this regard, it would have been very easy for Mitchell to diffuse the Union's allegations of regressive bargaining by clearly informing them in response that the October 8 proposal was still on the table. This Mitchell failed to do.[23]

[22] Provost credibly testified Respondent's November 6 changes really upset the Union because they were changes to prior tentative agreements, and to benefits the employees already enjoyed in the area of seniority.

[23] Respondent attempted to place two newspaper articles and two cross word puzzles into evidence referring to the term Plan B to bolster an argument that the mere labeling of Respondent's November 6, proposal as Proposal B, was sufficient to apprise the Union officials that the October 8 proposal was still on the table. Admittedly, these documents were not presented to the Union at the bargaining table on November 6. In fact, they were obtained after the fact. Upon objection, I excluded the four documents from evidence during the hearing, with leave for the parties to further argue their admissibility in their briefs. Having reviewed these rejected exhibits, I adhere to my decision to exclude them. First, the Respondent had made three proposals prior to the November 6, meeting, each replacing rather than serving as an

The parties discussed Respondent's Proposal B union-security language on November 6. Provost testified Mitchell kept "making a claim that the union had the ability to negotiate increases or decreases in agency fees. We told him, one thing is it's illegal—Beck, General Motors Beck ruling." Provost testified he explained the Union's constitutional process to Mitchell, and that the failure to follow the Union's constitutional guidelines concerning dues would subject the Local to charges with the Department of Labor. Provost testified Respondent's response was they believed the Union had the ability to negotiate agency fee payer amounts.

Provost testified the Union is required by law to publish employees Beck rights once a year, so the members have the ability to state they are a Beck objector or have nonmember status. Provost testified that during the November 6 meeting, both he and Compher asked Mitchell more than once if Mitchell would be interested in talking to the Union's general counsel concerning Respondent's proposal on union security, or to the Union's international president. Provost testified Mitchell did not respond to that offer. Provost testified that on November 6, the Union never said or insisted that non members pay a hundred percent of dues. He testified that the Union's proposal on union security did not require that they do so. Provost admitted the Union's written proposal on union security to Respondent did not say anything about proportional dues for objectors. However, Provost testified he and Compher told Mitchell that if Respondent was so concerned about this that the union officials "would teach them how to show employees to become objectors through the Beck disclosure." Provost labeled this offer by the Union as a verbal proposal on union security, which was in addition to the Union's proposed written contract language. Provost testified the union officials offered Mitchell this more than once on November 6.

Compher testified Respondent's November 6 proposal concerning union security, "was the major discussion of that day." Compher testified it was the first time the Union had seen a proposal where employees who object to being full dues paying members pay a specified percentage as an agency fee. Compher testified, "I explained very simply to Mr. Mitchell across the table that we can't bargain this percentage, it's illegal. If you don't believe me, here is my attorney's or general counsel's name and number and here's our international president's name and number." Compher testified that during the November 6 meeting, the union officials made the statement that negotiating the amounts agency fee payers paid was illegal because it violated the Union's constitution and bylaws.

Compher testified in negotiation sessions prior to November 6, the Union told the Respondent the employees had a right not to join the union, and that they did not have to pay full dues. He testified that on November 6, the Union told Respondent that the Union would assist the employees on how to apply to become an agency fee payer or objector. Compher testified, "We told them we can't bargain any types of percentage because it's illegal. And I believe at that time Mr. Mitchell made the statement he believes that we can convince our higher-ups, whatever that–" Compher testified that during negotiations, the Union never demanded that an objector pay a hundred percent of dues because that would be illegal. Compher testified the Union sends employee objections to full dues payments to the Union's headquarters, to the General Secretary's department, and they figure out how much the objector has to pay for collective-bargaining representation. He testified, "that's the part of what we were trying to tell the Company we would help them do, guide them in the right direction." Compher explained that under the Union's constitution they "had to refer them—any dues objector has to go to the General Secretary—we cannot bargain that."

Compher testified that during negotiations from June through November, the Union only made one proposal on union security. Compher testified the agency fee referenced in the proposal is not equal to the full amount of dues. Compher testified there is nothing in the proposal that says the agency would be reduced but it was explained to Mitchell several times across the table. Compher testified, "I explained to you exactly what our proposal was, and I explained to you several times during negotiations, if any employee wanted to object to paying dues, we would tell them how to go, where to go, and what to do. I explained to you that several times. You can't dispute that."

Mitchell testified that after Respondent presented the Union with Proposal B on November 6, the Union stated they would not agree to 50 percent of monthly dues for agency fee payers and that that had to be 100 percent. He testified later on in the session Respondent altered its union security proposal to a 75 percent fee for agency fee payers which the Union also rejected stating that they could not and would not accept any offer that did not have 100 percent of dues for agency fee payers. Mitchell testified, "That's what they said at the meeting on November 6th. They said, we're not authorized to accept anything less than 100 percent." However, Mitchell also testified the Union said during negotiations that they would not negotiate over the amount of fees paid by agency fee employees, "and they said that all of the Company's proposals on union security are illegal. And after caucuses where they called somebody, they said, on November 6th they

alternative to the prior proposal. Second, I have concluded that the Union was never informed that the October 8 proposal was labeled as Proposal A, thereby undermining any claim that merely labeling the November 6 proposal as Proposal B served to inform the Union that it was serving as an alternative rather than a replacement of the October 8 proposal. Finally, as set forth above, by the accusations of regressive bargaining made by the Union on November 6, Respondent's officials were aware that the union officials considered Proposal B to be a replacement and not an alternative to the October 8 proposal, and Respondent's officials never sought to clarify the matter. Thus, I do not credit Mitchell's claim, over the union officials' denial, that Mitchell told them at the end of the November 6 meeting that the October 8 proposal would be withdrawn by December 1, if it was not accepted by that date.

came back and said that it had to be 100 percent." Mitchell admitted stating in his affidavit that the Union said "in negotiations that they cannot negotiate over the amount that agency fee payers will pay, based on the union's constitution and that it is illegal."

The testimony of Provost and Compher concerning the discussion on union security was consistent between witnesses and it had a ring of truth. Moreover, it was confirmed in large part by admissions by Mitchell that he was informed by the Union that they could not negotiate over the amount fee payers would pay because it was illegal under the Union's constitution. I have credited the testimony of the union officials that they informed Mitchell that agency fee payers did not have to pay 100 percent under the Union's union-security proposal, and that they gave assurances that they would assist in explaining this to employees. Mitchell's testimony that the union officials insisted that agency fee payers would have to pay 100 percent during this meeting is undermined by his admission that they informed him that they could not negotiate over it in the first place. Moreover, his claim is undercut by the realities of the meeting. To credit him, would mean that two experienced union officials would not have been aware of the Union's Beck policies and that agency fees payers have a right to object to full fees. I would further have to credit him that they continued with this position after they called their International office seeking advice on the Union's Beck policy. I do not find Mitchell's testimony worthy of belief. Rather, I find that during the meeting, the union officials stated the Union was seeking its written proposal on union security to be included in the collective-bargaining agreement, but they also informed Respondent that under that proposal agency fee payers did not have to pay 100 percent of membership dues as the union officials credibly testified.[24]

Compher testified that during bargaining sessions prior to November 6, Mitchell told Compher that Respondent had "philosophical differences" about having a union-security provision in the contract. Compher testified, "Mr. Mitchell had always stated to me, across the table, on numerous occasions, that he had a philosophical difference with employees having to pay dues." Compher testified that was the only reason Mitchell gave in objecting to the union's proposal on union security. Mitchell testified the reason Respondent did not agree to the Union's proposal on union security was because Respondent has a strong belief in individual freedom and liberty and that all employees should not be compelled to support organizations or causes they do not believe in. Mitchell testified, "We discussed that at great length during the negotiations." Mitchell also testified Respondent invited the Union to compromise on its version of union security during negotiations. Mitchell testified, "I would say one reason is that the union's refusal to consider or offer any compromise." Mitchell testified, "We invited compromise. The other side said there's not going to be any. And that is also one reason for our position." However, Mitchell admitted stating in his affidavit that Respondent did not agree to the Union's proposal on union security because Respondent has a strong belief in individual freedom and liberty and that employees should not be compelled to support organizations or causes they do not believe in. Mitchell admitted to not citing the Union's inflexibility on union security in his affidavit as an impediment to an agreement. Mitchell's affidavit supports Compher's version of the discussion. It is also unlikely, that Mitchell repeatedly told Compher that he had philosophical objections to union security, but at the same time seriously invited compromise. Moreover, there is no claim that Respondent ever suggested a realistic compromise, although Mitchell admittedly at some point was in possession of the DynCorp contract which had an alternative union-security provision, which had previously been agreed to by the Union. I have concluded that the evidence reveals that the Union steadfastly adhered to its written proposal on union security, and Respondent responded that it was opposed to union security based on what in essence were philosophical grounds.

Mitchell testified that on November 6, the Union included a written no strike proposal as part of its counter proposal to Proposal B. Mitchell testified Respondent then made a counterproposal that included most of the Union's language on no strikes. Mitchell identified Respondent's written counter proposal concerning the no-strike clause, which omits any language pertaining to an employee ban on picketing. Compher testified he could not recall whether on November 6, the Union presented Respondent with a counterproposal on strikes and lockouts, stating, "We may have." Compher testified a marked up version of a strikes and lockout provision was not presented back to him on November 6. However, Compher testified he may have seen the proposal that day. Provost was shown by Mitchell and he identified a "Strike and Lockouts" provision, which he testified he thought he saw part of it in another Machinists contract. Provost testified he did not give the provision to Respondent on November

[24] Respondent did not object to the Union's union security proposal on the grounds that it was unlawful. Moreover, the proposal was limited by its terms to requiring employees to be in good standing "as in compliance with standards permitted by NLRB and court decisions relating to Union shop requirements." See, *Chester County Hospital*, 320 NLRB 604, 622 (1995). The Board and the Supreme Court have found union-security provisions lawful when they track the language in Sec. 8(a)(3) of the Act, even if they do not inform employees of their right to object from paying full dues. The Board has held that by tracking the language of Sec. 8(a)(3) a union-security provision "incorporates all of the refinements and rights that have become associated with the language of Sec. 8(a)(3) under *General Motors & Beck*." See, *Schreiber Foods*, 329 NLRB 28, 29 (1999). See also, *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998). Here, the Union's proposal went beyond the language of Sec. 8(a)(3) in that the proposal states in part that absent being an member and employee must pay an, "agency fee equal in amount to monthly membership dues." However in artfully drawn, there can be no doubt that at this point in time the Machinist's Union has a Beck policy, which is published to employees, and that the union officials here informed Mitchell of that policy and that they were not seeking 100 percent dues from agency fee payers. See, *California Saw & Knife Works*, 320 NLRB 224 (1995).

6. Given the somewhat vague recollections of the union officials here, I have credited Mitchell that Respondent did present another strikes and lockouts provision to the Union on November 6, which omitted the ban on picketing that had initially been included in Respondent's initial Proposal B.

B. Analysis

In *Langston Co.,* 304 NLRB 1022, 1060 (1991), the following principles were set forth:

> . . . there can be little doubt that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession, *NLRB v. American National Insurance Co.,* 343 U.S. 395, 404 (1952); 29 U.S.C. § 158(d). Nor may the Board directly or indirectly, compel concessions or otherwise sit in judgment on the substantive terms of collective-bargaining agreements. *H. K. Porter v. NLRB,* 397 U.S. 99, 106 (1970). The Board is forbidden to compel agreement when the parties are unable to agree, for such action would violate the fundamental premise on which the act is based: private bargaining under government supervision of the bargaining procedure, without any official compulsion over the terms of the contract (H. K. Porter, supra, 397 U.S. at 108).

In *Sivalls, Inc.,* 307 NLRB 986, 1008 (1992), it was stated that:

> 'In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, [the Board] will seldom find direct evidence of a party's intent to frustrate the bargaining process. Rather, [it] must look at all of [the party's] conduct, both away from the bargaining table and at the table, including the substance of the proposals on which the party has insisted.... Such an examination is not intended to measure the intrinsic worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mindset open to agreement or one that is opposed to true give-and-take.' *NLRB v. A-1 King Size Sandwiches,* 732 F.2d 872, 874 (11th Cir. 1984); *NLRB v. Mar-Len Cabinets,* 659 F.2d 995, 999 (9th Cir. 1981); *Hydrotherm, Inc.,* 302 NLRB 990 (1991); *Prentice- Hall, Inc.,* 290 NLRB 646 (1988); *Reichhold Chemicals,* 288 NLRB 69 (1988).[25]

In evaluating proposals the Board and courts will review their content, the timing they are made, and the reasons given for the proposals at the bargaining table to determine whether they are made in good faith, or evince an intent to frustrate the bargaining process. For example, in *NLRB v. A-1 King Size Sandwiches, Inc.,* 732 F. 2d 872, 877 (1984), cert. denied 469 U.S. 1035 (1984), the court enforced a Board order finding surface bargaining based on the positions that the respondent employer took during negotiations. The employer had proposed an extensive management rights clause, and the Court noted that its proposed grievance and arbitration procedure was "largely illusory." In finding a violation, the Court concluded that, "it is clear from our extended recital of the proposals made . . . that the Company insisted on unilateral control over virtually all significant terms and conditions of employment, including discharge, discipline, layoff, recall, subcontracting, and assignment of unit work to supervisors." The Court went on to state that, "The Board correctly inferred bad faith from the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable." The Court cited *NLRB v. Wright Motors, Inc.,* 603 F.2d 604, 609–610 (7th Cir. 1979), and *NLRB v. Johnson Mfg. of Lubbock,* 458 F.2d 453 (5th Cir. 1972), as precedent for its conclusion.

Along these lines, the opposition to union security and dues checkoff based on philosophical grounds without business justification has been held to constitute evidence of bad-faith bargaining. See. *Chester County Hospital,* 320 NLRB 604, 622 (1995), enfd. 116 F.3d 469 (3rd Cir. 1997); *CJC Holdings,* 320 NLRB 1041, 1047 (1996), affd. 110 F.3d 794 (5th Cir. 1997); *Hospitality Motor Inn,* 249 NLRB 1036, 1036 fn. 1; and *NLRB v. A-1 King Size Sandwiches, Inc.,* supra at 877.

In *Hercules Drawn Steel Corp.,* 352 NLRB 53, 71–72 (2008), it was noted that regressive proposals standing alone are not per se violative of the Act, and that the Board examines a respondent's explanation for a change in position to determine whether it was undertaken in bad faith and designed to impede agreement. In *Quality House of Graphics,* 336 NLRB 497, 515 (2001), it was stated that:

> In *Reichhold Chemicals, Inc.,* 288 NLRB 69 (1988) (*Reichhold II*), affd. in pertinent part sub nom. *Teamsters Local 515 v. NLRB,* 906 F.2d 719 (D.C. Cir. 1990), the Board reiterated some of the factors that it will consider in determining whether bad-faith bargaining bad occurred. These include among others: unreasonable bargaining demands that are consistently and predictably unpalatable to the other party; unilateral changes in mandatory subjects of bargaining; and insistence to impasse on nonmandatory subjects of bargaining, all of which are present in the instant case evidencing the Respondent's design to frustrate a bargaining agreement. Moreover, the Board has held that the interjection of new proposals after months of bargaining can be evidence of bad-faith bargaining. The Board has also held that the assertion of a proposal disingenuously is an indicia of bad-faith bargaining. (Footnotes omitted.)

From all of the above, and the timing of the Respondent's proposal, its regressive nature, without justification, the Respondent's seemingly pretextual explanation of the purpose therefore, and the Respondent's apparent disingenuous assertion of this proposal to the Union, I find and conclude that the Respondent's May 8, 1998 proposal was

[25] In *NLRB v. Wright Motors, Inc*., 603 F.2d 604, 609–610 (7th Cir. 1979), the court stated that, "Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. *NLRB v. Holmes Tuttle Broadway Ford, Inc*., 465 F.2d 717, 719 (9th Cir. 1972); *Vanderbilt Products, Inc. v. NLRB*, 297 F.2d 833 (2d Cir. 1961); *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131, 134–135, 139 (1st Cir.) (1953), certiorari denied, 346 U.S. 887."

not made as part of any good-faith effort to reach an agreement, but instead, constituted bargaining in bad faith with the Union designed to frustrate a collective-bargaining agreement, in violation of Section 8(a)(5) of the Act.[26]

It has also been recognized that when a party withdraws from tentative agreements it can constitute an indicia of bad-faith bargaining. See, *Golden Eagle Spotting Co. v. NLRB*, 93 F.3d 469, 471 (8th Cir. 1996). Thus, the Board has held that a party may withdraw from a tentative agreement concerning a contract only when it has good cause to do so. See, *Suffolk Academy,* 336 NLRB 659, 669 (2001), enfd. 322 F.3d 196 (2d Cir. 2003); *Driftwood Convalescent Hospital,* 312 NLRB 247 (1993); *Homestead Nursing Center,* 310 NLRB 678 (1993); and *Arrow Sash & Door Co.,* 281 NLRB 1108 fn. 2 (1986).

In *Service Employers Local 535 (North Bay Center),* 287 NLRB 1223 fn. 1 (1988), the Board held that the bargaining over the amount of agency fees is a permissive subject of bargaining. A party may advance a proposal on a permissive subject of bargaining as long as it does not insist upon it as a price for an overall agreement. See *Reading Rock, Inc.,* 330 NLRB 856, 861 (2000); and *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143, 144 (2007). The Board has also held that a repeated proposal to change the scope of the unit, a nonmandatory subject of bargaining, can constitute evidence of overall bad-faith bargaining. See, *Branch International Services,* 310 NLRB 1092, 1103 (1993), enfd., mem. 12 F.3d 213 (6th Cir. 1993). Finally, an employer's refusal to meet in a location reasonably close to the plant or employees worksite, particularly when no justification is presented, places a hardship on the employees and their union and is indicative of bad faith bargaining, if not in and of itself unlawful. See, *Somerville Mills,* 308 NLRB 425, 426 fns. 5 and 6 (1992), enfd. 19 F.3d 1433 (6th Cir. 1944).

In the current case, following an election the Union was certified on February 8. The parties held their first bargaining session on June 24, with five additional sessions before their final meeting on November 6. The last session before the November 6 meeting was held on October 8. At the outset of negotiations, Respondent made the Union aware that any collective-bargaining agreement had to be submitted to the federal contracting officer by December 1, in order for Respondent to be compensated for any wage and benefit increases above the area wage determination. By the second session on June 25, the parties had reached tentative agreement that promotions, job assignments, layoffs, and recalls were to be based on seniority. This in essence incorporated Respondent's practices at the time.[27] The evidence reveals that during the initial session on June 24, the parties had reached tentative agreement that discipline and discharge were to be for just cause.

The evidence indicates that, during the October 8 session, the Union listed union security, pay for stewards while investigating grievances, the cost of examinations and licenses, the grievance procedure concerning what could be taken to arbitration, shoe allowance, a request to reclassify the truckdriver position, pay for lead persons, pay for boiler tenders, shift differential pay, and a pay increase for the dispatcher as the open items. During the meetings up to and during October 8, union security was a serious bone of contention between the parties, with Mitchell stating Respondent opposed union security for what in essence were philosophical reasons, and the Union adamantly adhering to the only proposal it had made stating it had been selected by the union membership. During the October 8, meeting, Respondent made a verbal contract proposal to the Union.

Following the October 8 meeting, Compher sent Mitchell an email requesting the resumption of negotiations the following week with the assistance of a federal mediator, offering the Union's place a business as a meeting place. Mitchell sent Compher an email dated October 15, with a written version of Respondent's October 8 verbal contract proposal, which Mitchell stated contained "all agreements reached to date" as well as Respondent's position on any open items. The written offer sent on October 15, included the parties prior tentative agreements on discipline and on seniority.

Thereafter, Compher sought the assistance of a federal mediator to arrange another meeting. However, he was informed, although the bargaining unit was in Maryland and employees had participated as members of the Union's bargaining committee, that Respondent would not return to Maryland and would only meet in Birmingham, Alabama. As a result, Compher sought approval from the Union to make the trip to Alabama, and he was accompanied by union official Provost, rather than any bargaining unit members to the next meeting which took place on November 6, in Birmingham, Alabama. Provost had not attended any prior meetings.

The November 6 meeting was scheduled to begin at 9 a.m., but Respondent arrived late and it did not start until around 10 a.m. Provost and Compher were there for the Union, and it was attended by Respondent's officials along with a federal mediator. It was not until 10:45 a.m. that Respondent's officials presented Respondent's Proposal B. to the Union. Proposal B contained a sweeping management-rights clause giving Respondent the ability to subcontract all work, exclusive control over job assignments and promotions, scheduling, the assignment of overtime, discipline and discharge, layoff and recall, and the right to establish work and safety rules.[28] Respondent also for the

[26] See also *Hotel Roanoke*, 293 NLRB 182, 185 (1989), holding that the "introduction of significant new bargaining proposals at a late stage of negotiations" constitutes an indicia of surface bargaining.

[27] While Respondent's counsel testified he was not aware of any prior layoffs, Compher credibility testified he was informed at the bargaining table by Respondent's management officials that seniority had been the practice as to the above enumerated items.

[28] At the same time, Respondent was insisting on a grievance-arbitration procedure that limited arbitration to grievances involving

first time proposed a no strike or lockout provision, which prevented all picketing by employees. Respondent presented this management-rights proposal for the first time on November 6, after the parties had had six prior bargaining sessions and after the Union had raised no objection to Respondent's prior proposal on management rights. Respondent made this proposal on November 6, knowing that there was a December 1, deadline for the parties to submit a collective-bargaining agreement to the government contracting officer in order for Respondent to be compensated by the government for any wages and benefits in a collective-bargaining agreement above that of the area standards. Respondent made this proposal after having heard there were relatively few open issues at the end of the October 8 session, and after requiring the Union to absorb considerable expense in traveling from the Maryland due to Respondent's insistence on continuing negotiations in Birmingham, Alabama, a great distance from the bargaining unit.

By making its Proposal B containing the described management-rights clause, Respondent reneged on tentative agreements reached early on in negotiations that promotions, job assignments, layoffs, and recalls were to be seniority based, and that discipline and discharge were to be for just cause. Respondent also interjected an unlimited subcontracting proposal, a proposal to waive employees' right to picket, as well as a proposal for unlimited discretion in the creation of work rules during the very late stages of negotiations.

Respondent, in its Proposal B, also made a first time proposal for a union-security provision, where agency fee payers were required to pay half the amount of the membership dues. During the meeting, the union officials told Mitchell that the Union could not bargain over the amounts to be paid by agency fee procedures, that to do so would violate the Union's constitution, and would be a violation of the Union's Beck procedures. They offered to have Mitchell speak to the Union's general counsel, and international president to confirm their statements, an offer Mitchell declined. In response the union officials informed Respondent the Union would assist in informing employees of their rights not to pay full dues as *Beck* objectors, but it could not bargain of the amounts they paid, which were controlled by the Union's constitution and Beck procedures. However, Respondent persisted in its position to negotiate the amounts to be paid to the Union by agency fee payers.

The union officials were angered by Respondent's last minute proposals, reacted strongly to the situation where they had to incur the time and expense to travel to Alabama, and accused Respondent of regressive bargaining to which Respondent's officials had no response. When the Union informed the Respondent that they could not bargain over the fees of agency fee payers, Respondent persisted in doing so. By insisting on bargaining on the Union's dues structure over the Union's objection Respondent unlawfully insisted on bargaining on a permissive subject of bargaining. Counsel for the General Counsel argues that Respondent did not insist to impasse on the union security provision contending that other items were open. There is no allegation that Respondent insisted to impasse on its union-security provision in the complaint. Regardless of whether Respondent's stance of union security caused the parties to reach impasse, it clearly dominated the discussion on November 6, and served as a severe impediment to the parties reaching agreement.[29]

Mitchell admitted telling the Union that Respondent's proposal on subcontracting was made for no specific reason, that it was just part of a management-rights provision taken from another document so Respondent left it in there. Mitchell stated in his prehearing affidavit that Respondent explained its new management-rights provision to the Union that Respondent was looking for more security in exchange for the Union's proposal on union security.

Compher testified that during the latter stages of the November 6 meeting, following the Union's strong protest, Respondent came back to its prior position that layoff and recall would be done by seniority, and that discipline and discharge would be for just cause. However, Compher testified that promotions and job assignments by seniority were not placed back on the table by Respondent. Mitchell's testimony reveals that during its counterproposal at the November 6 meeting Respondent also removed the prohibition against picketing from the no strike no lockout provision. Compher's testimony reveals the November 6 meeting ended at 2:15 p.m. I do not find Respondent's concessions at the end of the meeting demonstrate an intent to bargain in good faith. Rather, Respondent's conduct during the meeting demonstrates an intent to make new, regressive, and unpalatable proposals during a critical meeting, thereby wasting time, even if some of the proposals were rescinded during the meeting. Thus, time was wasted by requiring the Union to rebargain for concessions that they previously obtained during negotiations. It is clear Respondent's goal was to thwart rather than reach an agreement.

I find that during negotiations, Respondent objected to

discipline or discharge, failure to pay wages or benefits under the agreement, or the alleged violation of federal or state law.

[29] Prior to November 6, Respondent had repeatedly objected to union security on philosophical grounds. The Board has held that such conduct concerning objecting to union security, absent a legitimate business justification constitutes evidence of bad faith. I do not hold the Union totally blameless concerning the parties' discussion on Union security. The Union's inflexible adherence to the language in its one and only proposal based on the fact that it was selected by the employees evidenced unwillingness to compromise. Moreover, the DynCorp contract contained union-security language which the Union had previously agreed to with another employer, which if proposed may have been more palatable to Respondent. However, Respondent admittedly obtained a copy of the DynCorp contract at some point in time, but has never suggested its union security language to the Union. Thus, I do not find the Union's position on union security here justified or was the cause of Respondent's behavior, particularly in view of the credibility resolutions I have made herein.

the Union's union security proposal purely on philosophical grounds. I find that late in negotiations, Respondent refused to meet at a location within reasonable proximity to the bargaining unit, and that during the November 6 meeting, Respondent made significant new proposals, breached tentative agreements, and engaged in regressive bargaining without good cause shown. Included in Respondent's November 6 proposal was a provision that would have eliminated the employees' right to picket.[30] Also included was a proposal to bargain the fees owed the Union by agency fee payers, a permissive subject of bargaining, which Respondent insisted on negotiating over the Union's strong objections. I find Respondent, by its course of conduct, engaged surface bargaining designed to frustrate rather reach agreement and that in doing so Respondent violated Section 8(a)(1) and (5) of the Act.

There is a dispute in testimony between Compher and Mitchell as to whether Mitchell informed the Union at the end of November 6 meeting, that if the Union did not accept Respondent's proposals by December 1, that they were being withdrawn. With Compher denying Mitchell's claim that he made such a statement. I have credited Compher that Mitchell did not inform the Union that it was withdrawing its October 8 proposal on November 6 effective on December 1 if not accepted by that date. I find that, in fact, Respondent led the Union to understand during the November 6 meeting, that the October 8, proposal had been withdrawn on November 6, in that it had been supplanted by Respondent's Proposal B tendered to the Union on November 6. I have concluded that Proposal B was made in bad faith to frustrate agreement.

Respondent has indicated at the hearing through Mitchell's testimony that it was Respondent's intent and Respondent did in fact withdraw any existing proposals as of December 1, regardless of whether they informed the Union of this on November 6. The General Counsel seeks as a remedy that Respondent be required to reinstate its October 8 proposal. Counsel for the General Counsel citing *Dynaelectron Corp.,* 286 NLRB 302 (1987), argues, in seeking full restoration of the October 8 proposal that Respondent is not limited by Service Contract Act wage determinations in making employees whole for its unfair labor practices. I agree with counsel for the General Counsel's position that Respondent should be required to reinstate is October 8 proposal for a reasonable period of time, and if the Union accepts the proposal that the proposal should remain in effect for the duration of the terms expressed therein, with the designated pay and benefit rates set forth there in. The October 8 proposal called for specified wage rates over a 3 year period to be implemented on December 1, on each of those years. Under Section XII, of the October 8 proposal, the agreement was to be effective December 1, 2008, and to remain effective for a term of 3 years. Clearly, in these circumstances, should the parties come to agreement based on that proposal and bargaining thereafter, the employees are entitled to be made whole based on retroactive pay and benefits according to the terms of the October 8 proposal. See, *TNT Skypak, Inc.,* 328 NLRB 468 (1999), enfd. 208 F.3d 362 (2nd Cir. 2000); *Northwest Pipe & Casing Co.,* 300 NLRB 726 (1990); and *Mead Corp.,* 256 NLRB 686, 686–687 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983). Moreover, in reinstating its October 8 offer, I find that Respondent should be required to cease maintaining its opposition to a valid union-security provision, absent a legitimate business justification for doing so.[31]

Following the November 6 session, Mitchell approved a memo under Evans signature which was distributed to all bargaining unit employees. The letter described the November 6 meeting, stating the only issue discussed was "union security—mandatory union membership and pay-

[30] The proposal eliminating the right to picket was included in Proposal B, under Section XI Strikes and Lockouts. Counsel for the General Counsel argues the proposal banning picketing of "any kind" is unlawful on its face arguing that it is a akin to a union's waiver of employee solicitation rights, which was prohibited by the Court in *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974). General Counsel's argument has some appeal in that employees can engage in picketing away from an employer's premises, and also engage in picketing at an employer's premises with no intent to disrupt work. Moreover, employees can also picket against an incumbent labor organization, as well as in its support, and therefore a total ban on all picketing can be construed as an impingement of employee Section 7 rights which goes beyond the legitimate purpose of a no strike clause which in general is to prevent the disruption of work. However, in *Englehard Corp*., 342 NLRB 46 (2004), enfd. 437 F.3d 374 (3d Cir. 2006), the Board addressed the issue of whether a union had waived the right to picket away from an employer's facility by language contained in a no strike clause. There employees had picketed away from the facility with no showing that production had been disrupted and their discharge pursuant to the provision was found to be unlawful, with the Board majority finding that the terms of the no strike clause when construed as a whole did not constitute a clear an unmistakable waiver of the employees right to picket away from the facility. The dissenting Board member found that the clause in question did waive the right to any picketing and would have upheld the discharge. None of the Board members involved in the decision stated that the Union could not as a matter of law waive the employees' right to picket.

The clause in question herein, as part of a no strike provision, could be construed as a possible attempt to prevent picketing only when it led to a disruption of work a opposed to a ban on all picketing as it states, "There will be no picketing of any kind by employees represented by the union, and such employees will cross any picket lines in order to report to work or perform their job assignments." However, I do not need to make these fine distinctions to resolve the issues in this case involving allegations of surface bargaining. I also do not need address the issue of whether a union can waive employees' section 7 rights to picket under all circumstances. This is because I have found that Respondent withdrew the disputed picketing provision from consideration during the same bargaining session in which it was proposed. Thus, it is no longer in play by parties. Nevertheless, I find that Respondent's first time proposal of such an important and legally complex provision, with no justification for do so, during this late stage of bargaining was part and parcel of its conduct designed to frustrate agreement, and constitutes strong indicia that it was engaged in surface bargaining.

[31] This does not mean that Respondent is required to agree to the language of the Union's existing proposal on union security, only that Respondent bargain in good faith over the subject matter as described herein.

ment of dues by all employees. All pay and benefit items and other contract language were agreed upon." The memo falsely stated, that "The Union insisted that all employees must either join the Union or pay an amount equal to Union dues. Those who do not should be fired, according to the Union." In this regard, I have credited Compher and Provost's testimony that they repeatedly explained to Mitchell that agency fee payers did not have to pay the full amount of dues.

Moreover, I find that, at the time Respondent issued the memo, there was no agreement on several contract items, such as the full application of seniority, grievance-arbitration, and shoe allowance. Mitchell also conceded that at the time the memo issued, the was no agreement on the Union's request to reclassifying the truckdrivers to FSDOs, that he was unsure whether there is agreement on subcontracting. I find that there was no agreement on Respondent's belated proposal on subcontracting. I attribute the fact that the Union failed to make a specific proposal concerning subcontracting was due to the fact that they were overwhelmed by the volume of Respondent's regressive and new proposals, and the short time they had to deal with them.

I find Respondent's memo to employees also mischaracterizes the tenor of the November 6 meeting, by attempting to cast the blame on break down of negotiations on the Union's position concerning on union security, rather than stating Respondent made new and substantial proposals late in negotiations, made regressive proposals, reneged on tentative agreements, made a proposal attempting to eliminate employees' right to picket, insisted on bargaining over the Union's objection on a permissive subject of bargaining pertaining to the Union's dues, and insisted on meeting at a great distance from the work place thereby in effect prohibiting employees attendance at the meeting. Respondent's memo was a clear attempt to drive a wedge between the employees and their Union, after Respondent had committed various Acts to undermine negotiations and frustrate agreement. I do not find the Union's posting a reply memo on its website serves to counter Respondent's memo to employees. First, Respondent's memo was distributed to all bargaining unit employees. Whereas the Union's memo had limited reach in that employees would have had to have the knowledge, means, wherewithal and desire to access the Union's website. I find that Respondent's cited memo was part of its conduct to frustrate bargaining and to undermine the Union, and that by issuing the memo Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Finally, I find that Respondent's refusing to meet on November 6, except at a great distance from Respondent's Maryland location worked a hardship on the Union, excluded employees from attendance, and was another Act designed to frustrate bargaining in violation of Section 8(a)(1) and (5) of the Act.[32]

CONCLUSIONS OF LAW

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

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

3. The Union is the certified and exclusive bargaining agent for the Respondent's employees in the following appropriate unit:

> All full-time and regular part-time Mechanics, Mechanic Helpers, Drivers, Fuel Distribution/Drivers, LOX Plant Operator, Lox Plant Lead, Supply Tech (Supply Clerk), Account Clerk II (Gas Station Operator, MDGAS (MOGAS) Operator), and Dispatcher Driver Operators employed by Respondent at its Patuxent River NAS facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

4. By the terms of its November 6, 2008 contract offer, Respondent reneged on tentative agreements previously reached with the Union that all job assignments, promotions, layoffs, and recalls will be controlled by seniority; and that all discipline and discharge will be for just cause; and Respondent engaged in this conduct while making regressive proposals in these areas with the purpose of frustrating the negotiation of a collective-bargaining agreement, thereby violating Section 8(a)(1) and (5) of the Act.

5. By refusing to accede to union security and dues checkoff based on philosophical grounds without advancing any legitimate business justification, Respondent has engaged in a course of conduct with the purpose of frustrating the negotiation of a collective-bargaining agreement, thereby violating Section 8(a)(1) and (5) of the Act.

6. By the terms of its November 6, 2008 contract offer, wherein it insisted on negotiating a union-security provision containing the amount of fees paid to the Union by nonmember employees over the Union's objection to negotiate pertaining to this permissive subject of bargaining, Respondent violated Section 8(a)(1) and (5) of the Act.

7. By interjecting, during a late stage of negotiations, a significant proposal on subcontracting as well as a proposal that employees waive all rights to picket, without a legitimate justification for doing so, Respondent engaged in conduct with the purpose of frustrating the negotiation of a collective-bargaining agreement, thereby violating Section 8(a)(1) and (5) of the Act.

8. By withdrawing contract proposals because the Union did not accept them in time for them to be approved by the United States government, Respondent has engaged in a course of conduct for the purpose of frustrating the negotiation of a collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act.

9. By refusing to meet with the Union on November 6, at a location in reasonable proximity to the location of the bargaining unit, Respondent has engaged in a course of con-

[32] This issue was not specifically alleged as a complaint allegation but it was listed in the remedy section of the complaint, and fully litigated at the hearing.

duct with the purpose of frustrating the negotiation of a collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act.

10. By falsely informing employees that the only issue preventing an agreement with the Union was the issue of union security, while at the same time engaging in unfair labor practices designed to frustrate bargaining, Respondent has sought to undermine the Union amongst employees in violation of Section 8(a)(1) and (5) of the Act.

11. By engaging in the conduct set forth in paragraphs 4 to 10 above, Respondent engaged in over-all bad-faith bargaining without a sincere desire to reach a collective-bargaining agreement, thereby violating Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist and that it take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent withdrew its October 8, 2008 proposal in violation of the Act in order to frustrate the negotiation of a collective-bargaining agreement, I shall recommend an order, which, among other things, requires Respondent to reinstate its October 8, 2008 proposal for a reasonable period of time, and that Respondent cease objecting to the inclusion of a union-security provision in that proposal without a legitimate business justification for doing so. If the Union notifies the Respondent within a reasonable time that the October 8, offer as described herein is accepted, along with any negotiated modifications, Respondent shall be required to sign a collective-bargaining agreement containing all of the terms of that offer along with any negotiated modifications and to accord employees any wage and benefit increases in the amounts and effective dates described in the October 8 offer, making employees whole for any losses of wages and/or benefits retroactively. Backpay shall be computed with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Having found that Respondent unlawfully insisted on bargaining at a remote location from the bargaining unit on November 6, 2008, as part of its plan to frustrate bargaining, I shall recommend an order where Respondent be required to reimburse the Union for all costs and expenditures, including reasonable salaries, monies lost due to absence from work, and travel expenses incurred by the Union during the preparations for, and participating in the collective-bargaining negotiations on November 6, 2008. I do not, as part of this remedy, find that Respondent is required to reimburse the Union for the cost of the rental for the room where negotiations where held, since Respondent offered the use of its attorneys law offices for that meeting which was rejected by the Union. The Union was represented by two experienced union officials, and I find in the circumstances here that their rejection of the Respondent's offer was of their own free will.

In order to ensure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, I recommend that the initial year of the certification be extended to begin on the date that Respondent, in compliance with the Order herein, commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. See, *Langston Cos.,* 304 NLRB 1022 (1991); *Overnite Transportation Co.,* 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).

The remedy section of the amended complaint requests that Respondent be ordered to bargain with the Union on request within 15 days of the issuance of a Board Order for a minimum of 24 hours per month and at least 6 hours per session, or any other schedule mutually agreed upon between the Respondent and the Union. I do not find this request to be unreasonable given the nature of the unfair labor practices I have found here, and I shall include this requirement as part of the recommended remedy herein, along with the proviso that Respondent agree to meet with the Union at locations in reasonable proximity to the bargaining unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Universal Fuels, Inc., of Daleville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other conditions of employment with the Union, as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Mechanics, Mechanic Helpers, Drivers, Fuel Distribution/Drivers, LOX Plant Operator, Lox Plant Lead, Supply Tech (Supply Clerk), Account Clerk II (Gas Station Operator, MDGAS (MOGAS) Operator), and Dispatcher Driver Operators employed by Respondent at its Patuxent River NAS facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) Reneging on tentative agreements such as that all job assignments, promotions, layoffs, and recalls will be controlled by seniority; and that all discipline and discharge will be for just cause while making regressive proposals with the intent of frustrating the negotiation of a collective-bargaining agreement.

(c) Refusing to accede to union security and dues checkoff on philosophical grounds without advancing any legitimate business justification for doing so.

(d) Insisting on negotiating a union-security provision containing the amount of fees paid to the Union by nonmember employees over the Union's objection to negotiate as to this permissive subject of bargaining.

(e) Interjecting significant proposals such as unlimited subcontracting and that the Union waive the employees' right to picket during late stages of negotiation without a legitimate

[33] 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.

justification for doing so.

(f) Withdrawing all contract proposals because the Union did not accept them in time for them to be approved by the United States government.

(g) Refusing to meet with the Union at a location in reasonable proximity to the location of the bargaining unit.

(h) Falsely informing employees that the only issue preventing an agreement with the Union was the issue of union security, while there were other open issues, and while at the same time engaging in unfair labor practices designed to frustrate bargaining.

(i) 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 in good faith with the Union, as the exclusive bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment, pursuant to the schedule described in the remedy section of this decision, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Reinstate its October 8, 2008 contract proposal, without rejecting union-security provisions without legitimate business justification and afford the Union a reasonable period of time to accept that offer or to make counterproposals, and if an agreement is reached sign a contract, with retroactive pay and benefits based on the wage and benefit rates contained in that offer making employees whole in the manner described in the Remedy section of this decision.

(c) Reimburse the Union for costs and expenditures for expenses incurred related to the November 6, 2008 negotiation session in the manner set forth in the Remedy section of this decision.

(d) Within 14 days after service by the Region, post at its facility at the Naval Air Station located in Patuxent River, Maryland, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 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 June 24, 2008.

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

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on February 8, 2008, be, and the same hereby is, extended for a period of 1 year commencing from the date on which the Respondent begins to comply with the terms of this Order.

Dated, Washington, D.C., October 20, 2009

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any 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 refuse to bargain collectively in good faith concerning wages, hours, and other conditions of employment with the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 4, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Mechanics, Mechanic Helpers, Drivers, Fuel Distribution/Drivers, LOX Plant Operator, Lox Plant Lead, Supply Tech (Supply Clerk), Account Clerk II (Gas Station Operator, MDGAS (MOGAS) Operator), and Dispatcher Driver Operators employed by Respondent at its Patuxent River NAS facility; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT renege on tentative agreements we have reached with the Union such as that all job assignments, promotions, layoffs and recalls will be controlled by seniority; and that all discipline and discharge will be for just cause while making regressive proposals with the intent of frustrating the negotiation of a collective-bargaining agreement.

WE WILL NOT refuse to accede to union security and dues checkoff in negotiations with the Union by proclaiming philosophical differences, and without advancing any legitimate business justification for doing so.

WE WILL NOT insist on negotiating a union-security provision

[34] If this Order is enforced by a Judgment of the 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."

containing the amount of fees paid to the Union by nonmember employees over the Union's objection to negotiate as to this permissive subject of bargaining.

WE WILL NOT interject significant proposals such as unlimited subcontracting during late stages of negotiation without a legitimate justification, as well interject a proposal that Union waive employees' right to picket with the intent of frustrating the negotiation of a collective-bargaining agreement.

WE WILL NOT withdraw all contract proposals because the Union did not accept them in time for them to be approved by the United States government.

WE WILL NOT refuse the Union's request to meet with the Union and bargain at a location in reasonable proximity to the location of the bargaining unit.

WE WILL NOT falsely inform employees that the only issue preventing an agreement with the Union was the issue of union security, when there were other open issues, and while at the same time we were engaging in unfair labor practices designed to frustrate bargaining.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain in good faith with the Union, as the exclusive bargaining representative of our employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment, pursuant to the schedule described in the Board's decision and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL reinstate our October 8, 2008 contract offer, without rejecting union security provisions without a legitimate business justification, and afford the Union a reasonable period of time to accept that offer or to make counterproposals, and if an agreement is reached sign a contract, with retroactive pay and benefits based on the wage and benefit rates contained in that offer.

WE WILL reimburse the Union for costs and expenditures for expenses incurred related to the November 6, 2008 negotiation session in the manner set forth in the Board's decision.

UNIVERSAL FUEL, INC.