

**Summa Health System, Inc. and American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO.** Cases 8-CA-26463-1, 8-CA-26463-2, 8-CA-26673, 8-CA-28523, 8-CA-28608, and 8-CA-29143

April 28, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 29, 1999, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and supporting and reply briefs, and the General Counsel and the Charging Party filed briefs in response.

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, and conclusions<sup>1</sup> and to adopt the recommended Order.

Our dissenting colleague characterizes our conclusion that the Respondent failed to bargain for a new contract in good faith as a finding premised merely on the Respondent's "firm advocacy of certain significant contract changes [which] demonstrated an intent to avoid reaching an agreement." On the contrary, our affirmance of the judge's conclusion is based on a variety of factors in addition to his findings regarding the Respondent's continued insistence on its sweeping proposals concerning work transfer, job classification, and wages. As set forth in the judge's decision, these additional factors include the Respondent's unlawful establishment and operation of "Process Enhancement Teams" for the purpose of circumventing the Union's bargaining authority; the unilateral transfer of bargaining unit work outside the unit; the Respondent's failure to provide any specific economic justification for the absolute discretionary powers it demanded which lessened protections for bargaining unit work, other than generalized insistence on some vague concept of "flexibility"; the Respondent's effective negation of the few bargaining concessions it made by its simultaneous insistence on proposed language conflicting with those concessions; the Respondent's refusal to

<sup>1</sup> The judge cited *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), enf.d. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998), in connection with the Respondent's insistence on being given the right to unilaterally determine wage increases. As the parties point out, *McClatchy* involved the implementation of a unilateral merit pay proposal after the parties had reached impasse. We therefore view *McClatchy* as applicable here only to the extent that it supports viewing a demand for unilateral employer discretion over wage increases as a factor in determining whether the employer has bargained in bad faith. See *South Carolina Baptist Ministries*, 310 NLRB 156, 157 fn. 4 (1993).

agree even to a provision affirming the Union's right to seek a unit clarification determination from the Board with respect to new employees whom the Union had agreed might be assigned bargaining unit work; and the Respondent's unlawful failure to comply with the Union's requests for information relevant to the negotiations. This case is therefore distinct from other cases in which we have found a violation of Section 8(a)(5) purely on the basis of the substance of employer proposals, e.g., *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), enf.d. 732 F.2d 872 (11th Cir. 1984).

Our dissenting colleague further contends that the Respondent cannot be found to have bargained in bad faith because in October 1996 it assertedly "offered to submit the disputed matters to arbitration." The Union initiated the offer to submit all outstanding issues to interest arbitration, and the Respondent initially accepted this offer only with respect to three of those issues, later expanded to five. As the judge noted, the bargaining issues the Respondent actually agreed to refer to arbitration did not even include all of those cited in the General Counsel's complaint, let alone all of the parties' other unresolved issues. The ultimate disposition of the matters sent to arbitration accordingly could not have formed the required basis for a full agreement. Nor can the Respondent's agreement to partial arbitration, after an extended period of bargaining, be viewed in isolation from the totality of the other evidence—including the Respondent's other violations of Section 8(a)(5) and (1), not disputed by our dissenting colleague—all of which bears on the question of its good faith.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Summa Health System, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, concurring in part, and dissenting in part.

1. I agree with my colleagues that the Respondent violated Section 8(a)(5) by bypassing the Union with respect to terms and conditions of employment. The Union was the exclusive bargaining representative. Notwithstanding this, the Respondent created "Process Enhancement Teams" (PETs) to make proposals regarding, inter alia, consolidation of positions within the bargaining unit and the transfer of unit work from the unit. Clearly, such conduct bypassed the Union in its role as the exclusive representative of employees concerning terms and conditions of employment.

The fact that the Union was given an opportunity to be on the steering committee of the PETs does not warrant a contrary result. As a member of the committee, the Union could be outvoted by others on the committee. Noted above, the Union is legally entitled to be the sole repre-

sentative concerning terms and conditions of employment.

Nor did the contract privilege the bypass of the Union. Even assuming *arguendo* that the contract gave the Respondent the right to consolidate unit positions, it did not give the Respondent the right to transfer unit work to nonunit employees.<sup>1</sup>

Concededly, the Respondent told the Union that after receiving PET proposals the Respondent would bring these matters to the Union. However, the Respondent's actions belied its words. The Respondent refused to bargain with the Union with respect to consolidation of unit positions and with respect to the transfer of unit work to nonunit employees. As discussed above, this refusal was unprivileged, at least with respect to the transfer of unit work.

In order to remedy the above violation, I would require that the Respondent disestablish the PETs, i.e., the mechanism through which it bypassed the Union. Further, inasmuch as this is essentially the remedy that would flow from an 8(a)(2) violation, I do not reach the issues of whether the PETs were a labor organization under Section 2(5) and whether Section 8(a)(2) was violated.<sup>2</sup> Suffice it to say that they were the mechanism through which the Respondent bypassed the exclusive bargaining representative.

2. I cannot find that the Respondent engaged in overall bad-faith bargaining. The facts are fully set forth by the judge. The parties met over 40 times prior to the union strike that began on November 7, 1996, and over 20 times after that date. The parties reached tentative agreement on many items. However, in the view of the judge and my colleagues, the Respondent's firm advocacy of certain significant contract changes demonstrated an intent to avoid reaching an agreement. I disagree.

I have reviewed the totality of the Respondent's bargaining. Having done this, I find no overall bad-faith bargaining. As recounted by the judge, the parties reached agreement on many provisions for a successor agreement. Concededly, the items separating the parties were not insignificant. And, these items included the Respondent's push for contract provisions that would reserve certain rights to itself. However, as the judge acknowledged, the Respondent's contract proposals were not *per se* unlawful. The Respondent did not insist to impasse on any of its proposals, and the Board may not compel a party to accede to the other party's demands. Most significantly, in October 1996, in an attempt to reach agreement and avoid a strike by the Union, the Respondent offered to submit the disputed matters to interest arbitration. *Clearly, an employer who is willing*

*to have a neutral third party resolve differences is not a party who wishes to avoid agreement.*

I disagree with the judge's discounting of the Respondent's offer to submit unresolved items to binding arbitration. The judge noted that interest arbitration cannot be compelled. However, that point is not significant here. Rather, the point here is that the Respondent *proposed* a reasonable and fair means of resolving the major issues separating the parties. Viewing the totality of the Respondent's conduct, and especially its offer to submit differences to binding arbitration, I cannot find that the Respondent bargained with an intent to avoid reaching an agreement.<sup>3</sup>

*Susan E. Fernandez, Esq.*, for the Acting General Counsel.  
*James A. Kurek, Esq. and Victor T. Geraci, Esq. (Buckingham, Doolittle & Burroughs)*, of Akron, Ohio, for the Respondent.  
*Sean Grayson, Esq.*, of Worthington, Ohio, for the Charging-Party.

## DECISION

### STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On a charge filed on May 17, 1994, in Case 8-CB-7702 by Summa Health System, Inc.<sup>1</sup> a complaint and notice of hearing issued on July 1, 1994, against American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO-CLC (Local 684) and on charges filed on June 16, 1994, in Cases 8-CA-26463-1 and 2 by Local 684 against Respondent Summa Health System, Inc., and on a charge filed on August 24, 1994, by Local 684 and the American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO (Council 8) against Respondent Summa Health System, Inc. in Case 8-CA-26673. On December 30, 1994, the Regional Director issued an order consolidating cases, amended consolidated complaint and notice of hearing; based on the foregoing charges and subsequent amendments, a second order consolidating cases, second amended consolidated complaint and notice of hearing issued on July 12, 1996. Subsequently, Charging Parties Local 684 and Council 8 have charged in Cases 8-CA-28523 and 8-CA-28608 on September 17 and October 18, 1996, that Summa Health System, Inc. had engaged in further unfair labor practices defined in the Act. On April 30, 1997, the Regional Director issued the third order consolidating cases, third amended consolidated complaint and notice of hearing (the complaint). The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by informing employees that an employee's union activity was the reason for that employee's disciplinary warning; that it violated Section 8(a)(1) of the Act by a selective and disparate enforcement on October 31, 1996, of a preexisting solicitation-distribution rule; that it violated Section 8(a)(1) and (2) of the Act from about January 21 to June 1994 by dominating and interfering with the administration of and

<sup>1</sup> In this regard, I have applied my "contract coverage" analysis, rather than a waiver analysis. See my opinion in *Dorsey Trailers, Inc.*, 327 NLRB 835, 836-837 (1999).

<sup>2</sup> See my dissent in *Polaroid Corp.*, 329 NLRB 424 (1999).

<sup>3</sup> The fact that the Respondent sought contract clauses, which gave it unilateral control over certain matters, does not establish bad-faith bargaining. See *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1950).

<sup>1</sup> At the hearing, counsel for the Acting General Counsel amended the complaint to reflect the Respondent's correct legal name, Summa Health System, Inc.

rendering unlawful assistance and support to certain employee-management committees known as “maintenance sub-PET team,” and Management Pilot Unit sub-PET team,” alleged in the complaint to have constituted a labor organization within the meaning of the Act. The complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by:

(1) Commencing on about January 21, 1994, and continuing thereafter, bypassing the employees’ exclusive bargaining agent and dealing directly with bargaining unit employees by discussing mandatory subjects of bargaining in the sub-PET teams referred to above;

(2) On about February 1994, unilaterally transferring bargaining unit duties to nonbargaining unit employees in the following bargaining unit job classifications: house-keeping, dietary, transportation, and maintenance;

(3) During a period of collective bargaining from October 1995 to April 1997, advancing and adhering to the following proposals. Article 1, section 2—the Respondent would have the sole, exclusive, and nonreviewable right to transfer to another job classification, within or outside the bargaining unit, any and all work at any time; article 2, section 2—the Respondent would be able to work nonunit part-time employees over 40 hours per week with no limitations; article 2, section 9—the Respondent could transfer bargaining unit work to non-bargaining unit employees whenever it deemed necessary; and article 25—the Respondent would have the ability to unilaterally determine wage increases in the second and third year of the contract;

(4) Refusing and failing to furnish or to timely furnish the employees’ bargaining agent with information necessary and relevant to the performance of its representation duties requested by its letter on about March 9 and September 1, 6, and 7, 1994, and August 12 and September 6 and 13, 1996.

Finally, the complaint alleged that Local 684 and Council 8 engaged in a strike against the Respondent from November 7, 1996, and continuing to February 3, 1997, which was caused by the Respondent’s unfair labor practices.

The Respondent filed an answer to the complaint on May 14, 1997. Pursuant to a charge filed on June 27, 1997, by Local 684 in Case 8-CA-29413, the Regional Director issued an order consolidating cases and complaints on February 6, 1998, which alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by its December 31, 1996 termination of employee Bobbie Powell, and its February 6, 1997 written warning to employee Linda Norman. On February 17, 1998, the Respondent filed its answer in Case 8-CA-29143 denying the commission of any unfair labor practices.

The issues raised by these pleadings were litigated at trial before me February 23–26 and March 23–26, 1998. Prior to trial, Case 8-CB-7702 had been settled and at trial was severed on motion by the parties and remanded to the Regional Director for compliance processing. The parties also reached a settlement agreement with respect to the allegation in Case 8-CA-29143 regarding the termination of employee Bobbie Powell. That allegation was therefore not litigated but remanded to the Regional Director for compliance processing.

At the trial, the parties were given full opportunity to adduce relevant testimonial and documentary evidence and to argue orally. They were also afforded opportunity to submit post-trial

briefs. On May 18, 1998, the General Counsel, the Charging Party, and the Respondent filed exhaustive briefs of 100, 79, and 30 pages, respectively.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs, and my observation and evaluation of the witnesses’ demeanor, I make the following findings

#### I. THE BUSINESS OF THE RESPONDENT

At all material times, Summa Health System, Inc., an Ohio corporation with an office and place of business in Akron, Ohio, Summa Health System’s facility, has been engaged in the operation of a hospital providing inpatient and outpatient medical care. Annually, in the course and conduct of its business, Summa Health System derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 from points located directly outside the State of Ohio.

It is admitted, and I find, that at all material times, Summa Health System has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATIONS

It is admitted, and I find, that at all material times, Local 684 has been a labor organization within the meaning of Section 2(5) of the Act.

It is admitted, and I find, that at all material times, Council 8 has been a labor organization within the meaning of Section 2(5) of the Act.

It is admitted, and I further find, the following.

The employees set forth in detail in Article II, Section 2 of the most recent collective-bargaining agreement between the parties and effective by its terms from November 23, 1992, to November 22, 1995, herein called the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. On an unspecified date in 1969, Local 684 and Council 8 (sometimes collectively referred to as the Union) were certified as the exclusive collective-bargaining representative of the unit and have been parties to successive collective-bargaining agreements since that time.

At all times since 1969, based on Section 9(a) of the Act, Local 684 and Council 8 have been the exclusive collective-bargaining representative of the unit.

#### III. THE UNFAIR LABOR PRACTICES

##### A. Background

In 1989, the Respondent acquired the ownership and operation of Akron City Hospital (ACH) and St. Thomas Medical Center (St. Thomas), which are situated approximately 2 miles apart. Certain employees at ACH are represented by Local 684. St. Thomas’ employees are not represented by any labor organization.

Local Union President Larry Powell testified without contradiction as to the background and bargaining history between the Local and ACH. Local 684 has represented service and maintenance employees at ACH since approximately 1969. The job classifications represented by the Local are set forth in Article 2, Section 2 of the parties’ latest 3-year contract which expired

on November 22, 1995. As set forth in the contract, the bargaining unit includes dietary, laundry, housekeeping, maintenance, aides, orderlies, transportation, laboratory, pharmacy, and medical records employees. At the time of the trial, there were approximately 380 employees in the bargaining unit. The bargaining unit excludes part-time employees working in the same classifications as bargaining unit employees and also excludes registered nurses (RNs), licensed practical nurses (LPNs), unit secretaries, respiratory therapists, and physical therapists. The Union had attempted to organize the excluded employees, including RNs and LPNs, without success.

John Childs, the Respondent's vice president, chief legal officer, and previous ACH chief collective-bargaining negotiator, testified that the Respondent commenced its existence upon the acquisition of the two hospitals and that no significant negotiations or real discussions with the Union occurred at that time regarding interhospital transfer of employees. He testified that the last intensive contract negotiation occurred in the 1989 contract negotiation but that the 1992 contract was "pretty much a rollover from the previous contract" except for dates and economic items, without a "full-blown negotiation." He testified in generalized terms about "changes generally in the health care field" since 1990; i.e., the expansion of "managed care" into Northeast Ohio, "severe pressure on hospitals regarding revenue in the market place," a difference of "several thousand per admission" less for a managed care discharge and a shorter "length of stay," and a change "from inpatient to outpatient" which has impacted revenue. Without any detailed specification, he testified that these "impacts in the health care field [have] been felt at [Respondent's operation]." He testified in generalized conclusionary terms to a need by the Respondent for a need for "flexibility," including flexibility in relation to the transfer and interchange of employees, classification, and work to meet "market place conditions." There was no evidentiary foundation adduced for these conclusions.

### *B. PET Teams*

#### *1. Facts*

In 1993, the Respondent introduced to its ACH employees the phrases "reengineering the hospital" and "PET teams"; i.e., "Process Enhancement Teams." In a June 1993 newsletter to employees, Al Gilbert, the Respondent's president and CEO, described reengineering as looking afresh at the work required to create a company's product or service and deliver value to the customer. The same newsletter informed employees that the Respondent had retained an international consulting firm, A. T. Kearney, its admitted agent, to assist the hospital through the process of reengineering.

Vice President Childs testified that the 1993 reengineering process intended to address issues of efficiency and cost reduction in operations, in part through the PET teams. According to Childs, there were originally four PET teams formed in 1993. Childs was a member of one of the teams, the Material Management PET Team. The other PETs were the General Services PET, the Patient Information PET, and the Patient Care Delivery PET.

Childs was also a member of the Steering Committee that exercised managerial control over the reengineering process and the PET teams. Thereafter, the Respondent formed numerous other teams referred to as sub-PETS. Childs testified that there were over ten sub-PETS. Documentary evidence reveals that as of April 1994, there were approximately 21 sub-PET

teams. Childs testified that several hundred employees were members of the PET and sub-PET teams. He testified that they were instructed not to address mandatory bargaining subjects of wages, hours, and conditions of employment. He did not specify how this was done or who did it. According to Childs, the PET team mechanism was phased out in 1995 and succeeded by more limited employee-managerial informational exchange mechanism under a so-called concept of employee discussion groups at the specific hospital floor level.

In April 1993, Eugene Damron, the then vice president of Local 684, and Larry Powell attended a meeting held by hospital representatives. Isabelle Reymann, vice president of operations, conducted the meeting on behalf of the Respondent. The reengineering and PET team concept was explained. Reymann solicited the Local's agreement to utilize bargaining unit employees as PET team members. Reymann told Powell and Damron that the employees' participation on the teams would last for 7 months and that they would serve on the teams full-time and receive their regular wages. At the end of the 7 months, the employees would return to their former positions. According to Powell's uncontradicted testimony, Reymann also informed them that the reengineering program would terminate in 4 years and that the PET teams would not include managerial members. She stated that the employees would be nominated for membership but did not elucidate how this was to be done. Reymann promised to meet monthly with the union representatives at which time she would advise them of what the PET teams were doing.

Powell responded to Reymann that the Union was aware of changes in the health care industry across the nation and would work with them in the reengineering process and agreed that bargaining unit employees could participate in the PET teams. He cautioned the management representatives that if at any time the Union had reason to believe that management was negotiating directly with employees, the Union would remove their members from the team. According to Powell's uncontradicted testimony, the monthly meetings that Reymann indicated would be held with the Union never came about and he subsequently received a roster of PET team members in September 1993 which revealed numerous senior managers' participation in 27 different PET teams. There is no dispute as to the extensive and comprehensive participation of the Respondent's managers in PET team meetings. Nor is there any dispute that these teams were the creatures of the Respondent and were sustained by the Respondent's resources and functioned on the Respondent's property under the Respondent's managers' direction and control of their agenda, discussions, and joint recommendations made as a result of their deliberation to higher management. The Respondent's managers imposed ground rules for team discussions. These managers imposed the objectives and goals of PET and sub-PET teams; e.g., to devise changes in hospital operations involving their own work function that might reduce costs and increase efficiency.

Although the Respondent's managers created the illusion of representational status of employee members, it was the Respondent's managers who controlled the so-called nomination and ultimate employee-member selection process.<sup>2</sup>

<sup>2</sup> In April 1993, the Respondent held meetings of all employees of both hospitals wherein in describing reengineering and four PET teams, it unilaterally announced criteria for qualification for employee membership, e.g., respect among one's peers, and solicited over 1400 nominations for employee membership.

Despite Childs' generalized testimony disclaimer that terms and conditions of employment were not to be addressed by the PET and sub-PET teams, it was inevitable that those topics necessarily were addressed because employee team members made suggestions, discussed suggestions, and made recommendations as to how employees' work functions and job tasks might be changed to effectuate more efficient operations and lesser labor costs. Thus, conditions of employment were in fact addressed by these teams although it is clear that much of what the bargaining unit employees recommended were given little deference by the managerial committee overseers. However, they were ordered to solicit support for PET and sub-PET team recommendations that were submitted to managerial steering committees. Some examples are as follows:

In December 1993, the Maintenance sub-PET team, led by Manager of Clinical Engineering Services Moe Kasti directed the team members to consider that a way to reduce costs was to combine jobs through cross-training of employees in work functions beyond their classifications, and instructed them to devise ways to combine classifications in order to reduce the hospital employment level. He announced that the goal was to reduce the maintenance employee complement by 5 to 10 percent. They were told that the PET process would function through August 1994. At a Maintenance sub-PET team meeting January 1994, CEO Al Gilbert told the team members that if they did not make changes in operations via cross-training and the reengineering process, he would do it unilaterally. Thereafter, such PET meetings were held weekly in the manner described above on the Respondent's time. At meetings, the team was directed to discuss the concept of "generalist"; i.e., an employee cross-trained to perform a variety of job duties, and to consider and make recommendations as to the relinquishment of bargaining unit job functions to nonunit employees; e.g., light maintenance duties such as light bulb replacement, picture hanging, and floor mopping to be done by nurses. When one unit employee failed to make any such recommendation, Cindy Trifelo, team member and Administrative Director of Surgical Services, made one for him. Some of these recommendations were actually implemented; e.g., nurses changed light bulbs and thermostats. Although there were occasions in the past when nursing unit personnel performed bargaining unit work in extraordinary situations, the preponderance of undisputed evidence reveals that as the employment level of bargaining unit employees decreased, many more menial maintenance functions were performed by nonunit personnel, such as the RNs and NAs, with routine frequency as a result of the reengineering and PET team program.

On occasion, some bargaining unit members questioned and even protested that bargaining unit work was being impacted by manager suggestions that bargaining unit work be transferred to nonunit employees without the input of the Union. These protests were rejected. On one such occasion, Trifelo retorted that the bargaining unit employees were the Union and they could instruct the Union what to do. Ultimately, the Maintenance sub-PET team submitted an extensive 60-page proposal dated May 1994 to the Steering Committee, which contained recommendations, inter alia, as to bargaining unit job functions, work performance, evaluation, workload, work inspection, skills, productivity, and safety. Clearly the whole thrust of these recommendations would necessarily impact conditions of bargaining unit employees' working conditions in order to reach the

Respondent's goal of greater efficiency and lower operating costs.

Another of the four original PET teams was the "Patient Care PET," which included bargaining unit employees, e.g., housekeepers, lab employees, etc. Their meetings commenced in September 1993. Thereafter, they received a variety of reengineering documents, which set subsequent agendas and, after breaking down into sub-PET teams, made recommendations which PET team facilitator Rick Wisniewski, the Respondent's director of finance, conveyed to the Steering Committee, which thereafter implemented them.

The Patient Care PET team was also provided a notebook entitled "To Create a Twenty-First Century Hospital—Redesigning Patient Care." This document described a way to "better service placement" by cross-training RNs "to perform ancillary services previously performed by specialists . . . examples of cross-training skills: respiratory therapy, physical therapy, EKG, phlebotomy, IV therapy." The notebook also detailed the creation of generalist positions to perform housekeeping, transportation, and dietary functions. This cross-training approach was placed on a graph, which was distributed to PET team members by PET team leaders and facilitators.

From the Patient Care PET team evolved the Patient Management sub-PET team. Management level employees also continued to sit on this sub-PET team, which met daily in smaller subsidiary groups. The sub-PET team identified "universal duties" that all staff on the nursing units could perform. These universal duties included delivering food, linen, changing light bulbs, and doing EKGs.

The team discussed creating new positions entitled RN-care coordinator, support associate technical associate, and administrative associate. Eventually, the Sub-PET team created job descriptions for these positions. Each of the job descriptions contained "miscellaneous duties," which were the "universal duties" identified by the sub-PET team. The miscellaneous duties set out in the job descriptions of the RN-care coordinator, technical associate, and administrative associate included the duties of passing and picking up trays, maintenance, room cleaning, bed cleaning, feeding, and transportation. Bargaining unit employees who were nurse's aides, maintenance employees, transportation aides, dietary aides, phlebotomists, and housekeepers had previously performed these duties.

The Patient Management Pilot sub-PET team also discussed hours of work of RN care coordinator, technical associate, and support associate. Specifically, the PET team discussed whether classifications should work 8 or 12 hours' shifts. When issues of changing union job classifications came up, members on the sub-PET team asked about the Union. The members of the team were told by management personnel of Summa, including Summa President Gilbert, "not to worry about the union."

In February 1994, Powell became concerned about employee reports of the PET team activities that he had been receiving.

Powell and Damron attended a PET team meeting of the General Services PET on February 1, 1994. Present at the meeting were team members of the General Services PET, both management and nonmanagement. Moe Kasti was also present at the meeting. Powell explained his concerns to Kasti concerning reports of the transfer of bargaining unit work to nonbargaining classifications. The team members acknowledged that the transfer of bargaining unit to nonbargaining unit classifications was being considered on a hospitalwide basis.

On February 7, 1994, Powell wrote Paul Jackson, Director of Labor Relations at ACH, and demanded that all bargaining unit employees be removed from the PET teams. Powell stated his concerns and based on his meeting with the General Services PET on February 1, he concluded that the Respondent was attempting to circumvent the Union and the collective-bargaining agreement concerning topics raised in the PET teams.

After receipt of the letter, Reymann asked to meet with the Union. On February 11, 1994, the Respondent's representatives Childs, Reymann, Jackson, Kasti, and Costeel met with Union representatives Powell, Damron, and Stump who denied that the Respondent had negotiated with employees regarding "jobs or job descriptions." Powell explained that the Union witnessed PET teams dealing with job changes that ought to be negotiated with the Union and that the Respondent was dealing directly with employees. Powell asked the hospital to negotiate with the Union, but Childs refused. Childs responded: "This has been an issue with you for many years. We need the input of the employees on the teams." Reymann acknowledged that positions would be eliminated and new positions would be created, but that the Respondent will proceed with the PET process. When Powell asked whether those positions would be negotiated, Childs answered, "I don't have to tell you how Article XXIII [and] XXIV of the collective-bargaining agreement work." Powell reiterated his demand for negotiation. Reymann answered him by stating that if "anyone does not want to be a part [of the PET process] that's fine, but we would like to have their input." Stump appealed to Childs to resolve what he characterized as "this non-communication." Childs suggested a written proposal for his review and a Respondent letter response of assurance that employee team participation will not be used against the Union "in any way." After some discussion of A. T. Kearney's relationship, Reymann stated that PET team members had "no authority to negotiate 'anything' and that all proposals, which she characterized as suggestions, would be submitted to the Respondent's Steering Committee which consisted of CEO Gilbert, the original PET team leaders, and the vice-presidents.

Powell acknowledged that the Respondent was "in need of change" but again requested negotiation of these changes.

Reymann offered the Union one position on the Steering Committee. Powell asked Childs if the Union would have a voting power equal to the Respondent on the Steering Committee, and Childs responded that the Union would have voting status on the committee equal to only one participant, several of which were managerial. Prior to the February 11, 1994 meeting, the Respondent had not offered the Union a position on the Steering Committee.<sup>3</sup> In a letter dated February 16, 1994, Childs informed Powell that the Respondent would not remove bargaining unit members from the PET teams. Childs also asserted that the PET process was not intended to avoid negotiation or interfere with the Union as bargaining unit representative. He characterized it as an information gathering mechanism intended to obtain efficiency, which will ultimately benefit unit employees. He stated:

If at any time during the process a union employee feels that we are asking them to do something they determine is inappro-

<sup>3</sup> The account of the February 11, 1994 meeting is based on the uncontroverted testimony of Powell and his contemporaneous notes, which were not objected to nor challenged as to accuracy.

appropriate, they can decide to either refrain in that specific circumstances or decide to resign from participation in that process.

Childs also reinvited the Union's participation, including Steering Committee membership; i.e., on the basis of one vote among several managerial votes and at will attendance at any PET meeting that might be of interest to the Union or which might be requested by an employee. He ended by suggesting that the Union submit a written proposal "regarding improvement of relations between the Union and the Hospital" to which he would respond.

Thereafter, some employee PET participants resigned.

Childs testified that he had had more than one meeting with the Union "leadership" regarding the PET process "and the fact that there would be bargainable issues brought to the Union", and he acknowledged one of them as the meeting of February 11, Powell's testimonial version of which he did not refute. Childs testified without controversion that the 1992-1995 collective-bargaining agreement articles XXIII and XXIV relieved the Respondent of the obligation to bargain with the Union regarding changes in job descriptions to be decided on by the Respondent. He testified that the collective-bargaining agreement merely requires the Respondent to provide the Union with notice of an intended classification change prior to implementation in order to negotiate the wage rate for that position, which wage rate is subject to grievance and arbitration if negotiation fails. Childs testified that the Respondent has historically made frequent unilaterally changed job descriptions and many times the Union has grieved and arbitrated unsuccessfully negotiated wage rates determined for those changed classifications by the Respondent.

Childs testified that over many years, there had been an "overlapping of duties" between certain bargaining unit positions and nursing unit positions. He testified that overlapping resulted in substantial discussions during the negotiation of the collective-bargaining agreement article II, section 9. He testified that the ability of nonunit personnel to perform "various functions" of the nursing units' orderlies or nurse's aides was addressed and resulted in the agreement that their work could be transferred to other nonbargaining unit personnel on condition that the total number of aides and orderlies never declined below 19, "when it's determined by the hospital to be medically, operationally or economically necessary to do so." During cross-examination, relating to the alleged frequency of overlapping nursing unit work functions, he admitted that he had very little personal observation of such occurrences but that he was aware of "job descriptions." Also on cross-examination, regarding his testimony relating to article II, section 9 of the collective-bargaining agreement, he conceded that the section prohibits the transferring of bargaining unit work performed by the maintenance, dietary, housekeeping, and pharmacy classifications to nonunit personnel pursuant to Exhibit D of the collective-bargaining agreement, which is referenced in article II, section 9.

## 2. Analysis

The issue presented here is similar to that presented to me in *Simmons Industries*, 321 NLRB 228 (1996), in which certain employee participation teams were found to have constituted labor organizations that were dominated, assisted, and supported by an employer. The analysis in that case is applicable in large part to the strikingly similar facts of this case and states in part as follows (*id.* at 252-253):

Both the General Counsel and Respondent have centered their arguments around the Board's widely noted and discussed decisions in *Electromation, Inc.*, 309 NLRB 990 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994); and *E. I. du Pont & Co.*, 311 NLRB 893 (1993), and numerous cases cited and analyzed therein.

The facts in this case with respect to assistance and domination are undisputed. If the employee participation committees herein constitute labor organizations, then they would most certainly constitute organizations dominated and assisted by Respondent. These entities were created, formed, funded, directed, and constituted by Respondent. Their continuance is at the sufferance of Respondent. Their employee membership depends on the method chosen by Respondent, i.e., direct appointment by Respondent as in the Safety Committees and Jay TQM Committees or by election of coworkers at the Southwest City correction ad hoc committees. Their functioning format and agenda are determined by the Respondent.

The real issues here are whether these employee participation teams are for all effective purposes de facto labor organizations. As discussed in the *Electromation* case, the concept of "labor organization" as contemplated by the Act is extremely broad and includes very loose, informal, unstructured, and irregular meeting groups. Such a loose organization will meet the statutory definition if: (1) employees participate, (2) the organization exists, at least in part, for the purpose of "dealing with" employers, and (3) these dealings concern "conditions of work" or concern other statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment.

The Board added:

Further, if the organization has as a purpose the representation of employees, it meets the definition of 'employee representation committee or plan' under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects. [*Electromation, Inc.*, *supra* at 994.]

The facts reveal[s] that all the employee participation committees herein were designed by the Respondent to be representational, i.e., to select a cross-section of employees in the departments from which they were selected. With respect to both safety and Jay Fast Food Committees, the employee members solicited the positions, conclusions, desires and/or needs of coworkers and relayed them to the employer agents on the committees and, in turn, by various methods of minutes or reports to higher management on reaching a consensus. [*Electromation, Inc.*, *supra* at 994.]

Whether the Safety and all TQM Committees "dealt with" the Respondent concerning work conditions is where the difficulty of analysis begins.

In the instant case, I find the same undisputed facts of domination, assistance, and support. The apparent representational nature of the process enhancement teams was cultivated by the Respondent when it set forth the criteria for membership and established an electoral nomination process. Employee members formed a consensus as to recommendation, which they took back to their constituency, i.e., coworkers from whom they solicited support. Conditions of employment that the teams discussed and negotiated proposed changes were more directly

impactive on working conditions than much of what the *Simmons* case safety teams dealt with.

In the *Simmons* case, the employer argued that its committees were informational in nature. It argued that employee participation merely provided a valuable source of information necessary for it to make decisions as to operational restructuring changes for efficiency and cost-cutting purposes. However, the facts disclose that despite Childs' oblique instructions of unspecified form to unidentified persons not to deal with mandatory bargaining subjects in sub-PET meetings, they did in fact do so. Nothing could be more impactful on the bargaining unit employees' conditions of employment than that which the sub-PET members proposed, discussed, and adopted by ostensible team consensus either freely or by managerial constraint, e.g., consolidation of bargaining unit classifications, the transfer of unit work out of the unit, and the reduction of bargaining unit employees.

The Respondent does not in detail address the issue of whether the sub-PETs constituted a dealing with those conditions of employment between the Respondent and their sub-PET employee representatives other than to assert in its brief that they did not replace the collective-bargaining agreement process.

In *Simmons Industries*, *supra*, at 254, I concluded that the distinction is often unclear between permissible employer-employee committee informational brainstorming about employment conditions under *E. I. Du Pont*, *supra*, and the impermissible "dealing with" which involves a "bilateral mechanism" entailing a "pattern or practice in which a group of employees over time makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required." As stated in *Simmons Industries*, *supra* at 253-254:

In the *E. I. Du Pont* case, the Board found a pattern of dealing concerning safety in working conditions whereby the employee committee members made proposals to management in different ways. Sometimes proposals were made to management representatives outside of the committee, which were responded to and corrected. At other times, the committee discussed proposals with management representatives within the committee proceedings. The Board found that the employee and employer representatives "interacted" under the rules of consensus decision-making whereby under management's procedural definition, all members of the group "were willing to accept a decision." There, the management representatives discussed proposals with employee representatives and had the power to reject any proposal, which the Board found constituted "dealing" just as if it had occurred between the committee as a whole and outside the committee management.

This is precisely the factual situation herein. Although there was no negotiation directly between the employee PET members and the managerial Steering Committee to which the consensus proposals were submitted for acceptance and implementation, there did take place an interactional exchange of proposals, a discussion, and a reaching of a consensus between managerial team participants. Compare *EFCO Corp.*, 327 NLRB 372 (1998) (safety committee).

I conclude in this case, as in the *Simmons* case, that the employee participatory team process herein satisfied the *E. I. Du*

*Pont* definition of “dealing with” between representational employees and the Respondent, whereby the maintenance sub-PET and the Patient Management Pilot sub-PET constituted *de facto* labor organizations with which the Respondent bargained concerning mandatory subjects of bargaining, about which it was obliged to bargain with the employees’ exclusive bargaining agent.

The Respondent further defends that it is exculpated by virtue of advance notice of the reengineering and PET process to the Union and the subsequent invitation extended to it to become an outvoted, single member of the multimanual populated Steering Committee. This defense is of no merit. A union’s waiver of its statutory rights must be clear and unmistakable and is not to be inferred from acquiescence in past unilateral changes. See *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104 (1996), and precedent cited and discussed therein. The Union at no time waived its right to renegotiate mandatory bargaining subjects. An invitation to the Union to surrender that right by virtue of a debilitated role in the PET process and the Union’s rejection of such offer cannot be construed as a constructive waiver or a license for the Respondent to deal with the *de facto* sham labor organizations created by that process.

The Respondent further contends in its brief that it was entitled “to make changes in job descriptions unilaterally” by virtue of articles XXIII and XXIV of the collective-bargaining agreement. It thus concludes:

There can be no dispute regarding the fact that the Process Enhancement Teams sometimes redrafted job descriptions as part of the overall restructuring of Akron City Hospital. In this respect, they may have encroached on issues which would normally be the subject of collective bargaining. However, given that the Union was provided an opportunity to become involved in the process, and the fact that the hospital retained the sole discretion to change job descriptions under Article XXIV of the collective-bargaining agreement, there has been no violation of the Act.

Assuming that the Respondent was given contractual authority to make unilateral decisions about matters dealt with by the sub-PETS, nowhere in the contract does the Union waive its right to act as the exclusive representative of the bargaining unit employees nor did it agree that if the Respondent wanted to deal with employees, it could do so directly or through other representatives, which it may or may not dominate. It is manifest that if an employer has been contractually ceded authority to take certain unilateral actions concerning otherwise mandatory bargaining subjects, it may do so unilaterally, but that if it desires interaction with the employees; i.e., desires bilateral negotiation, it must deal with the exclusive bargaining agent and not with *de facto* sham unions that it creates. If it is correct in its contractual interpretation, the Respondent had only two lawful choices: to act unilaterally as spelled out in the collective-bargaining agreement or to negotiate with the bargaining unit’s exclusive representative, i.e., the Union.

Moreover, articles XXIII and XXIV of the collective-bargaining agreement clearly give the Respondent the unilateral right to change or to consolidate bargaining unit classification but do not specify that the Respondent can unilaterally transfer unit work to newly created nonunit classifications. Childs admitted this in cross-examination. Indeed, it is admitted that Article II, Section 9 specifically protects listed specified bar-

gaining unit “departments and/or classifications” from a limited right to transfer out bargaining unit work for reasons of medical, operational, or economic necessity.

Exhibit D of the collective-bargaining agent sets forth departments and numerous classifications thereunder. Listed are the following departments: Dietary, Laundry, Housekeeping, Maintenance, Central Service, Operating Room, Rehabilitation Services, Transportation, Pharmacy, Receiving, X-Ray, Distribution, Ambulatory Care Clinic, Special Diagnostic, and Treatment Center South.<sup>4</sup>

The sub-PETs dealt with and made proposals, some of which were implemented beyond consolidation of unit classification but rather extended to the transfer of bargaining unit work from those departments and classifications to nonunit classifications for reasons of desirability, not demonstrated necessity. Thus, the collective-bargaining agreement cannot be cited by the Respondent as a license to negotiate directly with employees the transferring-out of bargaining unit work. No reasonable interpretation of the collective-bargaining agreement gives the Respondent that right. *Hospital Episcopal San Lucas*, 319 NLRB 54, 56 (1995). Compare *Trojan Yacht*, 319 NLRB 741, 743 (1995), and *NCR Corp.*, 271 NLRB 1212 (1984), discussed therein. See also *Conoco Inc.*, 318 NLRB 60, 63 (1995).

Accordingly, I find that the Respondent violated Section 8(a)(1) and (2) as alleged in the complaint by dominating, interfering with the administration of, assisting and supporting the maintenance sub-PET team and the Patient Management Pilot Unit sub-PET team—labor organizations within the meaning of the Act—between about January 21, 1994, to about June 1995.

I further find that the Respondent violated Section 8(a)(1) and (5) of the Act in bypassing the employees’ exclusive bargaining representative and dealing directly with employees in the PET process concerning mandatory subjects of bargaining. *E. I. Du Pont & Co.*, *supra*, *Hospital Episcopal San Lucas*, *supra*.

### *C. Transfer of Bargaining Unit Work to Nonbargaining Unit Employees*

#### I. Facts

After the PET teams recommended and the Steering Committee approved the job descriptions created by the Patient Management Pilot Unit sub-PET teams for RN-Care Coordinator, Technical Associate, Support Associate, and Administrative Associate containing universal duties, and after the Maintenance sub-PET team recommended and the Steering Committee approved the transfer of certain maintenance work to nonbargaining unit employees, the Respondent commenced training employees in these job functions. Specifically, in late 1995 and early 1996, the Respondent conducted “cultural classes,” wherein employees were taught new job skills. RNs, LPNs, Respiratory and Physical Therapists, X-Ray Technicians, and Support Associates were trained how to clean beds and bathrooms, mop floors, pass trays, and transport patients. They

<sup>4</sup> In his testimony, Childs characterized Exh. D as a “classification list, not a department list.” The plain unambiguous language of art. 9 states in relevant part:

This work customarily performed by the bargaining unit employees shall be transferred to hospital nonbargaining unit employees when it is determined by the hospital to be medically operationally, or economically *necessary* to do so. This language shall not affect or be used in the attached *departments and/or classification* listed by Exh. D of the agreement. [Emphasis added.]

were educated as to cleaning solutions and the contents of housekeeping carts. Maintenance duties—how to use a plunger to clear stopped-up toilets/sinks, how to change a light bulb, how to change thermostats—were demonstrated. LPNs and RNs were also trained how to draw blood for twice-daily blood rounds. Some were supplied with small maintenance kits containing basic mechanic tools.

Prior to these training classes, different hospital departments performed all of these functions:

Dietary Aides (Dietary Department): Generated menus, passed out and collected meal trays.

Transportation Aide (Transportation Department): Transported patients from floors to other locations throughout the hospital.

Phlebotomists: Performed twice-daily blood draws on all patients.

Maintenance Department: Performed maintenance repair, unclogged stopped-up sinks/toilets, changed light bulbs, changed thermostats in patients' rooms.

Housekeeping: Cleaned patients' rooms, beds, and bathrooms.

Nurse Aides: Performed rounds of vital checks for each patient.

Bargaining unit employees had performed all of these duties. On consequence of the PET process, the Respondent created a Patient Care Support Associate classification as a new bargaining unit classification by combining the jobs of nurse aides, housekeeping, transportation, and dietary aides. Despite the creation of this classification, however, RNs, LPNs, respiratory and physical therapists and unit secretaries were trained to perform all of the job functions of the new support associate, pursuant to their "universal duties."

After cross-training, RNs, LPNs, respiratory therapists, physical therapists, and unit secretaries began performing bargaining unit work on a routine and regular basis. These non-bargaining unit classifications began performing all the job duties for which they had received training, including patients beds, rooms, transporting patients, generating menus, passing trays, changing thermostats, drawing blood, changing light bulbs, unblocking clogged sink/toilets, and doing light maintenance.

Prior to cross-training, nurses and LPNs, except for a rare emergency, never cleaned patients' rooms, beds, or bathrooms; never performed light maintenance; never performed daily blood drawing previously performed by Phlebotomists; and rarely generated menus, passed trays, or transported patients.

In the summer of 1994, Local 684 received a copy of a PET document containing draft job descriptions for new positions—Patient Care Support Associate, Administrative Associate, Technical Associate Physical Therapist, Technical Associate LPN, and RN Care Coordinator. Each job description contained language under description of work, which indicated each position was responsible for carrying out "multi-functional activities" (i.e., universal duties) such as environmental, dietary, transporting, supplies, and light maintenance activities. Powell, Local 684 president, became concerned because their duties were bargaining unit duties and yet they were now contained in job descriptions for nonbargaining unit employees.

Powell immediately asked to meet with ACH Director of Resources Paul Jackson. Powell and Damron met with Jackson sometime in July 1994 when Powell confronted Jackson with

copies of the draft job descriptions. He explained that he had received copies of the descriptions from a PET team member and after reviewing them, he had become concerned about the transfer of bargaining unit work to nonbargaining unit employees.

Jackson admitted that the descriptions were a product of the PET process. Powell asked Jackson to bargain over the transfer of bargaining unit work to nonbargaining unit classifications—specifically, Powell requested to bargain over the description of universal duties. Jackson refused and indicated that the hospital had the unilateral right to change job descriptions.

A subsequent meeting was held on August 5, 1994. Present for the Respondent were Paul Jackson and Karen Casteel. The Respondent's representatives told Powell that the Patient Care Support Associate was going to be a bargaining unit job. Powell asked Jackson if the Respondent was willing to negotiate the Patient Care Support Associate job description. Jackson refused to negotiate over the combination of bargaining unit jobs into the Patient Care Support Associate position<sup>5</sup> as well as the bargaining unit work transferred to nonunit classification.

The record is clear that as a result of the reengineering and PET process, through which the Respondent sought to reduce staff by expanding the job duties normally performed by existing hospital classifications, the hospital created new classifications/job descriptions for the positions of RN care coordinator; technical associate (for LPN, respiratory therapy and physical therapy); support associate and administrative associate. There is no dispute that these job descriptions contain "universal duties"—the effect of which is to make it an assigned function of the job of a RN, LPN, administrative associate, physical therapist, and/or respiratory therapist to include patient support duties such as: transportation, dietary, supplies, and light maintenance.

It is also undisputed that historically this work had been bargaining unit work—performed by transportation aides, nurse's aides, orderlies, dietary aides, housekeepers, phlebotomists, and maintenance personnel. At the start of the reengineering process to the date of the trial, the bargaining unit employment declined from 510 members to 380.

## 2. Analysis

The Respondent's argument that it was justified in moving unit work to nonunit persons and positions is premised upon an assertion of fact not supported by record evidence and upon a claim of contractual right unworkable by any reasonable contractual interpretation. The Respondent argues that nurses have "traditionally changed light bulbs and have occasionally transported patients to labs or other areas." As found above, such functions had never been performed as a routine nursing duty but were isolated in nature and occurred to accommodate a rare instance of emergency caused by the absence of the bargaining unit employee and the need for immediate action.

As cited above, the Union's toleration of such isolated episodes, even if known to it, cannot support an inference of waiver of its duty to conserve bargaining unit work, nor much less an agreement by it to establish the routine performance of bargaining unit work in consequence of a diminution of bargaining unit employees.

Respondent next argues that article XXIII and article XXIV of the collective-bargaining agreement accord to it "the right of the Hospital to unilaterally create and change job classifica-

<sup>5</sup> The Acting General Counsel does not allege that the Respondent failed to negotiate with the Union over the combination of bargaining unit classifications into the patient care support associate position.

tions.” It argues that it therefore had the right “to transfer bargaining unit work to nonbargaining unit employees, provided that the number of bargaining unit employees within the classification aides or orderlies did not fall below a pre-set level,” citing the testimony of Childs and the union president. However, as found in the foregoing section of this decision, articles XXIII and XXIV clearly, as conceded by Childs in cross-examination, are restricted to the creation of new bargaining unit positions and intraunit transfers, and not to out unit persons. In his cross-examination, the union president protested that by the new practice, “that the hospital was going in went well beyond” the rights given to it in the contract. Childs’ testimony cited article II, section 9 of the collective-bargaining agreement, also discussed in the foregoing section of this decision. No reasonable interpretation of that collective-bargaining agreement section supports the Respondent’s position.

Article II, section 9 of the collective-bargaining agreement specifically prohibits the transfer of bargaining unit work performed by classifications listed in Exhibit D of the collective-bargaining agreement to nonunit employees, including the work performed by: “Housekeeping, Maintenance, Transportation Aide, Distribution Aides (supplies), Dietary Aides and IV Technician (phlebotomist).” Similarly, article II, section 8 provides that work customarily performed by employees in the bargaining unit shall not be performed by supervisors or other personnel. I therefore find that the Respondent refused to bargain over a unilateral change in the terms of the parties’ collective-bargaining agreement by refusing to bargain in good faith with the Union over the transfer of maintenance, dietary, housekeeping, transportation, distributions (supplies), and phlebotomy duties to nonbargaining personnel in violation of Section 8(a)(1) and (5) of the Act as alleged in the complaint. *Pine Brook Care Center*, 322 NLRB 740 (1996). *E. I. Du Pont Co.*, supra.

#### *D. October 1995–April 1997 Bargaining*

##### 1. Facts

(A) At various times during October 1995 to April 1997, Respondent Summa Health Systems, Inc., AFSCME Local 684, and Ohio Council 8 met for the purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment of the unit.

(B) During the time period described above, Respondent Summa Health Systems, Inc. advanced and adhered to the following proposals: article I, section 2—Respondent Summa Health Systems, Inc. would have the sole, exclusive and non-reviewable right to transfer to another job classification, within or outside the bargaining unit, any and all work at any time; article II, section 2—Respondent Summa Health Systems would be able to work nonunit part-time employees over 40 hours per week with no limitations; article II, section 9—would permit Respondent Summa Health Systems, Inc. to transfer bargaining unit work to nonbargaining unit employees whenever it deemed necessary; article XXV—would give Respondent Summa Health Systems, Inc. the ability to unilaterally determine wage increases in the second and third year of the contract.

(C) By its overall conduct, including the conduct described above in paragraph 28(B), Respondent Summa Health Systems, Inc. has failed and refused to bargain in good faith with AFSCME Local 684 and Ohio Council 8 as the exclusive collective-bargaining representative of the unit.

The Respondent’s answer categorically denied the entire paragraph, but the facts are essentially undisputed that during numerous collective-bargaining negotiation meetings over the entire period, the Respondent did in fact make and insist upon the alleged demands.

The Acting General Counsel’s theory of violation, as argued in his brief, is not as Respondent argues in his brief, that such proposals are per se bad faith. Rather, he and the Union argue that in the context of bargaining that occurred, adherence to these proposals evidenced an intent to avoid reaching agreement.

With respect to any conflict in testimony regarding these negotiations that exist, and they are by and large very limited, I credit the union negotiators who evidenced greater independence, detailed, less generalized recollective ability and less reliance upon documentation than did the Respondent’s negotiators, particularly litigator/witness Attorney Kurek who relied upon after-the fact pretrial summarizations to prompt his recollection. Childs’ testimony as to negotiations was too brief and conclusory to be of much probative value.

Negotiations for a successor contract to the 1992–1995 collective-bargaining agreement began on October 23, 1995. Ron Janetzke, Special Counsel to the president of AFSCME Ohio Council 8, served as the Union’s chief negotiator from the start of negotiations until he retired in 1996. He was succeeded by Larry Stump. There were approximately 26 negotiating meetings held between October 23, 1995, and July 30, 1996. The last bargaining session Janetzke attended was July 30, 1996. Larry Powell, Eugene Damron, and Larry Stump, staff representative for Ohio Council 8, were also members of the Union’s negotiating committee. Several bargaining unit employees acted as observers.

Attorney James Kurek served as the Respondent’s lead negotiator throughout negotiations. Paul Jackson, director of labor relations, and Natalie Stemple, a manager in the nursing area, were also members of the Respondent’s negotiating team. Subsequently in negotiations from May 1996 through July 1996, the parties’ chief negotiators met without their respective committees. John Childs also attended the May through July 1996 negotiating meetings.

By letter prior to the start of negotiations, Kurek proposed negotiation ground rules, which had been utilized in prior negotiations, and Janetzke verbally acquiesced. The ground rules provided that tentative agreements were to be initialed by representatives of parties at the meeting wherein the agreement is reached or the next scheduled meeting.

At the first meeting held on October 25, 1995, the parties exchanged complete contract proposals except wage proposals. The Respondent’s initial proposal contained new language in the management-rights’ clause at article I, section 2, which read as follows:

*Section 2. As part of the foregoing management rights, the Hospital shall have the sole, exclusive and un-reviewable right to subcontract to an outside vendor or to transfer to another job classification either within or outside the bargaining unit any and all work at any time when the Hospital, in its sole and exclusive discretion, determines that such subcontracting and/or transfer is in the best interest of the Hospital, notwithstanding any other provisions set forth in this agreement.*

Janetzke feared that by this proposed addition to Article I, the Respondent would have the sole and unreviewable right to transfer bargaining unit work out of the unit and thus would have the ability to dissipate the bargaining unit. At the bargaining table, Janetzke expressed the Union's concern many times during the course of negotiations. Article I, section 2, with respect to the transfer of work out of the unit, never changed through the course of negotiations up to the strike.<sup>6</sup>

Prior to the start of formal negotiations, the parties had met and discussed various issues. In these meetings, Kurek informed the Union that the Respondent wanted the right to transfer and assign work out of the bargaining unit to wherever management felt it was necessary. At the first negotiating session, the Respondent failed to explain why such a proposal was necessary and the Respondent's negotiators gave no detailed justifications for the proposal except to make generalized references to "flexibility" and consistency with nonunit employees, and "competition." However, there was no discussion of the relationship of competition to the Respondent's specific proposals.

The Respondent's initial proposal struck existing language from article II, section 2, which had constituted a restriction on the Respondent's ability to utilize nonbargaining unit part-time employees in bargaining unit work. Pursuant to this contract language, the hours worked by part-time employees could not, without economic penalty, exceed a ratio of 25 percent part-time paid hours to 75 percent full-time paid hours. The Union considered this ratio to be a job security measure for bargaining unit members. Janetzke was concerned that by striking the ratio, the Respondent's proposal would enable the hospital to work part-time employees without limitation. Later in contract negotiations, during the time when Kurek, Childs, and Janetzke met alone, Kurek and Childs informed Janetzke that the Respondent wished to be able to work part-time employees in excess of 40 hours. The only justification the Respondent negotiators gave for deleting the protective language in article II, section 2 was the Respondent's desire for flexibility to use part-time employees whenever and wherever the Respondent felt they were needed.

The Respondent's initial proposal also struck language in article II, section 9 of the collective-bargaining agreement which qualified or restricted the Respondent's ability to transfer bargaining unit work to nonbargaining unit employees. As discussed in the foregoing section of this decision, Exhibit D attached thereto protected a vast array of departments and job classifications from unit work dissipation. Janetzke feared the loss of such protection and ultimate dissipation of the bargaining unit entirely. In defending their proposal, the Respondent's negotiators reiterated their generalized need for "flexibility" and unfettered discretion to transfer work out of the unit.

At the October 31 meeting, the Union indicated that its major issues were layoff recall, job duty changes, use of part-timers, use of enhancement teams, and transfer of unit work. Janetzke reiterated the Union's concerns with their proposal's impact on job security. The Union was willing to consider split shifts to keep full-time employees employed rather than have the hospital hire or use part-time employees. The Union was also willing to modify the existing layoff procedure so the hospital could retain part-time employees even when full-time employ-

ees were to be laid off. At the close of the session, the Union reiterated willingness to make changes but emphasized its "2 big issues—fear of unilateral changes by the Employer and job security for members."

The parties' next negotiation session was November 2, 1995. During this session, the parties reached tentative agreement on two housekeeping matters. The tentative agreements were initialed and dated by Kurek and Janetzke pursuant to ground rules.

At the next meeting on November 3, 1995, the Union presented its first wage proposal for a 4-percent wage increase in the first year of the contract and a 3-percent wage increase in the second and third year of the contract.

The parties met again on November 13, 1995. The Respondent gave the Union its first written counterproposal since bargaining began. The counterproposal dealt with subcontracting. The Respondent offered no wage proposal.

The parties met again on November 14, 1995. The Union's counterproposal on subcontracting was given to the Respondent. However, no wage proposal was given to the Union.

On November 17, 1995, the parties discussed drug testing, layoff and recall, and the bargaining unit recognition clause. No wage proposal was given to the Union by the hospital.

On November 21, 1995, the Respondent presented its wage proposal, which offered a wage increase of 3 percent in the first year if agreement was reached by November 22, 1995. The Respondent proposed that in the second and third year, bargaining unit employees would receive a wage increase in a percent equal to the base increase given to all other nonmanagement employees that year. At the meeting, Janetzke informed Kurek that the Union could not permit the Respondent to set bargaining unit employees' wages and that no self-respecting union would do so. Kurek told Janetzke that the Respondent wanted uniformity. He explained that the Respondent wanted to treat nonbargaining unit employees and unit employees in the same manner when deciding the level of wages and benefits. Church's explanation was no more explicit than that the hospital industry was going through unspecified changes and the Respondent wanted the right to set wages unilaterally. Janetzke asked if equity adjustment given to management employees would be given to bargaining unit employees. Janetzke asked for history of wage increases to non-management level employees, which Kurek did not have but indicated he would provide.

At this session, the Respondent also made an initial proposal to maintain the enhancement teams (PET teams) with the unilateral right to appoint members of the teams.

The parties met again on November 22, 1995. The Respondent gave the Union a history of nonbargaining unit wage increases compared to unit increases. The history indicated that in 2 years from 1989 to 1995, the Union negotiated higher increases than was given to other nonmanagement level employees. When Janetzke asked why Summa was asking the Union to give up its right to bargain over wage increases, Kurek replied only that the hospital would give unit employees the same increase it gave "throughout [the] Hospital." Janetzke pointed out the hospital could give a 0-percent increase. Janetzke then countered with a proposal for a wage reopener. Kurek rejected this proposal because of the cost.

In the meeting, the Union also countered the hospital proposal on design and work teams. The Union agreed to their existence, asked for union participation and communication,

<sup>6</sup> Art. I, sec. 2, as originally proposed, also referred to subcontracting. Later in negotiations, subcontracting was contained in art. I, sec. 3.

and asked for assurances that the team would not discuss mandatory subjects of bargaining or change the labor agreement.

With the expiration of the collective-bargaining agreement, the Respondent gave the Union notice that it was terminating the dues check-off and union security provisions of the bargaining agreement.

The parties met again on December 4, 6, and 14, 1995, with no movement on articles I, section 2; article II, sections 2 and 9; or wages.

At the December 15, 1995 meeting, the Union offered a counterproposal to the Respondent on article I, section 2, Management Rights. Under this proposal, the Union ceded to the Respondent sole, exclusive, and unreviewable right to transfer bargaining unit work within bargaining unit classifications. The Respondent rejected the Union's proposals.

In addition to deleting protective language from article II, section 9, with respect to classifications listed in Exhibit D of the contract, the Respondent proposed new language in article II, section 9. The Respondent proposed in the first paragraph of that Article that it would have the ability to temporarily assign bargaining unit employees to nonbargaining classifications at any Summa location but nonbargaining employees could be temporarily assigned to bargaining classifications without becoming a part of the bargaining unit. Janetzke concluded that this new language would enable the Respondent to temporarily assign nonbargaining unit employees to bargaining unit positions without including them in the unit.

At the December 18, 1995 meeting, the Union offered the Respondent a counterproposal on article II, section 9 which would give the Respondent some flexibility in the temporary assignment of employees. Janetzke explained that this proposal would enable the Respondent in emergency situations to temporarily assign full-time bargaining unit employees' duties to nonbargaining unit duties. The Union's proposal also stated that the temporary assignments would be limited to 30 days, whereas the Respondent's initial proposal had no time limit for the length of the temporary assignment. There was no agreement reached at this meeting with respect to article II, section 9. Throughout negotiations, the Respondent consistently took the position that they wanted to hire as many part-time employees as needed in bargaining unit classifications and to work them in excess of 40 hours.

The parties met again on December 19 and 21, 1995; January 22, 26, and February 8, and 15, 1996, without reaching agreement on any issues. On January 26, 1996, the Union proposed a meeting between Summa's legal counsel, John Childs; Janetzke; Kurek; and William Endsley, Ohio Council 8's president, to discuss the status of negotiations and the Respondent's intentions.

On February 16, 1996, the parties met again for negotiations. The sides discussed use of part-time employees by the hospital. The Respondent's spokesperson stated that the Respondent wanted the right to hire as many part-time employees as it wanted and work them as many hours as it wanted.

In the 7 months from the start of contract negotiations up to May 1996, when Janetzke, Childs, and Kurek began to meet without the bargaining committees, the Respondent made no forward movement on any of the four contract proposals at issue in this matter. The last meeting with full committees occurred on March 28, 1996. Janetzke complained that union officials discussed the fact that negotiations were not progressing and that something had to be done to move the process

along. The Union proposed the idea of Janetzke meeting alone with Childs. Eventually, the parties came to agreement and Childs, Kurek, and Janetzke began to meeting without the full committees on May 21.

At a meeting held on June 14, 1996, Janetzke gave Kurek and Childs a proposal covering various sections of article II, including section 9. Janetzke testified that his proposal intended to give the Respondent the right to make temporary assignments. Janetzke's proposal on article II, section 9 added language to protect bargaining unit employees assigned to nonbargaining unit positions, such as continuation of contract coverage for those employees. There was no agreement between the parties on Janetzke's June 14 proposal.

In this June 14 proposal, Janetzke attempted to address the Respondent's concerns with the use of part-time versus full-time employees in bargaining unit jobs. At article II, section 5 of the June 14 proposal, Janetzke proposed that the ratio of part-time employees to full-time employees in bargaining unit jobs remain the same as it was at that time for the duration of the contract. Janetzke's proposal contained some exceptions.

At the July 16, 1996 meeting, the Respondent gave the Union its first written proposal since November 22, 1995. The proposal reflected no change from the hospital's original proposed language in article I, management rights with regard to transfer of bargaining unit work. In this regard, the hospital maintained the sole, exclusive, and nonreviewable right to transfer bargaining unit work to nonunit classifications at its sole and exclusive discretion, notwithstanding any provision of the agreement. The Respondent had proposed more discretion in the employment of part-time employees. In an apparent concession, the Respondent accepted the Union's suggested change regarding the ratio of part-time to full-time employees and to the creation of split shift for full-time employees, but only at its sole discretion. However, other Respondent proposals ceding to it wide discretion nullified these apparent concessions. The Respondent adhered to its initial wage proposal. Janetzke responded by accusing the Respondent of engaging in sham bargaining inasmuch as its proposal would permit it to classify employees as part-time but yet work them on a full-time basis, which would ultimately dissipate the bargaining unit. The Respondent's negotiators reiterated a need for generic "flexibility."

At the July 23, 1996 meeting, Janetzke tendered to Kurek and Childs a proposal which somewhat ameliorated the absolute discretion sought by the Respondent regarding the transfer of unit work but yet did grant to the Respondent some accommodation. The qualification sought by the Union was that the transfer decision not be "non-reviewable," that the Union be given prior notice, and that the decision to transfer out unit work be grievable as to the issue of placement of the recipient employees in or out of the unit. Alternatively, the Union sought acknowledgment of its right to file a timely unit clarification petition with the Board. The Respondent's negotiators had several times rejected the grievability aspect on the grounds of a feared proliferation of a grievance and litigation. Janetzke pointed out that his proposal would permit the Respondent to implement its decision and that reviewability was after the fact of implementation. The proposal was again rejected out of hand. The Respondent insisted on the right to act without litigation or review.

At the meeting, Janetzke announced what he characterized to the Respondent's negotiators as a major concession by the Un-

ion on the wage issue. He proposed an up-front first year wage increase of 6 percent in return for acquiescence to the Respondent's demand for discretionary wage raises in the second and third years. Janetzke testified that he made this concession to "test" the Respondent. He told the Respondent's negotiators that if the Respondent wanted the right to unilaterally determine wages, they would have to pay a price for it. They responded that the Respondent would not pay that price. A union offer of the same deal but a 5-percent increase was later offered and also rejected in a subsequent meeting.

Janetzke protested that the Respondent was unlawfully negotiating to impose an adamant insistence upon the unilateral right to set wages, hours, and terms and conditions of employment, and that the Union waive its statutory rights to Board redress.<sup>7</sup>

On July 30, 1996, Kurek, Childs, and Janetzke met for the last time. Initially, the Respondent answered the Union's counterproposals presented on July 23, 1996. The Respondent maintained its position with respect to article I, section 2; article II, sections 2, 5, and 8; layoffs under article XVII; article II, section 9; and wages. Janetzke presented yet another counterproposal on article I, section 2, management-rights/transfer of unit work, limiting the Union's right to grieve or petition the Board to include in the unit part-time employees performing work on an average of 40 hours per week "over an extended period of time." This proposal was also rejected on the grounds of feared grievance proliferation.

At the close of negotiations on July 30, 1996, Janetzke made the Respondent one final oral proposal. The Union proposed:

1. Its new language in article, section 2;
2. Agreement on article II, sections 8 and 9, provided the Union was given its language in article I, section 2;
3. Agreement to the hospital's hospitalization proposal, provided a 5-percent wage increase;
4. Agreement to the hospital's unilaterally setting wage increase in years 2 and 3 of the collective-bargaining agreement, provided the hospital guarantee a 5-percent wage increase in year 1.

Kurek responded to this offer by saying that the hospital "will consider and respond with a comprehensive final offer." No tentative agreements were reached, signed, or initialed between the parties.

On August 11, 1996, Janetzke received the Respondent's final proposal. Janetzke compared the final proposal with the Respondent's July 30 proposal. On the subject of the unrestricted right to transfer bargaining unit work out of the bargaining unit as proposed by the Respondent in article I, section 2, the Respondent's final proposal did not change. The Respondent did not move or change its position on the various articles proposed to give it the ability to utilize part-time employees more than 40 hours per week as nonbargaining unit employees, as well as unilateral discretion regarding light duty assignments, determination of work shifts, reassignment of

employees whose jobs had been abolished to avoid bumping, and changes in reassignment policy.

As agreed between the parties, Janetzke presented the Respondent's final offer to the membership for a vote conducted at special membership meeting on August 22, 1996, at 10 a.m. and 7 p.m. The membership discussed the offer and vote to ratify or reject. Janetzke, Powell, Stump, Damron, and other Local 684 officers were present at both meetings.

Janetzke presented the hospital's final offer to the membership. Janetzke discussed each of the hospital's proposal and talked about problems that the Union had with the proposals and whether or not the Union could recommend them. Janetzke discussed, *inter alia*, the Respondent's article I, section 2 proposal, the wage proposal, and the proposed use of part-time employees at the hospital. Janetzke and Stump described the nature of an unfair labor practice strike. The membership at both meetings was informed about the issues of unfair labor practice charges that the Union had already filed with the National Labor Relations Board and told that the Union would be filing additional charges over the Employers failure to bargain in good faith. Janetzke told them "we have an unfair labor practice strike."

Members at both sessions were read a series of three resolutions that had been prepared by Janetzke. The resolutions called for the rejection of the final offer. The membership voted on three resolutions—the Employer's final proposal, whether the Union should seek further negotiations, and whether to authorize an unfair labor practice strike. The membership voted overwhelmingly to reject the Employer's final proposal. The combined tally of the two meetings resulted in a 215 to 1 vote to reject the contract. By an equally large margin, the membership at both meetings voted to seek further negotiations with the Respondent and authorized the Union to strike if necessary. Resolution 3 sets forth the reasons for the strike authorization. Those reasons included the pending unfair labor practices against the Respondent and possible unfair labor practices to be filed with the Board, including an alleged refusal-to-bargain in good faith.

Stump informed Paul Jackson the day after the vote, in writing, that the membership had rejected the Respondent's final proposal. Stump suggested dates on which the parties could resume contract negotiations. When negotiations resumed in late August or early September 1996, Stump served as the Union's chief negotiator, succeeding the retired Janetzke. At this first meeting, Stump made clear the concerns the membership had about the Respondent's last proposal. The discussion included the Respondent's proposals allowing it to transfer bargaining unit work to nonbargaining unit employees and use of part-time employees in excess of 40 hours per week.

At the September 3, 1996 meeting, Stump presented the Respondent with a comprehensive outline of the membership's concerns expressed at the membership meetings that preceded the vote, which resulted in the overwhelming rejection of the Respondent's final offer. The outline discussed the membership's concerns with each article in the Respondent's final proposal.

At the parties next session on September 12, 1996, the Union presented the Respondent with a written proposal on all outstanding Articles. Much of the proposal seeks to return to current contract language. With the exceptions of wages, the Union's proposal did not seek any gains, but only sought to coun-

<sup>7</sup> The Acting General Counsel did not argue that the Respondent's refusal to explicate the Union's right to the Board's unit clarification process in the collective-bargaining agreement amounts to a demand for a union waiver of such rights. Kurek testified without contradiction that he explained to Janetzke that he sought no such explicit waiver. Janetzke admitted that Childs explicitly disclaimed that the Respondent was seeking such a waiver.

counter the Employer's proposed concessions contained in its final offer.

During these sessions, Kurek complained that the Respondent and the Union had reached tentative agreement on all issues but three as of the July 30, 1996 meeting between Janetzke, Childs, and Church, and now Stump was returning to "square one." The Union maintained that no tentative agreements were reached and any agreements were part of a package deal.<sup>8</sup> Stump pointed out to Kurek that no tentative agreements had been reached unless they had been initialed and submitted jointly to each other.

The parties met on September 26 or 29, 1996, with Federal Mediator David Thorley. The Union proposed through the mediator that all open issues be submitted to interest arbitration which, according to the Union, exceeded what the Respondent had been contending had been tentatively agreed; i.e., there had been no tentative agreements but for two or three. The Respondent maintained its position that as of July 30, 1996, tentative oral agreement had been reached on all but the "big three" issues of article I, section 2—Work Transfer; article II, section 4—Creation of New Positions; and article XXV—Wages. Further, its contention was that the Union reopened all the other 40 agreed-upon issues on September 12, 1996. It then concluded that it was unreasonable for an arbitrator to resolve "more than forty open issues" but agreed to submit the afore-described "big three" issues to interest arbitration. That position was stated in its counterproposal dated October 28, 1996, and presented at the meeting of that date. At the same meeting, Stump presented a letter to the Respondent, which announced the termination of the collective-bargaining agreement and notification of a strike to commence midnight on November 7, 1996, characterized therein as a result of the Respondent's unfair labor practices. The strike commenced as announced and continued until February 3, 1997.

While some meetings were held between the parties during the strike, discussions focused primarily on the possibility of binding arbitration of contractual issues and the settlement of the strike. During the time period of the strike, there was no agreement on any contract proposals.

Stump received a letter from Kurek dated November 21, 1996. The second page of the letter indicated that the Respondent was modifying its wage proposal. The proposal was modified to account for the fact that a year had passed in contract negotiations. Thus, the Respondent's wage proposal in the November 21 letter referenced a 2-year instead of a 3-year contract. The Respondent sought the ability to set the wage rates in the second year of the contract. This was the first written proposal the Union had received from the Respondent on the subject of wages since contract negotiations resumed after rejection of the final offer.

The parties met again to negotiate on January 17, 1997. At this meeting, the Union offered through the mediator a written counteroffer to its own offer dated September 12, 1996. The proposal modified the Union's position on the calculation of the existing part-time to full-time ratio, temporary transfers, hours of work, wages, subcontracting, and duration. Kurek testified that the Respondent did not consider it to be sufficient move-

ment. The parties then discussed the Respondent's announcement of the reduction of 60 bargaining unit positions due to declining staffing requirements, 56 of which had been occupied prior to the strike.

On January 29, 1997, the parties entered into a written strike settlement agreement. The strike settlement agreement provided, in part, that the parties would enter into a period of negotiations for 60 days, ending on March 31, 1997. If the parties were not able to reach agreement during that time on five issues selected by the Union and set forth in the strike settlement agreement, these unresolved issues would be submitted for interest arbitration to the Federal Mediation and Conciliation Service. Two of the five issues are proposals that are the subject matter of the complaint. The parties agreed to submit transfer of work out of the bargaining unit and the use of part-time employees under the contract. Other issues to be submitted to the arbitrator were: subcontracting bargaining unit work, layoff and recall, the attendance/tardiness policy, and certain pending grievances.

At the February 11, 1997 negotiation meeting, the Respondent presented its first comprehensive written counterproposal since its final proposal in August 1996. The Respondent did not change in any respect its proposed article I, section 1—management-rights unilateral transfer of unit work; article II, section 2—use of part-time employees over 40 hours a week; article II, section 5—part-time ratio to full-time except in the event of a layoff, in conjunction with article XXV—use of unlimited part-time employees during layoff; article II, section 9. The hospital did modify its wage proposal to reflect a 3-percent wage increase in year 1 and year 2, but with the unilateral right to determine a wage increase, if any, in year 3 equal to the base general increase of nonunit employees. The parties did agree to current contract language on 55 other issues. These tentative agreements were initialed and dated in accordance with the agreed-upon ground rules and the practice in the early phase of these negotiations. Most of the tentative agreements reached were to retain current contract language. None of the proposals, as contained in the complaint, were tentatively agreed upon at the February 11, 1997 meeting.

At a meeting held on February 28, 1997, the Union presented yet another counterproposal to the Respondent. The Union's proposed article II, section 2 incorporated the hospital's interpretation of the ratio language on the ability to use part-time to full-time employees. In the past, the hospital interpretation of that ratio had been that they would be able to work part-time employees 25 percent to 100 percent of the full-time hours. The Local's position in the past was that part-time employees could be worked only 25 percent of 75 percent of full-time hours. The Respondent's latest proposal tendered to the Union on February 11, 1997, contained no protective ratios at all, consistent with its previous contract proposals.

There were some negotiating meetings held in March 1997.

On April 30, 1997, the Board's Region 8 issued its third order consolidating cases and third amended complaint in the instant case. On May 1, 1997, the Union and the Respondent submitted their final position statements to the federal mediator on the five issues to be arbitrated. It was with the issuance of the hospital's position statement to the federal mediator that the hospital agreed to drop its proposal on article I, section 2—transfer of unit work.

The parties' strike settlement agreement provided that Mediator Thorley was to choose between the final proposals of the

<sup>8</sup> Kurek's testimony as to what had been tentatively agreed to orally and when was extremely nonspecific. Childs' much briefer testimony was even more conclusionary. Janetzke's more detailed, convincing testimony establishes that no such oral agreements were made.

Union and hospital in fashioning his award. On August 20, 1997, Stump's involvement with negotiations with the Respondent ended in July 1997 when he left employment temporarily on sick leave. The five issues, as outlined in the strike settlement agreement, were submitted to Federal Mediator Thorley who issued his unsigned decision on or about August 20, 1997. The mediator accepted the Union's proposal on article II, section 2. The mediator adopted the Respondent's proposal for article II, section 9.

With respect to article XVII, layoff, and recall, he proposed a compromise position between the parties. At article 1, management rights, the mediator adopted part of the hospital's submission eliminating language, which provides "contractual coverage shall continue for temporally assigned unit employees during the term of assignment to a non-unit position."

Negotiations continued between the parties to the date of the trial without alternate agreement. Stump's successor as lead union negotiator, upon his hospitalization, was himself succeeded by yet another replacement.

## 2. Analysis

In *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board stated:

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." The employer is, nonetheless, "obliged to make some reasonable effort in some direction to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all."

It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).

Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. None of these indicia is present here. There was, on the other hand, evidence of the Company's good faith, such as its appearance at 13 negotiating sessions, its offer of a 20-cent-per-hour wage

increase effective 29 May 1984, the prior successful bargaining relationship between the parties, and the agreement in principle to the Union's sick leave proposal.

The Company's firmness in insisting on a 1-year extension of the current contract does not of itself constitute bad faith. We find that the totality of the Company's conduct throughout the course of bargaining establishes that the Company engaged in hard bargaining, rather than surface bargaining. [Citations omitted.]

Thus, although adamancy is not itself a determining factor, it may be a factor in consideration of a bargaining party's total behavior at and away from the table.

Furthermore, the Board will not sit in judgment of, but yet will still examine the bargaining proposals themselves to help resolve the issue of good faith. In *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988), the Board took care to note that although it would not judge the "acceptability" of a proposal to a party, it would apply its "cumulative institutional experience" and examine bargaining proposals when appropriate as "evidence of an intent to frustrate the collective-bargaining process." The Board stated, *id.* at 70:

Each party to collective bargaining "has an enforceable right to good-faith bargaining on the part of the other." Enforcement of that right is one of the Board's most important responsibilities. Indeed, the fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative. The Board will not have fulfilled its obligation to look at the whole picture of a party's conduct in negotiations if we have ignored what is often the central aspect of bargaining, *i.e.*, the proposals advanced by the parties. [Footnotes omitted.]

See also *Association of D. C. Liquor Wholesalers*, 292 NLRB 1234 fn. 5 (1989), *enfd.* 924 F.2d 1078 (D.C. Cir. 1991). *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (*McClatchy II* on remand of *McClatchy I*, 964 F.2d 1153 (D.C. Cir. 1992)).<sup>9</sup>

The proposals so adamantly insisted on by the Respondent during many months of negotiations related to the very essence and viability of the Union's representational status. Unilateral discretion to determine wages and unrestrained license to dissipate the very work of the unit itself by out-of-unit work transfer and use of nonunit employees would seriously denude the Union of its significance as employee representative. Indeed, although the Board has found that parties may negotiate to good-faith impasse over the issue of a unilateral merit pay proposal, the Board found that such proposal would cede to an employer such broad powers that it could not lawfully be unilaterally implemented even upon such good-faith impasse. The Board stated in *McClatchy II*, *supra* at 1390-1391:

Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the employer

<sup>9</sup> See *McClatchy Newspapers (McClatchy III)*, 322 NLRB 812 (1996), in accord with *McClatchy II*.

could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria, the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process." . . . [W]e find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's agreement), it would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.

With respect to transferring out of unit work, such a proposal is not per se unlawful but is rather a mandatory subject of bargaining. As long as an employer does not insist on changing the unit description, it may lawfully bargain to good-faith impasse on the issue providing it does not attempt to deprive the Union of the right to contend that the persons performing the work after the transfer are to be included in the unit. *Antelope Valley Press*, 311 NLRB 459, 461-462 (1993); *Batavia Newspaper Corp.*, 311 NLRB 477 (1993).

The Respondent argues that its adherence to the proposals at issue therefore were lawful. That adherence, however, must be evaluated by the totality of its conduct. The demand for the ceding of this discretionary authority must be viewed against the Respondent's recent pre-bargaining divisive intrusion into the relationship of the Union and its constituency by virtue of the Respondent's direct bargaining with employees, unilateral changes in employment conditions, and creation of sham internal bargaining entities. Indeed, its unlawful unilateral action was in fact a preemptory strike that tainted the legitimacy of its profession of open-minded bargaining for union acquiescence. The disputed issues emerged from a background of complaints and grievances over alleged Respondent erosion of bargaining unit work protection which, according to its negotiators, the Respondent admittedly sought to avoid by the arrogation of complete discretion to the Respondent.

The discretion sought in the three complaint-cited proposals moreover were made within the context of other discretionary authority which had been ceded to it in the expired contract or sought in the new contract regarding job abolishments, part-time/full-time employee ratios, shift determination, hospitalization/insurance coverage, absenteeism policies, jury duty leave, reassignment of employees without need of bumping rights, and reclassification of employees without posting or bidding for the new position. Additionally, the Respondent sought diminution of employee benefits and union perquisites such as modest office space previously enjoyed.

The Union made periodic efforts to soften the blow of the Respondent's proposals by offering some accommodation to the hospital's need to obtain some flexibility to compete in the open market, which need Janetzke conceded at the bargain table, but the Union sought without success to dilute the complete absolutism inherent in the Respondent's proposals.

The Union's December counterproposal on article I, section 2 attempted to inject some element of reviewability by conditioning the Respondent's discretion on nonarbitrary or capricious reasons. Similarly, he sought to accommodate the article II, section 9 proposal in emergency situations and the qualification that temporary assignments to nonunit jobs would not automatically be absorbed into the unit, and nonunit employees could be temporarily transferred to unit positions.

In June 1996, the Union moderated its opposition as to the definition of a temporary employee. With the June 14, 1996 counterproposal, the Union softened its position regarding a hand and fist protective ratio of part-time/full-time unit hours. On July 23, 1996, Janetzke accepted the Respondent's proposed article II, section 2, with the deletion of the word "non-reviewable" and provision for some form of after-the-fact reviewability. Thus, the Respondent could immediately implement its desired change subject to later review. Janetzke made similar overtures at the July 23, 1996 meeting when he futilely attempted to inject some accountability to or input by the employees' bargaining representative regarding job transfers out of the unit.

With respect to wages, after 9 months of the Respondent's adamancy, Janetzke was prepared to surrender the Union's bargaining right in return for at least a price. Even that was rejected. The Respondent's argument that such a bargaining collapse somehow vests retroactive validity for its adamancy is unwarranted. *Chester County Hospital*, 320 NLRB 604 (1995), citing *General Electric Co. v. NLRB*, 400 F.2d 713, 727 (5th Cir. 1968), cert. denied 394 U.S. 904 (1969). Similarly, I reject the argument that the Union's resort to interest arbitration after months of the Respondent's immobility also validates its take-it-or-leave-it bargaining stance.<sup>10</sup>

Throughout bargaining, the Respondent had made no meaningful concessions. When it did, the purported concession proved to be a mere sham as it was nullified by another coexistent proposal. In the face of proffered union accommodation, it remained unmoved and insistent that some vague concept of "flexibility" justified precise, absolute discretionary powers, so destructive of the Union's representational status mandated upon it by the Act. The Respondent did not explicitly contend that the Union would not have the right to seek representation of employees to whom unit work had been assigned and did assure Janetzke that it was not seeking a waiver of its right to claim such representation via a unit clarification petition. However, the Respondent's refusal to insert a simple recognition of such in the collective-bargaining agreement in light of the Union's fears suggests that it did not really want to assuage those fears. The Respondent's conduct came perilously close to taking the position that the Union could not contend that employees assigned unit work were in the unit, as the Union feared.

The Respondent never offered, at any time, any specific economic justification for these demanded powers or explanation why the proffered accommodations that it peremptorily rejected would not assuage its need without total union representational capitulation. Only minor movement by the Respondent occurred but only after the complaint issuance and the onset of interest arbitration.<sup>11</sup>

<sup>10</sup> Interest arbitration constitutes a waiver of the Union's right to engage in good-faith, give-and-take bargaining. As such, it is a permissive bargaining subject and cannot be compelled. *Columbus Printing Pressmen Union 252*, 219 NLRB 268 (1975), enf. 543 F.2d 1161 (5th Cir. 1976); *Sheet Metal Workers Local 20*, 306 NLRB 834, 839 (1992).

<sup>11</sup> Childs testified, without contradiction, that on the eve of the strike, November 6, he, Kurek, and Sombati, union council representative, met at a dinner and agreed to language proposed by Sombati regarding the topic of subcontracting of work to outside contractors as a quid pro quo for acceptance of the Respondent's work proposal. He testified that the language, however, was put in the form of a respondent proposal to the mediator who accepted it in his proposed solution on the issue.

I conclude that such movement was too little and came too late to ameliorate the bargaining atmosphere which had become tainted by the Respondent's overall conduct which I find manifested a bad-faith intent to avoid a negotiated agreement.

In support of its contention that it was privileged to adhere to the disputed proposals, it relies on *Cincinnati Enquirer, Inc.*, 298 NLRB 275 (1990). In that case, the Board found lack of evidence of absolute adamancy on the issue of wage control and that the control was not as extensive as alleged. Furthermore, there was no allegation of bad-faith bargaining in any other respect. In the *McClatchy* cases discussed above, there had been the premise of overall "in depth" good-faith bargaining which I find is absent here. *McClatchy I*, 299 NLRB 1045, 1046 (1990).

In *Antelope Valley Press*, supra, and *Batavia Newspapers Corp.*, supra, the employer's insistence upon the right to transfer unit work was explained in depth and was premised upon a demonstrable economic need of an industry to adapt with some flexibility to new technologies. It was not sought merely that the employer might have flexibility; i.e., the freedom of not having to deal with the employees' bargaining representative over issues vital to the survival of the unit itself for no demonstrable justification. There, the employer never insisted by contract proposal or orally in bargaining that the Union would be precluded from claiming that the nonunit employees who were to be assigned unit work should not be included in the unit. See also *Detroit Newspaper Agency*, 326 NLRB 700, 701-702 (1998). Here, despite its disclaimer of waiver intent, the Respondent's refusal to acknowledge reviewability and the Union's right to seek Board redress on the grounds that such provision would result in a proliferation of grievances and "litigation" seemed calculated to suggest to the union negotiators that the Respondent's proposals as unmodified by the Union's counterproposal would by implication, necessarily preclude such litigation, inclusive of a unit clarification petition.

The Respondent's disputed proposals were merely part of a vast array of proposals calculated to arrogate to the Respondent unreviewable control over bargaining unit wages and bargaining work. Coupled with its recent prenegotiation bypassing of the Union and direct dealing with employees, its unlawful unilateral actions, and its conduct at the bargaining table where it gave no serious consideration of the Union's ameliorating counterproposals and no cogent explanations for the demands, they are convincing evidence that the Respondent had no intention of reaching contractual agreement but rather sought the diminishment of the Union as the meaningful exclusive employee bargaining agent. I therefore find that by such conduct, the Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.<sup>12</sup>

#### *E. Complaint Paragraph 29—the Alleged Unfair Labor Practice Strike*

Paragraph 29 of the complaint alleges that the November 7, 1996 to February 3, 1997 strike against the Respondent was an unfair labor practice strike. There is no allegation that the Respondent unlawfully refused reinstatement to any strike.

<sup>12</sup> The Respondent's unlawful failure to comply with the Union's request for information necessary for it to perform its duties as bargaining agent, made prior to and into the period of contract negotiation as found unlawful in the sec. E of this decision further supports this conclusion.

### 1. Facts

The facts underlying this issue relied upon by the General Counsel are set forth above. The Respondent argues that other facts demonstrate the true motivation for the strike. Union President Powell admitted in cross-examination that within a few weeks of the strike, ACH had received adverse media publicity regarding its emergency room patient care and that an imminent inspection visit by a regulatory agency was pending, and he may have told the mediator that such events would provide the Union with leverage if they did call a strike. Kurek testified that he received this "perception" of union motivation in his discussion with the mediator. Childs testified without contradiction that Union Representatives Endsley and Sombati "indicated they understood that that was why the strike occurred when it did." He failed to testify as to what either agent said that constituted this indication, what they based the conclusion, or whether they stated that this was the only reason for the strike.

### 2. Analysis

Certain unfair labor practices have been found by the Board, with Court approval, to have an inherent causal effect without other evidence of explicit motivation of strikers or strike decision-makers. *F. L. Thorpe & Co.*, 315 NLRB 147, 149 (1994), enfd. in part 71 F.3d 282 (8th Cir. 1995); *C-Line Express*, 292 NLRB 638 (1989); *SKS Die Casting & Machinery, Inc. v. NLRB*, 941 F.2d 984, 991 (9th Cir. 1991); *Vulcan Hart Corp. (St. Louis Div.) v. NLRB*, 718 F.2d 269, 276 (8th Cir. 1983). Furthermore, the Board and reviewing Court may consider objective criteria and evaluate "the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context." *Soule Glass Co. v. NLRB*, F.2d 1055, 1080 (1st Cir. 1980). See also *Gibson Greetings*, 310 NLRB 1286, 1288 (1993), where the Board relied upon objective evidence and concluded that a strike had been prolonged by the employer's conduct "which tainted the bargaining climate and impeded opportunities for settlement of the strike."

In *C-Line Express*, supra, 638, the Board stated, with respect to the causal relationship of a subsequent unfair labor practice to the prolongation of a strike:

The Board has long held that an employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair labor practice strike. Rather, the General Counsel must establish that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.

Elsewhere, the Board has held causation or prolongation where the unfair labor practice was a contributing cause, a cause in part, or played a part in a contributing factor or where it had anything to do with causing a strike. See, respectively: *Walnut Creek Honda*, 316 NLRB 139, 142 (1995); *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995), enfd. 89 F.3d 692 (10th Cir. 1996); *Fairhaven Properties, Inc.*, 314 NLRB 763, 768 (1994); *Domsey Trading Corp.*, 310 NLRB 777, 791 (1993); *Decker Coal Co.*, 301 NLRB 729, 746 (1991); and *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978). Thus the criteria is not whether a strike would have occurred anyway in the absence of unfair labor practices nor even the extent of their prominence in the causal motivation.

I conclude that the General Counsel has adduced bargaining conduct sufficient objective and subjective evidence on which to conclude the Respondent's unlawful bargaining conduct

would have had the impact of tainting the bargaining climate and would have had the impact of motivating the employees to strike, or at least partially motivated the employees to strike.

The Respondent's evidence runs to the tactical, precise timing of the strike and not for the basic motivation for the strike, but in any event, at best sets forth an additional reason for the strike. It does not negate evidence that the Respondent's unlawful bargaining conduct at least in part motivated the strike. Accordingly, I find that as alleged in the complaint, the strike was from its inception and to its end an unfair labor practices strike.

#### *F. Information Requests*

##### *1. Facts*

The complaint in paragraphs 15–18, 20, 22–24, and 27 alleges nine different formal union information requests that the Respondent either failed to comply or complied within an untimely manner.<sup>13</sup>

The Respondent's answer entered a blanket denial to the allegations, but there is no factual dispute that those requests were made on the date alleged and for the information alleged. Furthermore, the Respondent admits to tardy compliance with many requests for relevant information.

Four requests—paragraphs 15, 17, 23, and 27—related directly to bargaining unit employees.

By letter directed to Paul Jackson dated September 7, 1994, Powell requested copies of job postings for three bargaining unit positions which reiterated earlier, identical, unsatisfied requests (par. 15). It is Jackson's responsibility to respond to union information requests. Powell's objective was to ascertain whether the Respondent had filled bargaining unit positions with nonbargaining unit employees inasmuch as the postings were for bargaining unit jobs but were seen by him posted on a nonbargaining unit bulletin board. Powell's testimony that the Respondent failed to comply with his request is uncontradicted.

On September 1, 1994, in writing, Powell renewed a request for information that had been made on three previous occasions by the Union and sought information about the status of employees working at a facility known as "Bath Radiology" (complaint par. 16). He asked whether they were ACH employees and for the wage rate, hours of employment, and job descriptions and classifications for those employees. He made the request based on reports he received from bargaining unit employees that bargaining unit employees were being transferred to Bath Radiology and employees from the Bath Radiology facility were performing bargaining unit work at ACH. Powell requested this information in order to be able to investigate these reports. On an unspecified date several months later, Powell received from the Respondent a copy of his letter request with the notation added at the bottom, "no one on ACH payroll at Bath." Powell continued to make oral requests for the same information for several months thereafter, inasmuch as he continued to receive similar reports from bargaining unit employees. Powell received no further information, which he felt was necessary to determine whether the reports were accurate. Without any further information, Powell filed a grievance. There is no other evidence to substantiate the reports from unit employees testified to by Powell.

On September 6, by letter, Powell renewed a prior unsatisfied request for job description, pay rates, and job postings for the emergency room ortho tech position (complaint par. 17). emergency room orderlies are unit employees. Two of them reported to Powell that work they had previously performed had been transferred to the new ortho tech position, a posting that was seen by Powell on a nonunit ACH bulletin board.

On an unspecified date, Powell received back a copy of his letter request from the Respondent with the notation, "There are no Ortho Tech positions in the Emergency Department," signed and dated "1-14-94." He raised the matter personally with Jackson who assured him verbally that there was no such position despite Powell's own observation of the posting. Jackson did not contradict Powell nor did he testify to the nonexistence of such posting. There is no other evidence that such position actually was implemented in the emergency room. Without any further information, Powell felt constrained to file a grievance over the issue.

By letter to Jackson dated September 6, 1994, Powell renewed an outstanding request for the identify and hours worked by electricians and painters for two separate time periods in September and October 1992 at the O'Neil Building, a downtown commercial building (complaint par. 17). Powell sought the information because he had received reports from maintenance employees to the effect that other unit maintenance employees had been sent to the O'Neil Building to build a hospital display in the front window of the building and had incurred overtime. The Union sought the information because the maintenance employees who had reported this to Powell were lower rated hourly employees. Powell believe that pursuant to the contract, they should have been offered the overtime. Powell was informed by a Respondent supervisor that the bargaining unit employees were actually working for management of the O'Neil Building at the time. Powell testified that he required those records in order to be able to investigate the situation inasmuch as he knew the employees who worked at the O'Neil building had worked their regular shift and were paid by ACH on the days in question. Powell never received the requested information.

Powell submitted another written request for information to Jackson on September 7, 1994, for the date of hire and rate of pay for three employees who worked in different ACH areas in the position of unit care coordinator, a bargaining unit classification (complaint paragraph 18). The Respondent originally created the unit service coordinator classification as a nonbargaining unit position. The Union had grieved the matter and prevailed in arbitration, and the classification was placed in the bargaining unit as a result. Powell sought the information because the Union took the position that those three individuals were unit service coordinators and should be placed in the bargaining unit pursuant to the prior arbitration award. The Respondent contended that they were nonunit employees.

The hospital and the Union proceeded to a second arbitration on the issue of those three employees. Powell received the information just prior to that subsequent arbitration, about 2 years after the Union initially requested the information in June 1993.

The Respondent's defense to the information requests by Powell rests upon the testimony of Jackson. He described the grievance procedure as consisting of four steps as follows: The first step involves the employee and supervisor. The second involves a written grievance from employee to union steward

<sup>13</sup> At trial, the Acting General Counsel withdrew pars. 19, 21, 25, and 26.

and a meeting with the Respondent's department director. The Respondent's director responds in writing in the third step, the written appeal of which, if any, proceeds to Jackson. The fourth step involves a formal grievance meeting and presentation of witnesses. Thereafter, the next step is arbitration. Jackson testified that meetings in step three and four are initiated by the Union. He testified that over the years he has had many information requests, which were complied with by the depositing of a response in a receptacle box maintained by his secretary in her office. He testified that if a grievance is involved, he determines relevancy and has waited to respond until step three to do so. If he immediately concedes relevance, the information is deposited in the secretary's office box; if not, he will discuss it with the Union.

Jackson testified that from the 1980's to 1992, there had been about 15 to 40 grievances filed per year but in the 1993 through 1994 period, they had accumulated to about 600. Janetzke claimed that they were about half that much, or less, but Powell conceded they may have reached 500. However, many of them apparently involved common "policy issues" or other common factors involving several employee grievants. In any event, clearly the increase was substantial. Jackson testified that in 1994, he followed a strict first-in, first-out order of response as well as grievance consideration despite a union request for prioritization of issues. Jackson did not contradict Powell's testimony that the past practice of the parties had been to prioritize grievance processing according to issues involved and not to follow a strict chronological order. Jackson testified that at one point, the Union ceased scheduling step three grievances and both parties thereafter proceeded to arbitration, bypassing step three. When that occurred, it became Jackson's practice to provide information request responses at some point prior to the arbitration hearing after the selection of an arbitrator. He conceded that such response was not timely at times but was submitted at least at the arbitration hearing itself. Clearly, by such admission, the Respondent's unilaterally adopted information-request compliance policy and practice afforded the Union little or no time to investigate and evaluate the merit of a grievance whereby arbitration might have been avoided by the Union's conclusion of lack of merit on its own initiative.<sup>14</sup> With respect to the supply coordinator request, he testified that there had been no step three procedure. He conceded that the Respondent's unilaterally adopted policy of not responding to information requests until step 3 is not one founded in the collective-bargaining agreement. Powell testified that although there came a time when the Union did not proceed through step three, at no time did the Union refuse to proceed through step three. He testified that the Respondent's refusal to prioritize grievances pursuant to past practice resulted in an accumulation of grievances particularly related to the reengineering policy and to 14 employee layoffs in 1994 which had become "stockpiled" at step two. It is Powell's uncontradicted testimony that the bilateral agreement to proceed to arbitration without the contractually mandated step three was reached when Janetzke became involved in the late 1994 onset

<sup>14</sup> In its brief, the Respondent claims that Jackson's newly adopted information request response practice was the result of an agreement with the Union. Jackson's testimony does not support this contention. On the contrary, it indicates that it was Jackson who unilaterally instituted the practice. At best, the Union tolerated it but did not abandon making timely information requests well in advance of step three and arbitration.

of contract negotiations. He also testified without contradiction that the Union never reached any agreement for the withholding of information until step three. Jackson did not testify that there had been any such bilateral agreement.

Powell testified that without sufficient information, he was compelled to move the grievance forward to step three and four. He testified that information request compliance at a department head and supervisor level ceased in 1994 when department heads informed him that Jackson ordered such cessation. Powell testified that he confronted Jackson on the issue but Jackson denied giving those orders. Jackson did not contradict him. In July 1995, a bilateral agreement was reached upon a method to prioritize grievances and thus ended the Respondent's refusal to process grievances on anything but a chronological order.

Janetzke or staff representative Stump made the remainder of the disputed information requests. By letter to Kurek on August 12, 1996, Janetzke reiterated prior unsatisfied requests of October 1995 and January and March 1996 for the identity and wage rates of employees in the classification of the patient registration interviewer/receptionist in the radiology department and the postings for that classification (complaint par. 20). A union grievance was pending over its claim that the position should be a unit position. The postings described it as a non-unit position and the Respondent filled the positions as such.

Responding by letter to Kurek's written questioning of the information's relevancy, by Stump's letter of March 29, 1996, the Union set forth the basis for the request. There it stated its objective to establish what work the employees at issue performed, the history of the position, and its community of interest with unit employees' job duties, classifications, and wage rates.

An arbitration hearing was held concerning the grievance over the unit placement issue of the receptionist in September 1996. The Union received much of the information from Kurek just prior to the arbitration hearing. Excluded from the submission were the job postings, bids, or position awards for the receptionist position. The Union further requested that if there were no job postings, bids, or awards, the Union wanted information as to how positions were filled. The Respondent did not produce any job postings, bids or awards, nor did it inform the Union how positions were filled.

By letter of September 6, 1996, Stump renewed a written request to Jackson for certain information initially requested on October 13, 1995. The Union requested contracts and subcontracts the Respondent had entered into with a courier delivery service known as "ASAP." The Union also sought any billings and invoices from ASAP from the time period July 1, 1994, onward. Janetzke testified without contradiction that the Union had lost certain jobs, which it believed the Respondent subcontracted to the ASAP. He expected that the information provided by the Respondent would enable the Union to learn exactly what type of work ASAP was doing and enable the Union to compare it with union jobs that had been lost. The Union filed a grievance over the loss of work to ASAP. The Union never received the requested information. According to Jackson's uncontradicted testimony, the matter did not proceed to arbitration or to step three.

The implication in Jackson's testimony is that because there was no step three proceeding or an arbitration hearing, the Respondent was relieved of the obligation of complying with the information request.

On September 6, 1996, Stump renewed a request for information initially made on September 22, 1995 (complaint par. 23). The Union sought records to determine whether one bargaining unit employee was entitled to overtime instead of another bargaining unit employee. It therefore requested the time records for a certain bargaining unit employee in the catering kitchen. The Union never received the information. Again, Jackson did not deny noncompliance but merely testified obliquely that the Respondent maintains timecards for employees in its office which in part would have answered the Union's questions and that he had satisfied timecard requests for two other catering employees. His explanation is incomprehensible.<sup>15</sup>

Article 3, section 2 of the contract states that the Respondent is to provide information on a weekly basis regarding new employees hired into full-time bargaining unit positions. This information includes the name of the employees, their address, rate of pay, and job classification. As far back as the pre-negotiating meetings held in September 1995, Janetzke told Kurek that the Union had not been receiving this information, and Kurek assured Janetzke that he would check on the matter with Jackson.

Jackson testified that with respect to newly hired employees, the Respondent provides information to the Union regarding date of hire, classification, and full-time status. He testified that the information is provided to the Union on employee hiring by placing it in the secretary's receptacle box with other information provided to the Union. The totality of the Respondent's evidence on the consistency of the practice is Jackson's hearsay testimony that on an unspecified date the director of employment informed him that it is being done on a regular basis. I therefore must credit the more specific, competent, and probative testimony of the Acting General Counsel's witnesses and their supporting documentary evidence.

Janetzke testified without contradiction that a later meeting when the Union renewed the request, Kurek admitted that the Union had not been receiving the information. Janetzke testified without contradiction that Childs told him at one point that the Respondent did not have enough clerical help and the hospital would check on getting additional help in order to get the Union the information. Janetzke testified that as time went on, the Union kept pressing the Respondent for the information and began to memorialize their requests in writing. Union representatives wrote letters requesting this information in February, August, and September 1996 (complaint par. 27). During the time period that Janetzke made these requests, the Union never received the information. Approximately 1 year passed between the time the Union initially brought the request on the pre-negotiating meetings in September 1995 to the date of the Union's third letter on September 13, 1996.

Powell testified that it was not until April 1997 that the Union began to receive information on new hires pursuant to arti-

cle 3, section 2. Prior to April 1997, the Union had not received information on new hires for a number of years. Pursuant to counsel for the Acting General Counsel's subpoena, the Respondent produced a document at trial identifying all employees hired into full-time bargaining unit positions since January 1, 1996, which identifies 17 employees hired from March 1996 through October 1997. Powell testified that of the 17 employees listed on the exhibit, the Union did not receive any information for 10 of the new hires.

The Union receives new hire information from the Respondent on a card that states the employee's date of hire, job classification, and department and starting rate, among other information. Documentary evidence establishes the total number of new information cards that the Union has received from the Respondent since April 1997. Included therein are some cards for employees who were not actually hired but who were recalled employees. The evidence confirms that the names of 10 of 17 newly hired unit employees were not reported to the Union.

## 2. Analysis

A failure to furnish the employee's designated bargaining agent with requested information which is relevant to the negotiation or administration of a collective-bargaining agreement or use in carrying out its statutory duties and responsibilities may constitute a breach of an employer's good-faith bargaining obligations under the Act. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Information concerning terms and conditions of employment with the bargaining unit is presumptively relevant and no specific showing of relevance is required, but as to areas outside the unit a more restrictive standard of relevance is applied. *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

In *AGC of California*, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980), cert. denied 452 U.S. 915 (1981), the Board considered the issue of whether a union was entitled to receive from a multiemployer bargaining association a list of "open shop" members. The Board concluded that the union's principal purpose in seeking the data was to "facilitate inquiry" into whether or not some of the employer association's open-shop members were bound by the collective-bargaining agreements and included in the represented units. The Board stated at 894:

[The Unions] are entitled to the requested information under the "discovery-type" standard enumerated in *NLRB v. Acme Industrial Co.*, 385 U.S. at 437, to judge for themselves whether to press their claims in the contractual grievance procedures, or before the Board or courts, or through remedial provisions in the contracts under negotiation. *The Torrington Company v. NLRB*, 545 F.2d 840 (2nd Cir. 1976). It is certainly well within the statutory responsibilities of the Unions to scrutinize closely all facets relating to the diversion or preservation of bargaining unit work and, therefore, they are fully warranted in any reasonable probing of data concerning the exclusion of the employees of certain AGCG members from the bargaining units. [Citation omitted.]

See also *Doubarn Sheet Metal*, 243 NLRB 821 (1979); and *Leonard B. Hebert*, 259 NLRB 881 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983), cert. denied 464 U.S. 817 (1983) (regarding "double-breasted" operation); *Leland Stanford Jr. Univer-*

<sup>15</sup> Janetzke testified that by letter to Respondent on September 6, 1996, he requested certain information relating to alleged subcontracting of delivery and pickup of X-ray film, jackets, patient charts, etc. He made this request in conjunction with a renewed request to proceed to arbitration over the issue. Janetzke testified that at some unknown date, he turned the matter over to a union attorney and was unable to testify to actual noncompliance of that request. He testified that there was no compliance during the time of his involvement with the grievance, but the record does not establish what length of time that was. Thus, the facts are insufficient to support complaint par. 24.

sity, 262 NLRB 136 (1962), enfd. 715 F.2d 473 (9th Cir. 1983) (concerning nonunit employee information necessary for contract negotiation); *Consolidated Coal Co.*, 307 NLRB 69 (1992) (regarding requested information concerning single, joint employer, or alter ego relationship and its relevance to contract violation); *Congreso de Uniones Industriales v. NLRB*, 966 F.2d 36 (1st Cir. 1992), vacating and remanding *Rice Growers Assn.*, 303 NLRB 980 (1991) (regarding requested information in the possession of the parent corporation concerning transfer of work to a third party in a severance pay dispute).

The Board has continued to apply broad discovery principles to requests for information that are either potentially relevant or useful to a union in its performance of its representation duties. *Pfizer, Inc.*, 268 NLRB 916 (1984). The Board has done so where grievances are filed during the life of the contract with respect to contractual language restricting subcontracting and where the information related to work covered by the contract. *Eazor Express*, 271 NLRB 495 (1984).

In *W-L Molding Co.*, 272 NLRB 1239 (1984), with respect to the application of a broad “discovery type standard,” the Board quoted with approval the following precedent: “It is not the Board’s function in this type case to pass on the merits of the Union’s claim that Respondent breached the collective bargaining agreement . . . or committed an unfair labor practice.” *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957. “Thus, the union need not demonstrate actual instances of contractual violations before the employer must supply information.” *Boyers Construction Co.*, 267 NLRB 227, 229 (1983). “Nor must the bargaining agent show that the information which triggered its request is accurate, nonhearsay, or even ultimately reliable.” *Ibid.* “The Board’s only function in such situation is in ‘acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.’” *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957, quoting *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Accord: *General Motors v. NLRB*, 700 F.2d at 1088.

On a showing of relevance to negotiations or other representational need, the employer must make a reasonable effort to produce the requested information or to secure if it is not available or to explain the reasons for its unavailability. *Rochester Acoustical Corp.*, 298 NLRB 558, 563 (1990); *Congreso de Uniones Industriales*, supra, and cases discussed there. Furthermore, the employer must comply with such requests in a timely fashion. *Consolidated Coal Co.*, supra, citing *EPE, Inc.*, 284 NLRB 191 (1987); *Assn. of D.C. Liquor Wholesalers*, 300 NLRB 224 (1990).

The information requested as alleged in complaint paragraphs 15, 17, 23, and 27 concerned bargaining unit employees and is presumptively relevant; i.e., the request for the job posting for full-time positions of stock handler, driver, cook 3, and pharmacy tech (complaint par. 15); the names and hours worked by electrician and painters at the O’Neil Building (complaint par. 17); the work equalization overtime records and the offering sheet for the catering kitchen (complaint par. 23); and the weekly list of new hires as required in article 3, section 2 (complaint par. 27).

The Respondent produced no comprehensible explanation for not complying fully with those requests, as was its obligation to do so under the Act.

With respect to Powell’s September 6 request for postings and information regarding the Emergency Department Ortho Tech position, the evidence indicates that the first written reply he received to the effect that there was no such position did not come until 2 months later (complaint par. 17). The delay was never explained. There is no evidence that such position was implemented but Powell’s testimony as to having observed actual postings for the job is uncontradicted. The information was relevant to Powell’s investigation as to whether bargaining unit work was being performed by nonunit employees in violation of the contract and, thus, whether any grievance might have merit. The Respondent’s tardy and cryptic response breached its duty to timely comply. The Respondent’s further breached its obligation to produce the requested postings, which were relevant to the Union’s investigation. Regarding Powell’s September 1, 1994 request for information relating to suspected work performed by bargaining unit employees at the Bath Radiology facility, there is no evidence that the Respondent had any documentation that it failed to produce (complaint par. 16). However, its tardy, cryptic communication to the Union that no ACH employees were engaged in work at the Bath facility breached its obligation to comply promptly with a request for information necessary and relevant to the policing of the collective-bargaining agreement. The Respondent lamented the proliferation of grievances in testimony and during negotiations, but its own cavalier attitude toward information-request compliance tended to exacerbate that proliferation because it prevented the Union from ascertaining the possible lack of merit of employee reports.

Another incident of egregiously tardy response to a request for information was the Respondent’s 2-year delay in providing necessary and relevant information regarding the alleged bargaining unit placement of service coordinators requested by Powell on September 7, 1994 (complaint par. 18). I find this also to constitute a breach of its statutory obligations. The Respondent had no basis in the collective-bargaining agreement, past practice, or agreement with the Union to warrant its unilaterally instituted policy of deferring relevant information requests to the step three procedure or, in its absence, to the eve of the arbitration proceeding, and sometimes later or not at all. Its arbitrariness in this conduct was matched by its unilateral decision in 1994 to deviate from the past agreed-upon practice of prioritizing grievance processing. For the same reason, I find the Respondent breached its statutory obligation by its incomplete arbitration eve compliance with Janetzke’s August 12, 1996 reiteration of multiple earlier requests for information necessary for the grievance processing of the radiology receptionist unit placement issue (complaint par. 20), and by its total noncompliance of Stump’s written request for information relevant to a possible loss of unit work to subcontracting to ASAP issue, necessary to the investigation of and processing of a grievance (complaint par. 22.)

Accordingly, based upon the foregoing findings, I find that the Respondent breached its bargaining obligations under the Act at the times and in the manner set forth above in this section of the decision and thereby violated Section 8(a)(1) and (5) of the Act.

#### G. Solicitation/Distribution

##### 1. Facts

Paragraph 30(A) of the complaint alleges that the Respondent has at all times material maintained the following rule:

## SOLICITATION/DISTRIBUTION OF LITERATURE

Solicitations by non-employees are prohibited anywhere on Summa Health System property unless Summa has granted prior approval. Except for programs sponsored and approved by Summa Health System, no employee may solicit any other employees on Summa premises for any purpose whatsoever while the employee solicited is working or the employee soliciting is work or in a work area. In addition, no employee may solicit any other employee in patient care areas (such as, but not limited to, patient rooms, emergency room, operating rooms, radiology rooms, and therapy rooms).

No employee may solicit or distribute to any patient or visitor at any time.

Paragraph 30(B) alleges that on or about October 3, the Respondent's agents, Larry Braewell, Mary Hunt, and Thomas Grubbs, enforced that rule, "selectively and disparately by refusing to allow employees to distribute union literature in non-working areas, the cafeteria and the 511 hallway, while on non-working time." The complaint alleges, and the Acting General Counsel argues, that by the alleged conduct in paragraph 30(B), the Respondent violated Section 8(a)(1) of the Act. It alleges no violation as to the mere maintenance of the rule itself.

The answer denied both allegations. However, it was stipulated at trial that the quoted rule was contained in the employee handbook and was in fact in force during all material times. Furthermore, although the agency of the alleged rule enforcers was denied in the answer, undisputed record evidence and admissions by Childs establish that they in fact were acting as security officers employed by the Respondent, and specifically acted upon Childs' instructions on the occasions alleged with respect to the rules enforcement against employees on non-working time and Eugene Damron, union vice president, who attempted to distribute union literature in the cafeteria with an employee on the date, allegedly as part of the Union's then-organizing campaign for the RNs, LPNs, and other professional and technical employees.

It is undisputed that the Union had in the past been permitted to use space for its office purposes in the 511 Hallway until the summer of 1996, when the Respondent withdrew the privilege. At that time, negotiator Kurek informed negotiator Janetzke that the Union could use the cafeteria for its unit servicing purposes as it had done in the distant past. In consequence after July 1996, the Union used cafeteria space for the preparation of arbitration cases and other purposes whereby Damron and employees convened at the south-end vending area of the dining room in full view of various Respondent agents. Furthermore, numerous solicitations have regularly taken place by employees for various purposes, including Mary Kay Products, Girl Scout Cookies, Tupperware, Avon, and church-sponsored fundraising candy sales, in full view of the Respondent's agents without any interference.

Childs testified that he had instructed security personnel to enforce the rule in the cafeteria on the date in issue inasmuch as he had received no prior notice and that it was a "patient care area; because outpatients go there on a regular basis." He admitted that these outpatients receive no care in the cafeteria. He had no recollection of the building 511 hallway incident and did not contradict testimony, which I credit, that the Respondent's security personnel also prohibited similar distribution there by an employee. Building 511's upper floors are not in

use. It is an older part of the hospital complex and adjacent to the main hospital building. The lower level is used for storage near which the Union had previously located its office. Employee paychecks are distributed to the nursing staff in the nearby hallway. No patients appear there.

The expired collective-bargaining agreement in article XII states:

Section 1—The Union may distribute literature throughout the Hospital in non-patient care areas during non-working time of the employee to which the literature is being distributed. It is understood that distribution of literature under this Section will not interfere with operations of the Hospital. Prior to distribution, the Union shall provide a copy of the literature to the Vice-President/Human Resources or his designee. With the exception of Union organizing material, the literature shall not contain anything critical of the Hospital or employees of the Hospital. This provision shall not extend to conferences called and conducted by the Hospital administration, or meetings of Union stewards and other Union representatives held during non-working time for the purpose of processing grievances as defined in Article XXV of this Agreement or other Union activity as approved by the Hospital, it being understood and agreed that such a meeting shall not in any way interfere with the operations of the Hospital or the performance of their duties by any employees.

Damron testified that he was aware of that provision and admitted that he had not obtained prior permission from the Hospital administration to distribute campaign literature in the cafeteria with an employee. It is undisputed that in prior years, Powell, union president, had distributed union cards and campaign leaflets on adjacent public sidewalks and parking lots, in non-patient care areas, and in the cafeteria in full view of the Respondent's agents without interference despite lack of prior notice and approval.

## 2. Analysis

The complaint is limited to allegations of the Respondent's interference with employee's right to distribute union literature in nonwork areas on nonworking time. There is no allegation relating to an unlawful interference with the Union's access to employees.

By its citation in its brief of *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the Respondent recognizes the right of the hospital employees to engage in nonworking time union solicitation and nonworking time union literature distribution in nonwork areas of the hospital absent a showing of interference with patient care. Further held therein is that it is the employer's obligation to show that disruption to patient care is a necessary or likely result of such activity. In that case, the activity occurred in the hospital cafeteria. The Respondent argues that the testimony of Childs satisfied its burden, and thus he acted properly in ordering the cessation of union literature distribution in the hospital cafeteria. The brief did not refer to the absence of any patient care in the building 511 hallway. In *Beth Israel*, the Court found that the employer demonstrated at best that the use of the cafeteria by patients was voluntary, random, and infrequent. Childs testified cryptically that outpatients use the cafeteria "with regularity." Thus, apparently no resident ambulatory patients use the cafeteria. Furthermore, since these are outpatients, their use of it is presumably voluntary. There is no definition in the record as to the degree of

delicacy of condition, if any, suffered by these outpatients, which presumably is less than that of resident ambulatory patients. Childs failed to testify as to the number of outpatients who use the cafeteria and whether any were present on the day in issue. Finally, Childs' testimony gives no idea as to the degree and frequency of such usage encompassed in the term "regularity," i.e., 1 or 100 outpatients every year, month, week, or day? The reasonableness of Childs' conclusion is undermined by the undisputed fact that the hospital had no qualms of permitting cafeteria space to be utilized for union business and solicitation/distribution on prior occasions. Accordingly, I find that the Respondent has failed to demonstrate that the October 1996 cafeteria distribution of union literature did, in fact, or even reasonably tended to disrupt or interfere with patient care. Certainly, no patient care was involved in the building 511 hallway employee distribution which was halted by the hospital's security personnel whom Childs' admittedly had given similar broad orders regarding the cafeteria and who were acting within then scope of their authority.

The only other defense that the Respondent raises in its brief is that the October distribution was a violation of the expiring collective-bargaining agreement inasmuch as no review by the Respondent had been obtained prior to the distribution. Childs, however, testified that his "problem" with the distribution was not lack of review by the hospital administrator but rather lack of "notice." It is undisputed that on numerous prior occasions during the lifetime of the collective-bargaining agreement, the Respondent waived such compliance and even encouraged regular ongoing union business in the cafeteria, not limited to grievance processing. The proviso does not state that distribution is conditioned upon prior presentation of a copy of the material to hospital administration, nor is there any reference to the need for explicit clearance of such activity, nor does it provide a penalty for noncompliance. However, the contract plainly refers to distribution by "The Union."

The prohibition of distribution enforced against Damron is not the issue but it is rather the interference with individual employees' right to distribute union literature; i.e., literature which supported their incumbent union and proffered it to non-bargaining unit employees as a bargaining agent. Even if the collective-bargaining agreement clause could reasonably be interpreted as a waiver of employee rights to engage in distribution of campaign material in support of their bargaining agent, it would be an invalid suppression of individual employee rights under the Act to the same extent had it prohibited anti-incumbent distributions, as the Union argues in its brief, citing *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974). See also *Universal Fuels, Inc.*, 298 NLRB 254 (1990).

Finally, where an employer extends to its employees certain privileges beyond the statutory rights, such as bulletin board usage, it may not selectively and disparately censor union postings even though contractual provisions provide for managerial prior approval. *Monongahela Power Co.*, 314 NLRB 65, 68 (1994); *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 51 (1997), *enfd.* 162 F.3d 513 (7th Cir. 1998). Therefore, a fortiori, contractual provisions setting fourth prior managerial approval of statutorily grounded distribution rights, assuming that such are not per se inherently destructive of those rights, may not lawfully be selectively and disparately enforced as was done by the Respondent here.

Accordingly, I find that by prohibiting the October distribution of union organizing literature by its employees in the cafe-

teria and in the hallway of building 511, the Respondent violated Section 8(a)(1) of the Act.

#### H. *The Disciplinary Warning to Linda Norman— Case 8-CA-29143*

##### 1. Facts

##### a. *Union activities and the Respondent's knowledge and animus*

After attending nursing school at ACH, Linda Norman was hired by it as a RN on graduation in 1974. Norman worked at ACH from 1974 to 1979, was rehired in 1986, and has worked continuously for ACH from 1986 to the present.

During her entire tenure at ACH, Norman has never received any disciplinary action with regard to the performance of her duties with the exception of two written warnings for absenteeism/tardiness received in 1988 and 1989. She has received numerous letters of commendation from ACH and patients under her care while at ACH and has consistently received favorable performance evaluations.

As a RN, Norman was responsible for coordinating direct patient care, administering medications, and effectuating doctors' orders. These duties called upon Norman to exercise professional judgment and to prioritize her work. In 1996 and 1997, she worked on the 4 North nursing unit on the 7 a.m. to 7 p.m. shift. Since July 1991, her supervisor has been Marge Sovacool, RN unit manager.

In the fall of 1996, Norman became actively involving in attempting to organize professional employees at ACH, including RNs, LPNs, lab, pharmacy, and respiratory therapy employees. She spoke about organizing employees to Larry Stump and Bobbie Powell—wife of Larry Powell, Local 684 president. From November 1996 through January 1997, Norman urged coworkers to organize and distributed about 50 union representation authorization cards and union literature in the nurses lounge on 4 North and in designated "smokers' shacks" on hospital property located outside the hospital. Norman frequently discussed the benefits of union organization with her coworkers and carried an AFSCME-labeled tote bag to the workplace. She also wore labeled hats to the ACH employee parking lot which she removed after walking to her workstation from the parking lot.

Norman was also deeply involved in supporting the strike that began on November 7, 1996, which she characterized as her "mission." She visited the strike hall almost daily and cooked for the strikers on her days off. The strike hall was located directly across from ACH on Market Street.

Over the duration of the strike, ACH employed outside security guards to patrol the campus. Powell testified that he observed them carry hand-held video cameras trained upon the coming and going of employees to and from strike headquarters. Cameras were also observed on rooftops and in windows of ACH buildings, which faced strike headquarters. Norman testified that unidentified men, wearing dark clothing and ski masks and holding shoulder-supported video cameras trained upon her, followed her as she walked down the nearby sidewalk.

After the strike began in November, Norman, with Bobbie Powell, formed a group to support striking employees and their families. The group was known as "Nurses for a Brighter Tomorrow." Norman and Powell enlisted help to gather gifts and donations for the strikers. They placed fliers promoting

“Nurses for a Brighter Tomorrow” in ACH lounges. Norman identified a particular flier that was posted in the lounge of 4 North that identified Powell and her as “Bobbie” and “Linda” and listed their home telephones. They were named in newspaper articles, including the nursing publication “Nurses Weekly” and the local newspaper, mentioning their efforts in support of the strikers. Copies of the nursing publication were prevalent in the hospital building.

Norman attended a union rally on December 14, 1996, that took place on Arch Street in front of the hospital between 12 and 2 p.m. She wore a black coat and large floppy hat. A pedestrian bridge connecting the hospital and another building, Professional Center North, spans Arch Street. Norman saw her supervisor, Marge Sovacool, during the rally standing in the walkway looking down at the rally. She also observed LPN Donna Perdeu standing with Sovacool for a period of time and saw Sovacool pointing in her direction. Norman stood with Powell during the rally. Powell also testified about the walkway incident and said that she observed Sovacool and Perdeu standing next to each other in the walkway. Powell observed the two women talking to each other and then noticed that Sovacool pointed towards Norman and her.

Sovacool testified as an adverse 611(c) witness called by Counsel for the General Counsel. Her demeanor was not forthcoming, but rather she was wary, guarded, hesitant, calculating, and most unconvincing. She initially testified that she had “no idea at all” that Norman was involved in organizing efforts by the Union for the nursing staff. But then she admitted that she was aware of the November 1996 organizing strike and had heard hearsay that Norman was involved in the strike “somehow.” Sovacool testified that she was “indifferent” to the strike. She denied knowledge that Norman was involved with “Nurses for a Brighter Tomorrow.” She admitted having seen the posted fliers but denied having noticed the names at the bottom and had no recollection of having personally removed one from the bulletin board. Sovacool admitted that she had observed copies of “Nurses Weekly” in the hospital and, moreover, subscribed to delivery of the publication at her home. Although she did not testify so, presumably she reads publications to which she subscribes. She admitted having observed, at least briefly, the December 14, 1996 union rally across from the hospital but did not recall having any discussion with Perdeu about it.

Donna Perdeu, employed at ACH for 18 years, testified for the Acting General Counsel. She was spontaneous, sincere, and convincing in demeanor and exhibited far more certainty than Sovacool. I credit her testimony, especially since it was not contradicted by Sovacool, who at best testified to a lack of recollection. According to Perdeu, she had observed Sovacool read the posted flier, “Nurses for a Brighter tomorrow,” then reach up and remove it, stating that it was not appropriate to be posted there.<sup>16</sup> Perdeu further testified that she and Sovacool stood together and observed the December 14, 1996 union rally and read the picket signs which Sovacool characterized as “inappropriate.” While they stood together and talked, Sovacool pointed to the group of union supporters and asked if it were not Bobbie Powell and Linda Norman with a big floppy

<sup>16</sup> There is no complaint allegation relating to Sovacool’s removal of the union leaflet from a bulletin board that was provided for employees to put a variety of personal items.

hat among the supporters. Perdeu claimed nearsightedness to Sovacool and inability to discern identities without eyeglasses.

Sometime after the rally, Norman was approached by fellow employee Cornue who asked to speak to her. Cornue ushered Norman into a private conference room and told her that nurses on the floor were upset and frightened about Norman’s discussions about organizing. Cornue told her that she had discussed the matter with Sovacool who told her to speak to Norman. After this discussion, Norman stopped talking about organizing on 4 North as frequently as she had in the past.

Sovacool’s testimony regarding the Cornue incident is markedly disingenuous and ultimately contradicts her earlier categorical denial of knowledge about Norman’s union organizing activities. At first Sovacool testified that Cornue, a LPN under her supervision, had approached her with a complaint that Norman had stirred up nurses in the lounge but that she, Sovacool, did not ask what it was about. She then testified that without knowing what the controversial subject matter was, she instructed Cornue to go to Norman and tell her that when she talks to her about “this,” it upsets Cornue and that Cornue does not want to talk about it. Apparently realizing the absurdity of such instructions without knowing the subject of the emotional disruption, Sovacool, when prodded further, admitted that the subject matter in fact related to union activities, the specific nature of which she still insisted on having ignorance. I conclude that her credibility was totally undermined not only by her demeanor and failures of recollection but also by her disingenuous evasiveness and self-contradiction; i.e., she clearly had much more than some idea that Norman was engaged in union organization activities. I find that she was well aware of it.<sup>17</sup>

On February 1, 1997, 1 day after the strike by members of Local 684 settled and members were to be returned to work, Sovacool issued a memo to all “med/surg staff” regarding “expectations.” In the memo, Sovacool stated that “there has been a more positive working environment in this institution since the beginning of November, 1996.” (This corresponds with the time frame Local 684 members went out on strike.) Sovacool went on to say:

This positive environment is what we must all strive to maintain. Remember the old saying: “If you’re not part of the solution then you are part of the problem.”

*b. The discipline*

On February 6, 1997, Norman received a 2-day suspension from Sovacool for refusing to take an emergency room report on February 1, 1997, which allegedly delayed patient care. Through the Respondent’s grievance procedure for nonunion employees, the 2-day suspension was later reduced to a written warning. Norman testified to the events leading to the discipline in detail, without contradiction. Sovacool merely denied that the discipline was motivated by Norman’s union activities. Neither she nor any other Respondent witnesses contradicted Norman. In fact, the Respondent called no witnesses on the issue. Sovacool’s two memoranda of those events drafted on February 3 were entered into evidence, but she herself did not

<sup>17</sup> A February 3, 1997 memorandum from Sovacool to the RN Administrator Director related in general terms unspecified complaints from unidentified coworkers of Norman regarding her alleged unspecified abusiveness toward them. One complaint referred to such abusiveness by Norman upon her learning that the complaining coworker had referred to a union organizing meeting in a conversation with Sovacool.

testify as to those events. She was not even examined by the Respondent. Accordingly, the following sequence of events is based upon Norman's uncontradicted testimony.<sup>18</sup>

Norman testified that 4 North was understaffed on February 1, 1997. The staffing pattern is normally four to five RNs, four LPNs, and four support associates. On the date in question, four RNs, three LPNs, and one support associate were responsible for 36 patients. Norman was responsible for eight patients. During lunch breaks, this responsibility increased to 18 patients. At that time she was presented with conflicting priorities that needed her attention.

While Norman was at the nurses station, one physician asked for assistance in correcting a medication error that had been made with respect to a patient the day before, another physician asked her to sterilize a subclavian I.V.; at the same time, the telephone rang. Norman picked up the telephone and an individual from the emergency room (ER) was calling to give a report on a patient that was due to come up to Room 461. Norman testified that when a patient is brought up to the floor from ER, a RN takes the patient report. At the time Norman was not responsible for that room and told the caller that she would attempt to find the nurse responsible room to take the report. Norman learned that the regularly assigned nurse, Karen Hegidus, was on her lunch break and later learned that RN Janis Dozier was in charge of covering the room while Hegidus was at lunch.

After Norman paged Hegidus and found that she was at lunch, Norman returned to the desk and at that point Margaret Bush, the secretary, returned from her lunchbreak. Norman told Bush that someone in ER was on the telephone and needed to give a report on the patient for Room 461. She indicated that she could not find Hegidus and that Norman was not able to take the call at that time. She instructed Bush to attempt to find someone else to take the call or inform ER that they would be called back.

Norman testified that faced with the conflicting demands for her attention, she prioritized her work and determined that the patient in need of the sterile dressing for the IV needed her immediate attention. She explained that the IV is a sterile procedure and involves a catheter being inserted through the IV into the main artery of the heart. If the dressing were left for any length of time there would be a chance of infection. Her second priority was to deal with the medication issue presented by the other physician. Lastly, Norman's third priority was to take the report from ER or find someone else to take the report. After Norman addressed the first two priorities, she testified that she delegated the responsibility to find the nurse responsible for Room 461 to Bush.

When Norman used her professional judgment and prioritized the need to perform the IV dressing rather than take the ER report, she knew that Dozier, the nurse in charge of the room, should be returning from lunch. She also knew the room had not been cleaned and, therefore, was not ready to receive a new patient.

After completing the sterile dressing, Norman finished her search for the medication error that she was asked to locate. She assumed that Bush had found Dozier and the ER report had

been taken. After the search for medication error, Norman reported off (i.e., updated fellow RNs about patients) to Dozier who had returned to the station and attempted to take lunch. With her lunch in her hand in the break room, she heard a commotion at the nurses station. She went to see what was happening and observed Sovacool, Dozier, Bush, and Byack at the station. Sovacool was visibly angry and upset over the failure of anyone to take the ER report and loudly admonished everyone in sight, including Dozier and Bush.

Norman interjected and told Sovacool that she was the nurse who initially did not take the call. Sovacool told Norman that it was not ever permissible to refuse to take a call from ER. Norman attempted to tell Sovacool that she did not refuse the call but that she said she was unable to take the call. Norman tried to tell Sovacool about the other problems with Dr. Holcomb and Dr. Sanders. Norman characterized Sovacool's demeanor as "wild." Norman tried to tell her that she had prioritized the problems and responded accordingly. Sovacool told her she did not want to hear it and that someone had to take that call.

Norman set her hot lunch down and took the report from ER. She explained that she did so only because of Sovacool's "ranting and raving". After taking the report, she was upset about how Sovacool had spoken to her in front of the other staff. The ACH North Code of Conduct called for all staff to work as a team and that each staff member would be treated as an equal and given mutual respect. She felt Sovacool had not followed these precepts.

Norman walked back to the break room where Sovacool was and, apparently in a loud voice, asked her why she had been so "mean." Sovacool denied that she had been mean and asked Norman to lower her voice. Norman, noting that both she and Sovacool were speaking at the same level, said Sovacool should also lower her voice. She tried again to explain to Sovacool the problems and staffing levels that were present on the floor when the ER call came to the unit. Sovacool told Norman that she was not permitted to discuss staffing levels and that she was going to write up Norman.

On February 2, Sovacool ordered Bush to write a statement about the incident. Her statement confirmed that Norman took the ER call, failed to take the report, and instead told ER she could not take the call at that time and thereafter tried to find a nurse. The statement goes on to state that Sovacool "told me to write up the incident or be writing up myself." She also confirmed that the room was not ready at the time of the call.

Subsequently, Norman received a notice of disciplinary action.<sup>19</sup> Sovacool then asked Norman to come to her office, and Norman asked to have a fellow employee as a witness. Sovacool denied the request even though she arranged to have a management witness present. Eventually, she let Dozier accompany Norman as her witness. At the beginning of the meeting, Sovacool told Norman that she wanted to talk to her about concerns that people were having about Norman on the floor

<sup>18</sup> Norman's arguably inconsistent testimony as to whether or not she actually ate or "took" lunch on that date is no basis to discredit her testimony as to the other events in absence of contradicting sworn testimonial evidence.

<sup>19</sup> The disciplinary notice prepared by Sovacool in effect rejected her priority argument and concluded that it was a breach of her duty to have left the station before assuring actual patient coverage for a room for which she had no responsibility. The document further accused Norman of having confronted Sovacool thereafter at the station in an aggressive, accusatory manner while "slamming" papers and charts about, thus violating ACH behavior policy. However, there was no testimonial evidence to support this memorandum. I therefore must credit Norman's testimonial account.

and Norman's conversation with Cornue. Norman responded, "You mean about my talk of organizing or Union activities and talk of the strike." Sovacool said "yes, that and other concerns."<sup>20</sup> Sovacool then discussed the events of February 1, 1997, and stated that Norman had displayed unacceptable work performance and had engaged in inappropriate behavior by being loud and aggressive. Norman retorted to Sovacool that she was upset but no louder than Sovacool. Sovacool also charged that Norman had gone to lunch without reporting off work. Norman told Sovacool she had reported off for lunch on February 1 and later obtained a statement from Byack to confirm this fact. Norman reiterated to Sovacool the problems that had occurred and the priorities she had determined. She also alluded to the fact that Sovacool had asked for statements from Bush and others but had never asked for Norman's version of events. Sovacool said that it did not matter and that Norman's performance was unacceptable. Sovacool issued Norman a 2-day suspension. According to Sovacool's February 3 memorandum, the thrust of the alleged breach of duty is that there is no excuse for refusing to take an immediate ER report, for which patient care was delayed. Secondarily, Norman was too aggressive in the nurse station confrontation.

Norman filed a grievance and the suspension was reduced to a written reprimand. She subsequently grieved the written reprimand, which resulted in the reduced discipline.

ACH maintains a policy entitled "Disciplinary Process and Rules of Conduct." The policy sets out a progressive disciplinary procedure consisting of formal counseling, written warning, written reprimand, suspension, and discharge. According to the policy, these progressive disciplinary steps can only be bypassed if an employee commits a serious group 2 offense. Failure to perform work at minimum standards is a group 1 offense, and Norman had never been disciplined for misconduct or work performance.

A review of the disciplinary records of other ACH employees who have been charged with unacceptable work performance and/or inappropriate behavior evidences that incidents involving much more patient impactful conduct than that engaged in by Norman resulted in the same initial discipline administered to Norman. These incidents included nurse's having wrong IV, which could have caused physical injury to the patient—2-day suspension; nurse's administering medications to patients without a doctor's order—2-day suspension; grossly inappropriate comments to patients—written warning.

## 2. Analysis

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer's adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394 fn. 7 (1983).

The *Wright Line* burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of

fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); *Williams Contracting, Inc.*, 309 NLRB 433 (1992); and *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Motivation of union animus may also be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490–491 (7th Cir. 1993). *Data Systems Corp.*, 305 NLRB 219 (1991); *Fluor Daniel, Inc.*, supra. Direct evidence of union animus is not required to support such inference. *NLRB v. 50-White Freight Lines, Inc.*, 969 F.2d 401 (7th Cir. 1992).

An inference of animus has been found to have been appropriately raised by timing, knowledge, and the manner of discharge implementation. *Sawyer of Napa*, 300 NLRB 131, 150 (1990), citing *NLRB v. Rain Ware*, 732 F.2d 1349, 1354 (7th Cir. 1984). However, mere coincidence alone, without other circumstantial evidence, may not always support an inference of animus. *Chicago Tribune Co. v. NLRB*, 962 F.2d 712 (7th Cir. 1992).

The Acting General Counsel had adduced evidence that the Respondent's discipline deciding agent had knowledge of Norman's union organizing efforts. Further, there is sufficient evidence upon which to infer that Sovacool was aware of Norman's leadership role in those activities. The Acting General Counsel had adduced evidence of Sovacool's disapproval of union representation efforts for nursing personnel. That disapproval was strong enough to have motivated her to remove an organizational flier from a bulletin board allotted for free use by employees. Sovacool was clearly adverse to Norman's solicitation of union support in the nurses' lounge.<sup>21</sup> In one of her memoranda, it was described by an alleged complainant as causing "trouble" in the unit. Sovacool grudgingly admitted that these troublesome conversations were union related and that she was aware of Norman's union activities. When the disciplinary confrontation commenced, Sovacool immediately related it to those conversations as at least one of the causes for the confrontation.

Additionally, the Acting General Counsel has established that Norman was initially disproportionately punished for non-patient impactful alleged behavior. Contrary to the disciplinary notice given to Norman, there is no evidence of any delay in patient care. On the contrary, the room was not even prepared for the patient when the first ER call was deferred. The Acting General Counsel has shown that although Sovacool was initially genuinely upset on February 1 over the failure of those present at the nurses' station by berating all of them, she quickly directed the focus of her attention solely upon Norman. Sovacool refused to consider Norman's explanation, sought statements from others but not Norman, disregarded the exculpatory statement of Bush, disregarded the potential culpability of those nurses who had responsibility for room 461 and the secretary charged by Norman to locate one of them, and issued the initially disproportionate discipline.

In the absence of credible, contradicting, sworn testimonial evidence, I must infer that Sovacool's issuance of discipline to

<sup>20</sup> Along with Norman's personnel file, Sovacool had spread before her a compilation of unidentified newspaper clippings.

<sup>21</sup> The record in whole establishes the Respondent's general animosity evidenced by other unfair labor practices

Norman was at least partially motivated by her union activities and was not merely coincidental to it.

The Respondent failed to adduce testimonial evidence in support of facts alleged in Sovacool's February 3 memoranda which might have supported a showing that Norman would have been justifiably disciplined with a written warning regardless of her union activities. Further, the Respondent offered no evidence that Norman's explanation to Sovacool would not have exculpated her under ACH's ongoing policy or practice, and it adduced no evidence of patient impact. It proffered no evidence to show why Norman should have been the sole focus of discipline as she apparently had been. According, I find that the Acting General Counsel satisfied his burden of proof under *Wright Line*, whereas the Respondent did not. Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by the discriminatory issuance of a disciplinary warning to Linda Norman on February 6, 1997, as alleged in the complaint.

CONCLUSIONS OF LAW

1. As found above, the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and Local 684 and Council 8 are labor organizations within the meaning of Section 2(5) of the Act and the exclusive bargaining representatives of an appropriate bargaining unit of the Respondent's employees as set forth in article II, section 2 of the collective-bargaining agreement effective from November 23, 1992, to November 22, 1995.

2. From about January 21, 1994, until 1995, the Respondent rendered unlawful assistance and support to and dominated and interfered with the administration of the Maintenance sub-PET team and the Patient Management Pilot Unit sub-PET team, found above to be labor organizations within the meaning of the Act, and violated Section 8(a)(1) and (2) of the Act. Further, by such conduct and by dealing with them thereafter, it thereby in effect dealt directly with the bargaining unit employees concerning mandatory subjects of bargaining while bypassing the duly authorized exclusive bargaining unit representative and breached its bargaining obligations under the Act, thus violating Section 8(a)(1) and (5) of the Act.

3. Commencing in February 1994 and thereafter in its dealings with the above-named sub-PET teams, the Respondent unilaterally transferred bargaining unit work inclusive of maintenance, dietary, housekeeping, transportation, distribution (supplies), and phlebotomy duties to nonbargaining unit employees—a mandatory subject of bargaining—without providing notice or bargaining opportunity to the exclusive bargaining unit representative in violation of Section 8(a)(1) and (5) of the Act.

4. During the period October 1995 to April 1997, by its overall conduct calculated to avoid reaching agreement upon a succeeding collective-bargaining contract, inclusive of its advancement of and adherence to collective-bargaining proposals arrogating to it sole, exclusive, and nonreviewable rights regarding the transfer and assignment of bargaining unit work to nonunit full-time and nonunit part-time employees and the right to unilaterally determine wages after the first year of the contract, the Respondent bargained in bad faith with the exclusive bargaining representative during negotiations for a succeeding contract and thus violated Section 8(a)(1) and (5) of the Act.

5. The strike conducted by Local 684 and Council 8 against the Respondent from November 7, 1996, to February 3, 1997,

was caused by the Respondent's unfair labor practices as found above in this Decision.

6. The Respondent breached its bargaining obligations under the Act and thereby Section 8(a)(1) and (5) of the Act by failing or refusing to fully comply or tardily complying with the exclusive bargaining representative's requests for information relevant to and necessary for negotiations or administration of a collective-bargaining agreement, including the investigation and processing of grievances, necessary for the performance of its representational duties as set forth by the following requests:

DATE	COMMUNICATION	SUBJECT MATTER
March 9, 1994	Local 684 Letter	Failure to provide February 7, 1993 job postings for full-time Stock Handler, Driver, Cook 3, and Pharmacy Tech positions.
Sept. 1, 1994	Local 684 Letter	Tardy, cryptic re-sponse to information relating to suspected work performed by unit employees at the Bath Radiology facility.
Sept. 6, 1994	Local 684 Letter	Failure to provide names of and hours worked by electricians and painters at the O'Neil Building.
Sept. 6, 1994	Local 684 Letter	Failure to provide job postings of Emergency Room Ortho Tech Positions. (Other information request-ed was tardily produced.)
Sept. 7, 1994	Local 684 Letter	2-year delay in providing information regarding the alleged bargaining unit placement of Service Coordinators.
Aug. 2, 1996	Council 8 Local	Failure to provide information relevant and necessary for the processing of a grievance relating to the unit placement of the Radiology Receptionist position; i.e., job postings, job descriptions, wage rates, identity of employees in such position.
Sept. 6, 1996	Council 8 Letter	Failure to provide work unit equalization overtime records and offering sheet for the Catering Kitchen.
Sept. 13, 1996	Council 8 Letter	Failure to provide weekly list of new hires.

7. By prohibiting the October 3, 1996 distribution of union organizing literature by its employees on their nonworking time in the hospital cafeteria and in the hallway of building 511, the Respondent violated Section 8(a)(1) of the Act.

8. On February 6, 1997, the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily issuing a written disciplinary warning to employee Linda Norman because of her union activities.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act,

I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully dominated, supported, assisted, and interfered with the administration of the Maintenance sub-PET team at its Akron City Hospital facility, I recommend that it be ordered to disestablish and cease all assistance and support to them to the extent that it has not already done so. Having found that the Respondent unlawfully bargained with the forenamed PET teams about mandatory bargaining subjects and unilaterally transferred bargaining unit work to nonbargaining unit employees by means of the PET team bargaining process, I recommend that the Respondent be ordered to rescind those unilateral changes effectuated by such transfer, restore that work to unit employees, and make whole all unit employees who at the compliance stage of this proceeding are determined to have lost earnings and other benefits as a result of the Respondent's unlawful February 1994 transfer of bargaining unit work. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully failed and refused to comply or tardily complied with the requests of the bargaining unit's representative for information relevant and necessary for the negotiation or administration of a collective-bargaining agreement, including grievance investigation and processing, I recommend that the Respondent be ordered to comply with those requests identified and described above in the Conclusion of Law section of this decision to the extent that it has not already done so.

Having found that the Respondent unlawfully issued a disciplinary warning to Linda Norman on or about February 6, 1997, for certain conduct alleged to have occurred on February 1, 1997, I recommend that the Respondent rescind such warning and expunge all records of that personnel action and the rescinded order related to that alleged conduct, wherever such records are located in any of its files, and inform Linda Norman in writing that it has been done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>22</sup>

#### ORDER

The Respondent, Summa Health System, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Dominating, assisting, supporting, and interfering with the administration of the Maintenance sub-PET team and Patient Management Pilot Unit sub-PET team or their successors at its Akron City Hospital, or bargaining with them or their successors concerning mandatory subjects of bargaining.

(b) Refusing to bargain in good faith with American Federation of State, County and Municipal Employees, Local No. 784, AFL-CIO, and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO, as exclusive bargaining representative for the appropriate unit of employees

as set forth in the November 23, 1992, to November 22, 1995 collective-bargaining agreement by:

(1) Dealing directly with employees concerning mandatory bargaining subjects by means of its PET team bargaining process, bypassing their exclusive bargaining representative, and unilaterally and without notice or bargaining opportunity provided to it, transferring bargaining unit work to nonbargaining unit employees.

(2) Engaging in a course of bad-faith bargaining calculated to avoid the agreement upon a collective-bargaining agreement.

(3) Failing and refusing to fully comply or tardily complying with the exclusive bargaining representative's request for information relevant to and necessary for the negotiation or administration of a collective-bargaining agreement, including the investigation and processing of grievances, and necessary for the performance of its representational duties.

(c) Disparately and discriminatorily enforcing its solicitation/distribution rules against employees who attempt to distribute union organizing literature on their nonworking time in nonwork, nonpatient care areas of its Akron City Hospital building complex, including the cafeteria and building 511 hallway.

(d) Unlawfully and discriminatorily issuing pretextual disciplinary warnings or other discipline against its employees because of their sympathies, membership, support, or activities on behalf of American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO, and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO, or any other labor organization.

(e) In any other 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) To the extent it has not already done so, immediately disestablish and cease giving assistance or any other support to the Maintenance sub-PET team and the Patient Management Pilot Unit sub-PET team or their successors at its Akron City Hospital facility or bargaining with them or their successors concerning mandatory subjects of bargaining.

(b) On request, bargain in good faith with American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO, and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO, as the exclusive representative of employees in the appropriate unit concerning all lawful mandatory subjects of bargaining, including the assignment or transfer of bargaining unit work to full-time or part-time, nonbargaining unit employees and wage increases and, if an understanding is reached, execute a signed written agreement.

(c) Rescind the unilateral changes effected by the unlawful February 1994 transfer of bargaining unit work to nonbargaining unit employees and restore that work to bargaining unit employees, and make them whole for any loss of earnings or benefits they may have suffered in the manner set forth in the remedy section of this decision.

(d) To the extent it has not already done so, immediately comply with the requests of the bargaining unit's representative for information relevant and necessary for the negotiation or administration of a collective bargaining agreement, including grievance investigation and processing, or necessary for the performance of its representation duties set forth in the requests

<sup>22</sup> 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.

made by letters of March 9, September 1, 6, and 7, 1994; August 12, September 6 and 13, 1996, as identified and described in the Conclusions of Law in this decision.

(e) Within 14 days from the date of this Order, rescind the unlawful disciplinary warning issued to employee Linda Norman on or about February 6, 1997, for certain conduct alleged to have occurred on February 1, 1997, and expunge all records of that personnel action and the rescinded suspension order related to that alleged conduct, wherever such records are located in any of its files, and inform Linda Norman in writing that this has been done so.

(f) Allow employees on their nonworking time to distribute union organizing literature in nonwork, nonpatient care areas of its Akron City Hospital complex, including the cafeteria and the building 511 hallway, to the same extent and manner permitted other employee distributions.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Akron City Hospital in Akron, Ohio, copies of the attached notice marked "Appendix."<sup>23</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, 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 January 21, 1994.

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

#### 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT dominate, assist, support, or interfere with the administration of the Maintenance sub-PET team and Patient Management Pilot Unit sub-PET team or their successors at our Akron City Hospital, or bargain with them or their successors concerning mandatory subjects of bargaining.

<sup>23</sup> 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 NOT refuse to bargain in good faith with American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO, and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO, as exclusive bargaining representative for the appropriate unit of employees as set forth in the November 23, 1992, to November 22, 1995 collective-bargaining agreement by:

(1) Dealing directly with employees concerning mandatory bargaining subjects by means of our PET team bargaining process, bypassing their exclusive bargaining representative, and unilaterally and without notice or bargaining opportunity provided to it, transferring bargaining unit work to nonbargaining unit employees.

(2) Engaging in a course of bad-faith bargaining calculated to avoid the agreement upon a collective-bargaining agreement.

(3) Failing and refusing to fully comply or tardily complying with the exclusive bargaining representative's request for information relevant to and necessary for the negotiation or administration of a collective-bargaining agreement, including the investigation and processing of grievances, and necessary for the performance of its representational duties.

WE WILL NOT disparately and discriminatorily enforce our solicitation/distribution rules against employees who attempt to distribute union organizing literature on their nonworking time in nonwork, non-patient care areas of our Akron City Hospital building complex, including the cafeteria and building 511 hallway.

WE WILL NOT unlawfully and discriminatorily issue pretextual disciplinary warnings or other discipline against our employees because of their sympathies, membership, support, or activities on behalf of American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO, and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO, or any other labor organization.

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

WE WILL to the extent we have not already done so, immediately disestablish and cease giving assistance or any other support to the Maintenance sub-PET team and the Patient Management Pilot Unit sub-PET team or their successors at our Akron City Hospital facility, or bargaining with them or their successors concerning mandatory subjects of bargaining.

WE WILL, on request, bargain in good faith with American Federation of State, County and Municipal Employees, Local No. 684, AFL-CIO, and American Federation of State, County and Municipal Employees, Ohio Council 8, AFL-CIO, as the exclusive representative of employees in the appropriate unit concerning all lawful mandatory subjects of bargaining, including the assignment or transfer of bargaining unit work to full-time or part-time, nonbargaining unit employees and wage increases and, if an understanding is reached, execute a signed written agreement.

WE WILL rescind the unilateral changes effected by the unlawful February 1994 transfer of bargaining unit work to nonbargaining unit employees and restore that work to bargaining unit employees, and make them whole for any loss of earnings or benefits they may have suffered.

WE WILL, to the extent we have not already done so, immediately comply with the requests of the bargaining unit's representative for information relevant and necessary for the negotiation or administration of a collective-bargaining agreement, including grievance investigation and processing, or necessary for the performance of its representation duties set forth in the requests made by letters of March 9, September 1, 6, and 7, 1994; August 12, September 6 and 13, 1996.

WE WILL, within 14 days from the date of this Order, rescind the unlawful disciplinary warning issued to employee Linda Norman on or about February 6, 1997, for certain conduct alleged to have occurred on February 1, 1997, and expunge all

records of that personnel action and the rescinded suspension order related to that alleged conduct, wherever such records are located in any of our files, and inform Linda Norman in writing that this has been done so.

WE WILL allow employees on their nonworking time to distribute union organizing literature in nonwork, non-patient care areas of our Akron City Hospital complex, including the cafeteria and the building 511 hallway, to the same extent and manner permitted other employee distributions.

SUMMA HEALTH SYSTEM, INC.